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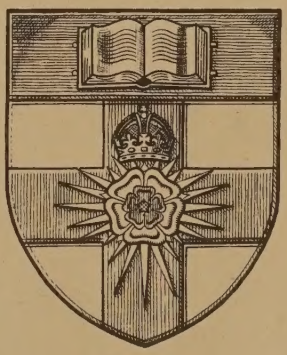

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# THE WEEKLY LAW REPORTS

**of The Incorporated Council of Law Reporting**

CONTAINING DECISIONS IN

THE HOUSE OF LORDS, THE PRIVY COUNCIL,

THE SUPREME COURT OF JUDICATURE,

ASSIZE COURTS and

ECCLESIASTICAL COURTS.

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**12.** —— *Jurisdiction—Domicile—Domicile of quasi choice in South Australia—Intention to reside in New Zealand—Residence in England at majority — English domicile of origin revived.*
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**13.** —— *Justices — Appeal to Divisional Court—Provision of reasons.*
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**14.** —— *Justices—Maintenance—Attempt to force husband to grant wife tenancy by excessive order.*
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**15.** —— *Justices—Maintenance—Committal order—Suspension on conditions—Conditions not complied with—Release of suspension—Committal warrant—Validity—Habeas corpus—Money Payments (Justices Procedure) Act*, 1935 (25 & 26 *Geo.* 5, *c.* 46), *s.* 11.
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**16.** —— *Justices — Maintenance — Home Office circular—Guidance as to amount of maintenance — Court's discretion not superseded.*
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**18.** —— *Justices — Majority decision — Whether duty on dissenting member to give reasons for dissent.*
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**21.** —— *Maintenance order—Construction—Consent order—Jurisdiction of court—Validity of order—Supreme Court of Judicature (Consolidation) Act*, 1925 (15 & 16 *Geo.* 5, *c.* 49), *s.* 190 (1) (2).
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**22.** —— *Matrimonial home—Desertion by husband—Wife told she could live there for life—Subsequent divorce of husband—Right to possession of house.*
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**3.** —— *Practice—Chairman of committing justices sitting as deputy chairman at trial. Criminal Law—Sentence—Preventive detention—When appropriate sentence.*
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**3.** —— *Rent Restriction—Change of identity of dwelling-house—Rateable value in* 1939 *exceeded £100—Subsequent bomb damage—*

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**5.** —— *Costs—Taxation—Country solicitor—Scale of costs allowable—Judgment against assisted defendant—Sum ordered to be paid—Negotiations between solicitors as to method of payment—Whether "incidental" to proceedings—Whether covered by legal aid certificate—Legal Aid and Advice Act*, 1949 (12 & 13 *Geo.* 6, *c.* 51, *s.* 1 (5)—*Legal Aid (General) Regulations*, 1950 (*S.I.* 1950, *No.* 1359), *regs.* 5 (2), 3 (3)—*R.S.C., Ord.* 65, *r.* 27 (29).
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**6.** —— *Divorce—Security for wife's costs—both husband and wife "assisted persons"—Matrimonial Causes Rules*, 1950 (*S.I.* 1950, *No.* 1940), (*L.* 27), *r.* 65 (3).
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* *In re* Harrow Literary Institution
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* Surrey County Council *v.* Ministry of Education - Lynskey J. 1 W.L.R. **516**

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**2.** —— *Industrial Disputes Tribunal — Jurisdiction — Reference of issue to tribunal by Minister — Whether employer bound by national terms — Distinction between "dis- "pute" and "issue" — Matter wrongly referred to tribunal as a "dispute"—Industrial Disputes Order,* 1951 (*S.I.* 1951, *No.* 1376), *arts.* 1 *and* 2.

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**3.** —— *Negligence of servant — Garage hand employed to move cars by hand—Car driven by him on to highway causing accident — Accident in course of employment — Unauthorized mode of doing authorized act — Liability of master.*

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**2.** —— Right of wife to remain in possession—Mortgagee's claim for possession. *See* Husband and Wife.

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* Regina *v.* Statutory Visitors to St. Lawrence's Hospital, Caterham. *Ex parte* Pritchard Divl. Ct. 1 W.L.R. **1158**

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* Bewlay & Co. Ld. *v.* London County Council - - Divl. Ct. 1 W.L.R. **1110**

**2.** —— *Hackney carriage — Cab-driver's licence—Decision to revoke by commissioner—Reference by commissioner to licensing committee—Licensee refused leave to call a witness — Licence revoked — Whether certiorari would issue—London Cab Order,* 1934 (*S.R. & O.* 1934, *No.* 1346), *para.* 30.

* Regina *v.* Metropolitan Police Commissioner. *Ex parte* Parker Divl. Ct. 1 W.L.R. **1150**

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**2.** —— *Attornment clause—Default—Claim by mortgagee for possession—Requirement of notice—R.S.C., Ord.* 55, *r.* 5 (*a*), *note.*

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* *In re* Little, decd. Barclays Bank Ld. *v.* Bournemouth and East Dorset Hospital Management Committee and Others Vaisey J. 1 W.L.R. **1132**

**NATIONALIZATION** — *Gas — Acquisition of undertaking of local authority—General rate fund—Claim by gas board for amounts debited in gas undertaking accounts and credited in other accounts — Determination of claim by Minister of Health—Ouster of jurisdiction—Doncaster Corporation Act,* 1926 (16 *& 17 Geo.* 5, *c. xxvii*), *ss.* 71, 72, 73, 75—*Local Government Act,* 1933 (23 *& 24 Geo.* 5, *c.* 51),

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* East Midlands Gas Board *v.* Doncaster Corporation - Hallett J. 1 W.L.R. **54**

**2.** —— *Gas—Local authority—Electricity undertaking—Transfer to statutory authority—Part of surplus revenue applied to general rate fund—Electricity Act*, 1947 (10 & 11 *Geo.* 6, *c.* 54), *ss.* 14, 15—*Exeter Corporation Act*, 1935 (25 & 26 *Geo.* 5, *c. cii*), *s.* 112 (1).

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**3.** —— *Hospital. See* Will.

**4.** —— *Transport—Road haulage—Compensation of employees—Claim under service agreement to damages for breach of contract—"Compensation"—Basis of assessment—Transport Act*, 1947 (10 & 11 *Geo.* 6, *c.* 49), *s.* 101—*Transferred Undertakings (Compensation to Employees) Regulations*, 1950 (*S.I.* 1950, *No.* 1083), *reg.* 3, *sch. II*, *paras.* 4, 5, 17.

* Regina *v.* Westminster Compensation Appeal Tribunal and Sell. *Ex parte* Road Haulage Executive C. A. 1 W.L.R. **506**

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**2.** —— *Conductor's duty on omnibus—Alighting of passengers.*

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**3.** —— *Dangerous thing—"Consummate care" required—Calor gas container—Leakage—Explosion—Injury—Liability.*

* Beckett *v.* Newalls Insulation Co. Ld. and Lightfoot Refrigeration Co. Ld. C. A. 1 W.L.R. **8**

**4.** —— *Duty—Reasonable foreseeability—Children—Scaffolding—Overturned by boys—Other children injured—Whether events which happened reasonably foreseeable.*

* Cuttress and Others *v.* Scaffolding (Great Britain) Ld. and Huntingdon Building and Development Co. Ld. C. A. 1 W.L.R. **1311**

**5.** —— *Duty of care—Extent—Personal injuries—Child straying from school premises on to highway—Lorry driver killed in avoiding child—Negligence of school mistress—Liability of education authority to driver's dependants—Remoteness—Reasonable contemplation.*

* Lewis *v.* Carmarthenshire County Council - - C. A. 1 W.L.R. **1439**

**6.** —— *Invitor and invitee—Railway station—Patch of oil—Injury to pedestrian—Standard of duty—Steps taken to render premises reasonably safe.*

* Blackman *v.* Railway Executive Hilbery J. 1 W.L.R. **2**

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* Rich *v.* London County Council C. A. 1 W.L.R. **895**

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* Bray *v.* Palmer - C. A. 1 W.L.R. **1455**

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**10.** —— *Vicarious liability—Agency—Motor-car driven by friend of owner—Accident—Car driven at owner's request—Mutual purpose—Negligence of car driver—Responsibility of owner.*

* Ormrod *v.* Crosville Motor Services Ld. Murphie, Third Party C. A. 1 W.L.R. **409, 1120**

**11.** ——. *See* Bailment; Master and Servant; Road Traffic; Solicitor.

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* Miles *v.* Clarke Harman J. 1 W.L.R. **537**

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**PRACTICE AND PROCEDURE**—*Administration—Foreign law—Deceased with foreign domicile—Grant of representation.*

* Practice Direction: Grants of Representation - Probate 1 W.L.R. **1237**

**2.** —— *Appeal—Compromise—Settlement on terms before hearing—Payment in full of appellant's claim and costs by respondents—Application by appellant for order that appeal be dismissed—Order for stay of further proceedings on appeal substituted.*

* Lees *v.* Motor Insurers' Bureau C. A. 1 W.L.R. **620**

**3.** —— *Appeal—Date of hearing—Statement and certificate to be lodged with notice of appeal.*

* Practice Note (Notice of Appeal) C. A. 1 W.L.R. **1503**

**4.** —— *Appeals—Transcript of evidence—Selection of necessary material—Costs.*

* Dixon *v.* City Veneering Mills Ld. (Practice Note) - C. A. 1 W.L.R. **1369**

**5.** —— *Appeal to Privy Council—Death of appellant during hearing—Abatement of appeal—Procedure for revivor—Judicial Committee Rules*, 1925, *r.* 51.

* Practice Note (Privy Council) J. C. 1 W.L.R. 1

**6.** —— *Arbitration—Issue of fraud—Application for an order that arbitration agreement and a condition precedent clause should cease to have effect—Jurisdiction of Divisional*

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*Court—Arbitration Act*, 1950 (14 *Geo.* 6, *c.* 27), *ss.* 24 (2), 25 (4).
* Kruger Townwear Ld. *v.* Northern Assurance Co. Ld. (Practice Note)
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7. —— *Assizes—Settlement of action before it comes into day's list—Party under disability—Procedure.*
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* *In re* Whittle (an Infant) (Practice Note) - - - C. A. 1 W.L.R. **1405**

13. —— *Criminal Law—Appeal against conviction on point of law—Desirability of certificate of appeal being granted by trial judge—Criminal Appeal Act*, 1907 (7 *Edw.* 7, *c.* 23), *s.* 3 (*a*)—*Criminal Justice Act*, 1948 (11 & 12 *Geo.* 6, *c.* 58), *s.* 38 (2).
* Practice Note (Certificate of Appeal)
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18. —— *Husband and Wife—Divorce—Practice—Undefended suit—Notice to produce.*
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**5.** —— *Income tax — Balancing charge — Road haulage—Nationalization—Not a sale—Succession by Transport Commission—Succession before permanent discontinuance of business—Income Tax Act*, 1945 (8 *& 9 Geo. 6, c.* 32), *ss.* 17, 60.
* Bramford's Road Transport Ld. *v.* Evans (Inspector of Taxes)
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**6.** —— *Income tax—Balancing charge—"Sale — Railway wagons vested in Transport Commission — Compensation — Whether transaction a sale—Assessment to income tax—Liability to balancing charge—Income Tax Act*, 1945 (8 *& 9 Geo. 6, c.* 32), *s.* 17 (1) (*a*), (3)—*Transport Act*, 1947 (10 *& 11 Geo. 6, c.* 49), *ss.* 29, 30.
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**7.** —— *Income tax — Charity — Statutory duty—Payment of annual sums to charity to meet expenses—"Annual payments"—Deduction of tax from payments — Epping Forest Act*, 1878 (41 *& 42 Vict. c. cxxiii*), *ss.* 39 (1), 41 (2)—*Income Tax Act*, 1918 (8 *& 9 Geo. 5, c.* 40), *Sch. D, Case III, All Schedules Rules, r.* 19.
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**8.** —— *Income tax — Crown — Sale of electricity undertaking to Crown—"Person "succeeds to any trade . . ."—Whether "per- "son" includes the Crown—Income Tax Act*, 1918 (8 & 9 *Geo.* 5, *c.* 40), *Sch. D, Rules applicable to Cases I and II, r.* 11 (2).

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**9.** —— *Income tax—Deduction—Expenses wholly and exclusively for purposes of trade —Advertising—To prevent nationalization of industry—Income Tax Act*, 1918 (8 & 9 *Geo.* 5, *c.* 40), *Sch. D, Cases I and II, r.* 3 (*a*).

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**10.** —— *Income tax—Expenses—Army officer —Expenses including mess subscription—Whether "wholly, exclusively and neces- "sarily" laid out in performance of duties as officer—Income Tax Act*, 1918 (8 & 9 *Geo.* 5, *c.* 40), *Sch. E, r.* 9.

* Lomax *v.* Newton. Griffiths *v.* Mockler - - Vaisey J. 1 W.L.R. **1123**

**11.** —— *Income tax—Land and buildings (Schedule A)—Failure to appeal to Commissioners—Liability to tax absolute—Income Tax Act*, 1918 (8 & 9 *Geo.* 5, *c.* 40), *s.* 169—*Finance Act*, 1941 (4 & 5 *Geo.* 6, *c.* 30), *s.* 12, *Sch. I, para.* 5—*Finance Act*, 1942 (5 & 6 *Geo.* 6, *c.* 21), *Sch. X, para.* 6 (3).

* Commissioners of Inland Revenue *v.* Pearlberg - - C. A. 1 W.L.R. **331**

**12.** —— *Income tax—Method of assessment—Town hall—Profits from use of hall for dances and roller skating—Income Tax Act*, 1918 (8 & 9 *Geo.* 5, *c.* 40), *Sch. A; Sch. D, Cases I, VI.*

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**13.** —— *Income tax—Profits of trade—Whether company carrying on one trade or two — discontinuance of certain trading activities—Profits from letting machinery—Assessment to tax — Income Tax Act*, 1918 (8 & 9 *Geo.* 5, *c.* 40), *Cases I and VI of Sch. D—Finance Act*, 1936 (26 *Geo.* 5 & 1 *Edw.* 8, *c.* 34), *s.* 22.

* North Central Wagon and Finance Co. Ld. *v.* A. W. Fifield (Inspector of Taxes) - - - C. A. 1 W.L.R. **610**

**14.** —— *"Seven-year covenant"—Claim for exemption from payment of tax—Conditions to be satisfied—Finance Act*, 1938 (1 & 2 *Geo.* 6, *c.* 46), *s.* 38 (1).

* Inland Revenue Commissioners *v.* Nicolson - Upjohn J. 1 W.L.R. **809**

**15.** —— *Income tax—Special contribution —Investment income—Tenant farmer paying rent to wife—Schedule A assessment—Farm let to partners, landlord being a partner—Finance Act*, 1948 (11 & 12 *Geo.* 6, *c.* 49), *ss.* 47, 48, 49 (2) (*b*).

* Worth *v.* Inland Revenue Commissioners. Inland Revenue Commissioners *v.* Worth. Inland Revenue Commissioners *v.* Hay - - - C. A. 1 W.L.R. **584**

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**16.** —— *Income tax—Tax reserve certificates—Interest free of tax when applied in payment of tax—Company's distribution of interest—Shareholder's liability to tax—Income Tax Act*, 1918 (8 & 9 *Geo.* 5, *c.* 40), *All Schedules Rules, r.* 20—*Finance Act*, 1942 (5 & 6 *Geo.* 6, *c.* 21), *s.* 29.

* Hutton *v.* Inland Revenue Commissioners - - Upjohn J. 1 W.L.R. **729**

**17.** —— *Purchase tax—"Pictures"—Pictorial coupons given away with goods—Free gift for collection of series—Dual purpose—Not choses in action—Liability to tax—Finance Act*, 1948 (11 & 12 *Geo.* 6, *c.* 49), *8th Sch., group* 25.

* Stephenson Brothers Ld. *v.* Commissioners of Customs and Excise. King & Jarrett Ld. *v.* Same

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**18.** —— *Special contribution — Relief—Income attributable to a period of years—More than one year's income in year of charge—"Full year's income"—Finance Act*, 1948 (11 & 12 *Geo.* 6, *c.* 49), *s.* 61.

* Fenwick *v.* Inland Revenue Commissioners - H. L. (E.) 1 W.L.R. **1039**

**19.** —— *Stamp duty — Charity — Conveyances of property to trustees on trusts for ". . . social and physical training and recrea- "tion" and "the moral social and physical "well being of persons resident in" named localities who "are members or likely to "become members of the Methodist Church" — Not for relief of poverty — Recreation not charitable—Whether "members of the Metho- "dist Church" a section of the community—Conveyances properly assessed to ad valorem stamp duty as voluntary conveyances or conveyances on sale—Finance Act*, 1947 (10 & 11 *Geo.* 6, *c.* 35), *ss.* 52 (1), (2); 54 (1).

* Baddeley and Others (Trustees of the Newtown Trust) *v.* Inland Revenue Commissioners Harman J. 1 W.L.R. **84**

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* Haines *v.* Roberts

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**2.** —— *Goods vehicle—"C" licence—Van used by window-cleaner for carriage of buckets, cloths and leathers—"Goods vehicle" used for carriage of goods—"Goods"—Road and Rail Traffic Act*, 1933 (23 & 24 *Geo.* 5, *c.* 53), *ss.* 1 (1), 36 (1).

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**3.** —— *Insurance — Motor-cycle — Sidecar "permanently attached" — Sidecar body removed — Chassis and wheel still attached — Insurance company admittedly "on risk"—Road Traffic Act*, 1930 (20 & 21 *Geo.* 5, *c.* 43), *Part II and s.* 35 (1).

* Carnill *v.* Rowland

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**4.** —— *Insurance — Motor tractor — Policy —Whether driver disqualified from holding*

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* Edwards *v.* Griffiths
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**5.** —— *Licence — Mechanically propelled vehicle — Lime-spreader — Used for carrying lime and spreading on agricultural land—Application for excise licences — Whether "agricultural engine" or "goods vehicle"—Vehicles (Excise) Act*, 1949 (12, 13 & 14 *Geo.* 6, *c.* 89), *ss.* 4 (1), (2) (*a*), 5, 27—*Finance Act*, 1950 (14 *Geo.* 6, *c.* 15), *s.* 13, *Sch. III.*
* Regina *v.* Berkshire County Council. *Ex parte* Berkshire Lime Co. (Childrey) Ld. - - Divl. Ct. 1 W.L.R. **1146**

**6.** —— *Licensing — Goods vehicle — Utility van, constructed for carriage of goods, towing caravan—No goods carried in van or caravan—Van licensed as private vehicle—Not used for carriage of goods or burden—Haulage—Carriage—Vehicles (Excise) Act*, 1949 (12, 13 & 14 *Geo.* 6, *c.* 89), *ss.* 5, 13, 27.
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**7.** —— *Motor assisted pedal cycle—Mechanically propelled vehicle—Taken without consent of owner—Pedalled without using engine—Motor cycle—No insurance or driving licence—Offences—Road Traffic Act*, 1930 (20 & 21 *Geo.* 5, *c.* 43), *ss.* 1, 2, 4, 28, 35.
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**8.** —— *Motor-vehicle — Licence — Duty — Vehicle carrying loose tools and equipment and fixed iron block as ballast when drawing loads—Haulage not "goods vehicle"—Fixed block included in unladen weight—Finance Act*, 1933 (23 & 24 *Geo.* 5, *c.* 19), *s.* 25. *Sch. VII, paras.* 4 (*e*), 5 (*c*)—*Road Traffic Act*, 1930 (20 & 21 *Geo.* 5, *c.* 43), *s.* 26.
* London County Council *v.* Hay's Wharf Cartage Co. Ld.
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**9.** —— *Negligence—Collision—In centre of straight road—Inference from facts—Impossibility of distinguishing between negligence of drivers—Both equally to blame—Failure to take avoiding action—Law Reform (Contributory Negligence) Act*, 1945 (8 & 9 *Geo.* 6, *c.* 28), *ss.* 1, 4.
* Baker *v.* Market Harborough Industrial Co-operative Society Ld.
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**10.** —— *Prosecution for dangerous driving—Notice of intended prosecution—Erroneous statement of time of offence—Validity of notice—Road Traffic Act*, 1930 (20 & 21 *Geo.* 5, *c.* 43), *s.* 21.
* Pope *v.* Clarke Divl. Ct. 1 W.L.R. **1060**

**11.** —— *Public service vehicle — Express carriage—"Special occasion"—Members of a club taken to a league football match on six occasions—"Private party"—Presence of two non-members on one occasion—Road Traffic Act*, 1930 (20 & 21 *Geo.* 5, *c.* 43), *s.* 61 (1) (2).
* Browning *v.* J. W. H. Watson (Rochester) Ld. - - Divl. Ct. 1 W.L.R. **1172**

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**12.** ——. *See* Criminal Law.

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* Smeaton Hanscomb & Co. Ld. *v.* Sassoon I. Setty, Son & Co. (No. 1)
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**2.** —— *Contract — No memorandum in writing — Commission to make fur coat — Whether contract for work and labour or sale of goods—Sale of Goods Act*, 1893 (56 & 57 *Vict. c.* 71), *s.* 4 (1).
* Marcel (Furriers) Ld. *v.* Tapper
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**3.** ——. *See* Arbitration.

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* Shiels *v.* Cruikshank
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**2.** —— *Power of appointment—Exercise of power in favour of appointor's children—Appointor entitled to income for life—Purchase by appointor of children's reversionary interests—Estate duty—Intention—Validity.*
* *In re* Merton. Public Trustee *v.* Wilson
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* Gill & Duffus (Liverpool) Ld. *v.* Scruttons Ld.
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**3.** —— *Charterparty—Demurrage—Lay time—Calculation—Cargo to be loaded at rate of 150 tons "per available workable hatch per weather working day."*
* Compania de Navigacion Zita, S.A. *v.* Louis Dreyfus & Compagnie
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**4.** —— *Charterparty—Time—Right to substitute ships—Clause—"At any time"—Alternative modes of performance—Election—Contract — Construction — Commercial document—Close analysis of word inappropriate.*
* S.A. Maritime et Commerciale of Geneva *v.* Anglo-Iranian Oil Co. Ld.
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**5.** —— *Compulsory pilotage—Foreign port Negligence—Pilot in control of navigation—Defence to action for damages—Shipowner not liable under foreign law for negligence of pilot—Port of Basrah By-laws—Incorporation of article 29 of Regulations for Preventing Collisions at Sea.*
* The Seirstad (Owners of) *v.* Hindustan Shipping Co. Ld. The Waziristan
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**6.** —— *Dock—Gangway leading from ship to wharf—Duty to provide "safe means of access"—Whether heads of gangway must be safe—Meaning—Docks Regulations, 1934 (S.R. & O. 1934, No. 279), reg. 9.*
* Dawson *v.* Euxine Shipping Co. Ld.
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**7.** —— *Dock — Statutory authority — Tug and towage—Shipping and unshipping of goods—Exclusion of privately owned tugs—Humber Commercial Railway and Dock Act, 1901 (1 Edw. 7, c. ccii), ss. 66, 70—Harbours, Docks, and Piers Clauses Act, 1847 (10 & 11 Vict. c. 27), s. 33.*
* J. H. Pigott & Son *v.* Docks and Inland Waterways Executive
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**8.** —— *Dry dock—Accident—Painting ship with anti-fouling composition—"Work of repair"—Breach of statutory duty—Common law liability—Shipbuilding Regulations, 1931 (S.R. & O. 1931, No. 133), reg. 11 (b).*
* Day *v.* Harland & Wolff Ld.
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**9.** —— *Limitation of liability—Expenses of raising barge—Whether "injury or "damage"—Whether caused by improper navigation — Private Canal Company Act — Whether general Act applicable—Merchant Shipping (Liability of Shipowners and others) Act, 1900 (63 & 64 Vict. c. 32), ss. 1, 3—Manchester Ship Canal Act, 1897 (60 & 61 Vict. c. cviii), s. 9—Manchester Ship Canal Act, 1936 (26 Geo. 5 & 1 Edw. 8, c. cxxiv), s. 32 (1), (2).*
* Owners of the Dumb Barge Stonedale No. 1 *v.* Manchester Ship Canal Company. The Stonedale No. 1
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**10.** —— Log. *See* Evidence.

**11.** —— Right of Master to detain crew. *See* False Imprisonment.

**12.** —— *Towage — Contract — Breach — Whether fundamental—Construction—Towage contractors to be indemnified for all "damage whatsoever"—Tow in collision with another vessel—Tug owners and tow owners liable in disproportionate degrees—Indemnity.*
* Swan Hunter and Wigham Richardson Ld. *v.* France Fenwick Tyne & Wear Co. Ld. The Albion
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**SOLICITOR**—*Negligence—Accident to workman—Retainer as to workmen's compensation—No duty to advise generally—Loss of option to elect remedy—Workmen's Compensation Act, 1925 (15 & 16 Geo. 5, c. 84), s. 29.*
* Griffiths *v.* Evans C. A. 1 W.L.R. **1424**

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**2.** —— *By-laws — London County Council—Regulation of parks and open spaces—Enforceable by penalty—Breach—No cause of action to member of public.*
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THE
# WEEKLY LAW REPORTS
## Volume I

*Containing those cases of value to practitioners which are not intended to be included in The Law Reports and also practice notes and directions.*

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[PRIVY COUNCIL.]

## * PRACTICE NOTE (PRIVY COUNCIL).

J. C.†

1952
Dec. 1.

*Practice and Procedure—Appeal to Privy Council—Death of appellant during hearing—Abatement of appeal—Procedure for revivor—Judicial Committee Rules*, 1925, *r.* 51.

AFTER THIS APPEAL (No. 51 of 1951) from a judgment of the Supreme Court of Ceylon, in proceedings relating mainly to a question of accounting between the parties, had been before the Board for five days, and before the argument was completed, it was announced that the appellant had died.

*Sir Frank Soskice Q.C.* (who with *Quass Q.C.*, *Handoo* and *Carl Jayasinghe* had appeared for the appellant) said that the result of the appellant's death was, as he apprehended, that the appeal abated. The proper course, if the appeal was to go on, was for a petition to be filed for revivor under rule 51 of the Judicial Committee Rules, 1925. For that to be done a certificate had to be obtained from the court appealed from saying who were the proper parties to be substituted for the appellant. There was a case referred to in Bentwich's Privy Council Practice [*Ledgard* v. *Bull* [1]] in which other evidence than a certificate was accepted as to who were the proper parties. But he (counsel) was not in a position to offer any other evidence to the Board because he did not know, and had no instructions, whether a will was left, or if there was a will, who were the executors. In those circumstances it was not possible for him or for his instructing solicitors to offer any indication to the Board in the way of evidence as to who would be the proper parties.

In those circumstances he apprehended that the Board would

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† *Present*: LORD OAKSEY, LORD REID and SIR LIONEL LEACH.

[1] (1886) L.R. 13 I.A. 134.

J. C.
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feel that the only course that could be taken if the appeal were to go on was for a petition for revivor to be filed in the ordinary way, and it would be necessary for the petition to be accompanied by a certificate from the Supreme Court of Ceylon as to who the proper parties were. Speaking as amicus curiae, he would submit that the Board should proceed no further that day. The appeal having abated, in due course those who became the appellant's personal representatives would decide whether or not to file a petition to the Board asking that the appeal might be revived.

The course suggested by counsel was taken, the Board expressing their sympathy with the relatives of the appellant.

C. C.

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[QUEEN'S BENCH DIVISION.]

1952
*Dec.* 1, 2, 3.
Hilbery J.

* BLACKMAN *v.* RAILWAY EXECUTIVE.

[1949 B. No. 2559.]

*Negligence—Invitor and invitee—Railway station—Patch of oil—Injury to pedestrian—Standard of duty—Steps taken to render premises reasonably safe.*

The plaintiff, when walking across a part of Paddington railway station premises known as the "lawn"—from which passengers were not expressly excluded—on her way to the tube station, slipped on a patch of oil which had dripped from vehicles which normally used that area, fell and sustained injuries. The foreman on duty had seen the oil when a vehicle had been moved, and he had immediately ordered sawdust, kept available for that purpose, to be put down, and had called to passengers not to go that way, but the plaintiff, who did not hear the foreman, and who was not seen by him, had slipped on the oil patch before the sawdust could be put down. The plaintiff, alleging negligence on the part of the Railway Executive, claimed damages for personal injuries:—

*Held*, first, that the plaintiff, although on her way to the tube station, was an invitee of the Railway Executive; and secondly, that the duty owed by the defendants was to take reasonable steps to have and to keep their premises as free from danger as they could reasonably be kept; and that there having been no failure to observe the danger or to take steps to render it innocuous in reasonable time, it could not be said that in the circumstances of the case the plaintiff's accident was due to any failure by the Railway Executive to exercise reasonable care, and they were not therefore liable.

*Bloomstein* v. *Railway Executive* [1952] W.N. 378 ([1952] 2 All E.R. 418) followed.

*Tomlinson* v. *Railway Executive*, The Times, Nov. 5, 1952, applied.

*Stowell* v. *Railway Executive* [1949] 2 K.B. 519 (65 T.L.R. 387) ([1949] 2 All E.R. 193) distinguished.

ACTION.

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BLACKMAN v. RAILWAY EXECUTIVE.

On May 19, 1948, the plaintiff was walking across Paddington station on her way to the Bakerloo Tube railway station. Part of the great hall of Paddington station, known as the lawn, was shut off on the north side by a train arrival indicator and movable barriers and on the south by buildings, and the whole of that space, except immediately in front of the bookstall and cloakroom, was used for the loading and unloading of mail-bags and mail vans, barrows and trolleys, used for the carriage of mail-bags, stood there. Normally the whole space was busily occupied, and when the mail vans, barrows and trolleys were all there it was a working part of the station and passengers were obstructed from going there. So that the mail vans and trolleys could go in and out it was impossible for the space to be shut off on the east and west sides by barriers which would prevent passengers from going into it. There was no particular marking or indication to show passengers that they were not to go on that part of the station. The barrows standing there had iron wheels and axles from which oil from time to time dripped on to the ground; when that occurred sawdust, kept on the premises for that purpose, was put upon the oil.

On the day in question the plaintiff entered the station by the mail vans entrance and crossed the lawn in order to take what for her would be the quickest way. Just before she arrived at the lawn some barrows, underneath which a large thick patch of oil had formed, were moved, and the foreman on duty noticed the oil on the ground. He immediately shouted to passengers not to go that way, and tried to make them go round by the bookstall, and he called to a trolley driver to bring some sawdust and put it down. At that time the plaintiff was passing behind the foreman; he did not see her and she did not hear him directing the passengers not to go that way. She walked across the lawn behind him, slipped on the patch of oil and fell, injuring her back and shoulder.

She brought this action for damages in respect of her injuries, alleging negligence against the Railway Executive in that they, their servants or agents, caused or permitted the platform to become dangerous to pedestrians by leaving on it oil or other material of a slippery nature on which she, whilst lawfully walking across the station, did in fact slip. The defendants denied that the plaintiff was walking lawfully at the material time and place, and they denied negligence.

*P. Merriton* for the plaintiff.
*Neil Lawson* for the Railway Executive.

The following cases were referred to in the argument:—*Stowell* v. *Railway Executive* [1]; *Pearson* v. *Lambeth Borough*

[1] [1949] 2 K.B. 519 (65 T.L.R. 387) ([1949] 2 All E.R. 193).

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*Council* [2]; *Bloomstein* v. *Railway Executive* [3]; *Tomlinson* v. *Railway Executive.* [4]

HILBERY J., having stated the facts, considered the medical evidence, and assessed the plaintiff's damages, if recoverable, at £500, continued: In the first place, I have to ascertain whether the plaintiff could be said to be an invitee or merely a licensee on the Paddington station premises; she came on the station in order to become a passenger in the tube, but Paddington premises are those of the Western Section and not of the Tube Railways, which are managed by the London Transport Executive. That question was examined in *Bloomstein* v. *Railway Executive*,[5] where the plaintiff had travelled from Camden Town to Euston on the underground railway but was nevertheless held to be an invitee of the Railway Executive on Euston station. Parker J. said: "If one looks at the Transport Act, 1947, it is clear that "all the properties, Euston, the L.M.S., the London Public "Transport Board, the underground and so on, were vested in the "Transport Commission, but for convenience the Transport "Commission's powers, liabilities and duties are delegated to "the various Executives including the Railway Executive and the "London Transport Executive. Section 5 (4) of the Act provides: "'Each Executive shall, as agents for the Commission, exercise "'such functions of the Commission as are for the time being "'delegated to them by or under a scheme made by the Commis-"'sion and approved by the Minister.' And then by subsection "(9) it is provided: 'As respects matters for the time being "'falling within the scope of any such delegation, the following "'provisions shall have effect except as between the Executive "'and Commission, that is to say—(*a*) any rights, powers and "'liabilities of the Commission shall be treated as rights, powers "'and liabilities of the Executive, and the Executive only.'" He went on to say: "It seems to me that the duty of invitor "to invitee is owed by the Transport Commission in respect of "its properties, and that for convenience those duties are to be "treated as the duties of the Executive in question. Accordingly, "under that Act any duty that the Commission owed to Mrs. "Bloomstein as a passenger on one part of the site is to be "treated as a duty of the Executive in question, the Railway "Executive." He therefore came to the conclusion in that case that the plaintiff, although she was on Euston station at the time and was intending to be a passenger in the Tube railway, was an invitee of the Railway Executive.

I therefore treat the plaintiff in the present case as an invitee of the Railway Executive—but an invitee of the Railway Executive where? There is nothing at Paddington station to show

[2] [1950] 2 K.B. 353 (66 T.L.R. (Pt. 1) 561) ([1950] 1 All E.R. 682).
[3] [1952] W.N. 378 ([1952] 2 All E.R. 418).
[4] The Times, Nov. 5, 1952.
[5] [1952] W.N. 378 ([1952] 2 All E.R. 418).

passengers that they are not entitled to cross that part of the property which is called the lawn, but the very presence of a large number of standing barrows and mail vans is a sufficient indication in the ordinary way that passengers are not invited to go that way; indeed they cannot do so when it is obstructed by the barrows unless they choose to thread a way between them. Anybody entering Paddington station by the mail van's entry would know that the way in which a passenger is intended, and invited, to go, is to turn to the left close to the bookstall, or to the right close along the front of the cloakroom, but there is no particular marking to show the bounds within which a passenger is intended to move, or to denote to a passenger that the lawn is a place that he must not go upon. Indeed, passengers cross the lawn if they are taking a short cut across from that entry to such platforms as 5, 6, 7, 8 or 9. In the circumstances, therefore, I treat the plaintiff as an invitee on this part of the station.

What, therefore, is the measure of the duty that is owed? I have been referred to *Tomlinson* v. *Railway Executive* [6] in the Court of Appeal before Somervell, Jenkins and Hodson L.JJ., which bears many resemblances to the present case. There the plaintiff had arrived by train at Euston station at a time of day when the porter on duty at the platform had to light lamps; there was only one porter and that was sufficient in the ordinary way, but there had just been a fall of snow on the platform, making it slippery, and the porter was unable both to clear the snow and to light the platform. An ill-lighted platform is a danger to passengers, and the porter first discharged the duty of lighting the lamps, and left the clearing of the snow till after he had lighted the platform. The plaintiff, getting out of the train, slipped on the snow and fell. The Court of Appeal treated the case as one where there was a duty to take reasonable care to have the premises reasonably safe for passengers. Somervell L.J. said: "I think it is worth pointing out that we are "concerned in this case with a particular sort of danger, the "danger from snow. There is no question, as there has been "in some cases, of an independent contractor employed by the "defendant. There is no question whether the duty is the duty "to take reasonable care to make safe or whether the duty is to "have premises as safe as reasonable care can make them. None "of those questions arises because it is common ground that if "there was a failure here it was a failure by the defendants "or their servants to take reasonable care with regard to this "snow. The judge found that the defendants had foreseen "the possibility of snow getting on to this platform and becoming "slippery and there were available buckets of sand and salt and "standing instructions as to sanding and salting. The duty of "sanding and salting at this station was on the porter and there

[6] The Times, Nov. 5, 1952.

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" was only one porter. When this snow came down he, quite " rightly, considered sanding and salting, but at this particular " time of day he had another duty to perform, and that was to " see that certain emergency lamps were lighted so that they " would be available in the event of a power cut. There had " been a number of power cuts at this time and, of course, the " whole station would be plunged into complete darkness unless " there were emergency lamps available. So that was another " problem with which the defendants had to deal, and they had " dealt with it by having lamps and by giving standing instruc- " tions that shortly before dusk those lamps were to be lighted, " and it was most important that they should be lit. The porter " who had begun to sand the snow, though he had not got to the " place where the plaintiff unfortunately fell, went off to light " the lamps. It was because he had that duty cast upon him " at that time that he did not and could not proceed with the " salting and sanding of the snow."

In those circumstances Parker J. found that the Railway Executive had failed to take reasonable care; the Railway Executive appealed and the Court of Appeal allowed their appeal. Somervell L.J. said: " It was, of course, a very short time after " this snowstorm that the accident happened. It seems to me " it would be an impossible burden on people in the position of " the Railway Executive qua snowstorms to say that the snow " must be salted or sanded as soon as it falls. If that was an " absolute duty it is difficult to see how reasonable care could " provide for it. It was a very short time after the snow fell " that the accident happened. It was, of course, an unfortunate " coincidence for the plaintiff that the duty of lighting these " lamps happened to coincide with this short, sharp snowstorm, " but it is still a fact that no one can expect snow to be sanded " or salted instantaneously. The danger of snow being slippery " everyone appreciates, although that does not mean that those " in the position of the defendants must not take reasonable " steps to prevent its remaining in that condition."

In the present case the foreman on duty on this part of the station noticed a patch of oil—thick oil—which had hitherto been under the barrows and was disclosed when they were moved; that is not unlike a snowfall. As soon as he observed it he tried to stop people coming round that way, and he shouted out to a man to get sawdust and put it down. Just as in *Tomlinson* v. *Railway Executive* [7] sand was kept available in the case of snow, so sand and sawdust are kept available at Paddington to meet cases where something makes the surface of the platforms or the ground slippery—the ground on which passengers, or intending passengers, may walk.

In *Stowell* v. *Railway Executive* [8] one of the platforms used

[7] The Times, Nov. 5, 1952.

[8] [1949] 2 K.B. 519.

during the night for fish traffic was found to be slippery and to have been left slippery so that a person coming to meet passengers slipped and fell and injured himself. In the present case, as soon as the trolleys were moved the foreman saw that oil had dripped on to the surface, and immediately took steps—the appropriate steps—to render that oil patch innocuous so far as any slipperiness was concerned. He sent a man to fetch sawdust, and he himself tried to divert passengers; he did not see the plaintiff go behind him and he was calling out to passengers to go close to the front of the bookstall when he heard a commotion behind him and, looking round, he saw that the plaintiff had fallen.

I have to ask myself whether, in the circumstances, there was any failure to exercise reasonable care either to keep, or to have that part of the station reasonably safe for the passage of passengers. Just as the fall of snow in *Tomlinson* v. *Railway Executive* [9] left in the circumstances little time for the porter to complete sanding and do his other jobs, so here this oil patch was not apparent as anything that might possibly affect passengers until the barrows were moved. The very purpose for which this part of the station is used prevents it from being permanently fenced off against use by passengers.

Everyone knows, and the Railway Executive through its servants must know, that wherever motor vehicles and well-oiled axles and wheels stand for any length of time oil is liable to drip and form a patch that may be slippery. But on this particular occasion there was no failure to observe within a reasonable time that an oil patch had formed. It was observed at once by the foreman, who immediately took steps to eliminate the possible danger from the slipperiness of the oil. There was no failure, therefore, in the way of taking steps in time to endeavour to render the situation free from danger. Can it be fairly said that the steps which were taken were not reasonably sufficient steps? The Railway Executive, as occupiers of these premises, are not insurers; they do not guarantee a person coming on the premises against any accident, or against slipping or falling. All that they do is to take reasonable steps to keep the premises as free from danger as they can reasonably be kept. Whether reasonable steps have been taken in cases such as this is always a matter of degree. As the cases that I have cited show, lawyers in different courts may take different views whether in the circumstances reasonable care has been exercised by defendants or whether a plaintiff's accident ought justly to be said to be due to a failure to take that reasonable care; but since the standard is that of reasonable care, I am bound to say in this case that the plaintiff has failed to show that her accident was due

[9] The Times, Nov. 5, 1952.

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to a failure on the part of the Railway Executive's employees in the particular circumstances to exercise reasonable care.

There will, therefore, be judgment for the defendants.

*Judgment for the defendants.*

Solicitors: *Alfred Bieber & Bieber; M. H. B. Gilmour.*

J. F. L.

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[COURT OF APPEAL.]

C. A.

1952
Nov. 27, 28; Dec. 1.

Singleton and Morris L.JJ.

* BECKETT *v.* NEWALLS INSULATION CO. LD. AND LIGHTFOOT REFRIGERATION CO. LD.

*Negligence—Dangerous thing—"Consummate care" required—Calor gas container—Leakage—Explosion—Injury—Liability.*

In two small chambers of a ship (an outer and an inner) refrigeration insulation was in course of construction. Company A on a Friday was brazing by means of gas from a calor gas container. The foreman engineer on ceasing work disconnected the cable, leaving, according to his evidence, the container, with the valve turned off and the regulator adjusted, in the outer chamber. The valve with a handle was supplied with the container, and there was no cap over it. The foreman knew that the men employed by his company would not be working in the chamber until the following Tuesday. He also knew that men employed by company B would be plastering in the two chambers on the Saturday and the Sunday. One of these men, in order that they might do their work in the outer chamber on the Sunday, at lunch time removed the container from the outer to the inner chamber. On Saturday the electric light bulbs in the chambers had been taken from their sockets. On Tuesday morning the plaintiff, an employee of B company, failing to find an electric light bulb in the outer chamber, went into the inner chamber, which was pitch dark, to seek a bulb and struck a match. There was an explosion resulting from escape of gas from the container and the plaintiff was injured. There was no evidence as to when gas first began to escape from the container. The plaintiff sued both companies:—

*Held* that, although the gas might be considered as a dangerous thing, the law applicable was the law of negligence, but the standard of care, in such a case, was of the highest. "The law "expects of a man a great deal more care in carrying a pound "of dynamite than a pound of butter." On these facts it was found that, by the conduct of their foreman, company A were guilty of negligence and liable in damages to the plaintiff.

Decision of Stable J., on this issue, reversed.

APPEAL from Stable J., sitting at Durham Assizes. The appeal was heard by two judges only by consent of the parties.

At Whitsuntide, 1950, the ship *Gyrotoma* was being fitted out at Sunderland. In two chambers of the ship refrigeration insulation was in course of construction: they were known as the

meat chamber and the vegetable chamber, the latter giving access to the inner meat chamber and also to the open air. The dimensions of the meat chamber were 12 ft. by 9½ ft.; it was 6 ft. high. Each room had a door. On Friday, May 26, 1950, the second defendants, the Lightfoot Refrigeration Co. Ld., had men working in the chambers who had taken there a calor gas container. The gas was taken from the container through a cable to where it was used for brazing. When work ceased on the Friday when their apparatus had been in use, Spencer, their foreman engineer, took the cable off the container and left the container with other tackle in a corner of the outer chamber. On Saturday and Sunday, May 27 and 28, two men, Edmunds and Beckett, the plaintiff, employed by Newalls Insulation Co. Ld., the first defendants, were working on plastering the two rooms, including work on the floors. Having finished their work in the inner chamber they started on the outer chamber, but found the tackle left in the corner by the foreman of the refrigeration company. Edmunds, the senior of the two men plastering, moved the container from the outer into the inner chamber on Sunday, May 28, at lunch time. No work was done in the chambers on the Monday. On the Saturday the bulbs of the electric lights had been taken out and electricity disconnected. On the Sunday the two men used candles. Men from the refrigeration company had not worked in the two chambers on the Saturday, Sunday or Monday.

On Tuesday morning, May 30, Beckett, the plaintiff, a man 20 years of age, having opened the door, went into the outer chamber and looked for an electric light bulb. Not seeing one, he went into the inner chamber, which was pitch dark. He struck a match to help him to find a bulb when there was an explosion of a mixture of gas and air which blew him into the outer chamber and he was burned and seriously injured.

Gas from the container cylinder came through a valve which, if securely turned, would prevent its escape. Beyond that and between that and where the cable was, when affixed, was a regulator, and if the regulator were properly adjusted there could be no escape of gas, even if the valve had been left open. When the container was delivered to a purchaser the valve was covered by a cap, which could be screwed tightly on and over the valve. There was a handle on the top of the cap, so that the container could be carried by it. If that were done the regulator would be disconnected. The container would be in a safer condition if the cap were on over the valve, since the valve could not then be turned or moved without the removal of the cap. A witness testified that when the container was taken on to the ship there was no cap on it. And it was clear that there was no cap on the container when it was left in the outer chamber by Spencer, the foreman of the refrigeration company.

The plaintiff brought his action against the two defendants, in each case alleging negligence. As regards the insulation

C. A. 1952

BECKETT v. NEWALLS INSULATION CO. LD. AND LIGHTFOOT REFRIGERATION CO. LD.

company he alleged negligence against their servant Edmunds when removing the calor gas container from the outer to the inner chamber on the Sunday. He alleged that the refrigeration company were negligent and he gave as particulars: "They left "the cylinder in the refrigerator in a faulty and defective and "dangerous condition, so that gas would or might escape from it. "They left it where it might have to be handled by others with "the valve exposed and without a proper protective cap or other "locking device fitted on it so that anyone handling the cylinder "would be likely to take hold of the valve itself and turn it, "with the result that gas would be permitted to escape. They "failed to give any adequate warning of the danger of taking "hold of the valve to other persons who might have occasion to "approach or handle the cylinder."

The insulation company by their defence denied negligence. They pleaded that "the said accident was caused or contributed "to by the negligence of the" refrigeration company, as alleged in paragraph 4 of the statement of claim. The refrigeration company by their defence denied negligence and alleged that: "The "accident to the plaintiff, if any, was wholly or directly or partly "caused by the negligence of the plaintiff himself and of the said "Edmunds and of some other servant of the first defendants or "of one or more of them in handling a cylinder of calor gas and "moving and using it in such manner as to open the valve of "the cylinder and to permit the escape of gas from it and in "leaving the said cylinder or causing or permitting it to be left "in a confined space in the said ship without closing or ensuring "that the valve thereof was securely and tightly closed and "in leaving or permitting the cylinder to be left with the gas "escaping from it and (in the case of the plaintiff) in striking a "match in a chamber where he knew a cylinder of calor gas had "been so left without first ascertaining whether it was safe to "expose a naked light."

Stable J. found no negligence on the part of either of the defendants, for whom he gave judgment, but he provisionally assessed the damages at £615. The plaintiff appealed.

*Geoffrey Veale Q.C.* and *J. Harvey Robson* for the plaintiff.

*Hylton-Foster Q.C.* and *G. S. Waller* for the insulation company.

*Marven Everett Q.C.* and *Norman Harper* for the refrigerating company.

The following cases were cited in argument:—*Dixon* v. *Bell* [1]; *Fletcher* v. *Rylands* [2]; *Rylands* v. *Fletcher* [3]; *Dominion Natural Gas Co. Ld.* v. *Collins and Perkins* [4]; *Rickards* v. *Lothian* [5];

[1] (1816) 5 M. & S. 198.
[2] (1866) L.R. 1 Ex. 265.
[3] (1868) L.R. 3 H.L. 330.
[4] [1909] A.C. 640 (25 T.L.R. 831).
[5] [1913] A.C. 263, 282 (29 T.L.R. 281).

*Kimber* v. *Gas Light and Coke Co.*[6]; *M'Alister (or Donoghue)* v. *Stevenson*[7]; *Northwestern Utilities Ld.* v. *London Guarantee and Accident Co. Ld.*[8]; *Hanson* v. *Wearmouth Coal Co. Ld.*[9]; *Woods* v. *Duncan*[10]; *Read* v. *J. Lyons & Co. Ld.*,[11] and *Ball* v. *London County Council.*[12]

SINGLETON L.J. The case for the plaintiff, as put forward in this court, was that the refrigeration company were dealing with something of a dangerous character, to wit gas, and that they did not use sufficient care in the way they left the container. Mr. Veale, on behalf of the plaintiff, referred us to some words of Lord Wright in *Northwestern Utilities Ld.* v. *London Guarantee and Accident Co. Ld.*[13] where, after considering dangerous things in general, he said[14]: "That gas is a dangerous thing within the "rules applicable to things dangerous in themselves is beyond "question. Thus the appellants who are carrying in their mains "the inflammable and explosive gas are prima facie within "the principle of *Rylands* v. *Fletcher*,[15] affirming *Fletcher* v. "*Rylands*[16]; that is to say, that though they are doing nothing "wrongful in carrying the dangerous thing so long as they keep "it in their pipes, they come prima facie within the rule of strict "liability if the gas escapes: the gas constitutes an extraordinary "danger created by the appellants for their own purposes, and "the rule established by *Rylands* v. *Fletcher*[15] requires that they "act at their peril and must pay for damage caused by the gas "if it escapes, even without any negligence on their part. The "rule is not limited to cases where the defendant has been "carrying or accumulating the dangerous thing on his own land: "it applies equally in a case like the present where the appellants "were carrying the gas in mains laid in the property of the City "(that is in the sub-soil) in exercise of a franchise to do so"; and Lord Wright repeated the words of Lord Dunedin in *Dominion Natural Gas Co. Ld.* v. *Collins and Perkins*,[17] and said[18]: "'Have the defendants been able to show affirmatively "'that the true cause of the accident was the conscious act of "'another volition, i.e., the tampering with the machines by the "'railway company's workmen?' It is not here intended to "enumerate all the defences which might be available to a defen-"dant in this class of action: but the two defences mentioned "are both material in this case."

We are told that the container, which is in court, was not

[6] [1918] 1 K.B. 439 (34 T.L.R. 260).
[7] [1932] A.C. 562, 611 (48 T.L.R. 494).
[8] [1936] A.C. 108, 119 (52 T.L.R. 93).
[9] (1939) 55 T.L.R. 747 ([1939] 3 All E.R. 47).
[10] [1946] A.C. 401 (62 T.L.R. 283) ([1946] 1 All E.R. 420n.).
[11] [1947] A.C. 156 (62 T.L.R. 646) ([1946] 2 All E.R. 471).
[12] [1949] 2 K.B. 159 (65 T.L.R. 533) ([1949] 1 All E.R. 1056).
[13] [1936] A.C. 108.
[14] Ibid. 118.
[15] L.R. 3 H.L. 330.
[16] L.R. 1 Ex. 265.
[17] [1909] A.C. 640.
[18] [1936] A.C. 108, 120.

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damaged by the explosion. It is difficult, indeed, to see that there could be any escape of gas from the container if the valve was turned tightly down and if the regulator was properly adjusted. It is equally difficult to see that, if both those things were done, there could be an accidental turning on of both, or an inadvertent turning on of both.

Stable J., in the course of his judgment, said: "Mr. Edmunds "admits that he picked the cylinder up, that he moved it from "one compartment to the other, and that he put it down. He "said that he handled the thing carefully, because he knew that "it contained gas, and in the course of his experience he had "known of explosions of acetylene or other gases. He says "perfectly frankly that, having put it down, he did not test the "taps to make certain that inadvertently he had not given a "twist which allowed some gas to escape."

The learned judge later said: "Mr. Veale puts his claim "against the refrigerating company in this way. He says that "this calor gas cylinder is placed by the law in a peculiar category "of things called dangerous. It contains a gas which, although "the evidence was that it is the safest kind of gas, is susceptible "of exploding, if a mixture of the gas and the right proportion of "air comes into contact with a naked flame, and I venture "respectfully to say, with reluctance, because the doctrine of "dangerous things is one that I do not think I have ever fully "grasped, that I must accept Mr. Veale's submission that inas-"much as this thing contains gas it comes within this rather "mysterious category of things known to the law as dangerous "things. Therefore, inasmuch as an explosion has been caused "and injury sustained, the refrigerating company has imposed "upon them the obligation of satisfying me that reasonable "precautions were taken, having regard to the surrounding "circumstances in relation to what was done with this cylinder "of gas."

Stable J. continued: "I am satisfied that what was done "was quite reasonable. I think that it is imposing a fantastic "standard to say that the regulator should have been dismantled "and a cap fitted over the tap." With all respect to the judge, I think that that must depend on whether or not it is easy for the tap or for the regulator, or for both, to be moved inadvertently when one is moving the container. He continued: "After all, that would not have obviated the possibility of "trouble. To have completely obviated the possibility of trouble "the thing would have had to have been locked up somewhere "where nobody could have touched it. Having regard to the "evidence of fact that these things are in universal use in private "houses, in caravans, and in motor-boats all over the country, "and that domestic gas is a feature of a vast number of dwell-"ings, with switches which let the supply of gas off and on "exposed to a mischievous act or inadvertent act, to hold that "a duty is imposed in relation to one of these cylinders in putting

" it where nobody can possibly get at it is stating the duty much " too highly. In my view, it was a perfectly reasonable thing " to leave that cylinder where it was ready for use when the men " came to work on the Tuesday, with the gas properly and " effectively turned off."

That, again, I venture to point out, must depend on the risk involved in the legitimate moving of the container itself. Stable J. continued: " The next alternative, the plaintiff having " failed against the refrigerating company, is that the wrongdoer " responsible for the mischief was Mr. Edmunds. It is, I think, " really agreed (and if it is not agreed I am perfectly satisfied " here) that Mr. Edmunds, in removing the cylinder from the " floor of this chamber where they were going to work, with all " the other things that were removed, was acting perfectly " properly, and nobody could have suggested that he was not. " It is possible that in shifting this cylinder he may—I say, he " may—have inadvertently twisted the top and perhaps the " regulator—although it is extremely difficult to see how he could " twist the regulator inadvertently—and brought about an escape " of gas."

I agree with the judge that it is extremely difficult to see how anyone moving the container (which is not a very big thing) could inadvertently turn on the tap and also move the regulator so that it was in a position to allow the escape of gas, if it was not before; for both things to have happened inadvertently seems to me to amount almost to an impossibility. The judge referred to the evidence of Mr. Barr, an engineer and an expert witness called for the refrigeration company, and said: " He thinks that " some mischievous or foolish person must have tampered with " this thing, and on purpose. However that may be, there is not " a shadow of doubt about this: nobody who saw Mr. Edmunds " for one single moment expected that he would be so foolish as " to turn this gas on on purpose. The most that can be said " against him is that he did it by mistake, inadvertently. I am " by no means satisfied that he did. This is one of those cases " in which the mystery, so far as I am concerned, remains " unsolved. The plaintiff having failed, in my judgment, to prove " any fault against anybody, inevitably as a result loses his " action, and the action must be dismissed with, presumably, the " usual consequences."

I have not referred so far to the other authorities on which Mr. Veale relied. I mention in passing that he referred to the words of Lord Macmillan in *Donoghue* v. *Stevenson*,[19] as showing that in circumstances of this kind the persons who placed the dangerous gas there were practically subject to a guarantee of safety; and he referred us to the words of Goddard L.J. in *Hanson* v. *Wearmouth Coal Co. Ld.*,[20] and of Tucker L.J. in *Ball* v. *London County Council*.[21]

[19] [1932] A.C. 562, 611.
[20] 55 T.L.R. 747.
[21] [1949] 2 K.B. 159, 170.

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The judgment of Stable J. amounts to this: here is a man who went to work and who at his place of work suffered an accident of a most unusual kind, an accident which, prima facie, would not have happened without someone's negligence. The judge found that there was no negligence on the part of Edmunds, the only person who is said to have moved the container after it was placed in the outer room by the refrigerating company's foreman. He said that Edmunds might have moved the tap, and perhaps the regulator, inadvertently, thought it was extremely difficult to see how he could twist the regulator inadvertently, and he said that though he might have moved it by mistake inadvertently, he, the judge, was by no means satisfied that he had done so. He found, too, that when dealing with a container containing calor gas such as this, that which the refrigeration company's foreman, Spencer, did was quite reasonable, and that it was imposing a fantastic standard to say that the regulator should have been dismantled and the cap fitted over the top, and that it was a perfectly reasonable thing to leave that cylinder where it was ready for use, with the gas properly and effectively turned off, when the men came to work on Tuesday. I think from that it follows that the judge found that the gas was properly and effectively turned off.

If all those findings are right, it is extraordinarily difficult, if not impossible, to understand how this accident came about. There was no suggestion whatever that any other persons went on to that part of the ship at the week-end. True, it was said that the electric light bulbs were removed on the Saturday so that people would not pocket them; whether workmen or others I do not know; but there was no evidence that any unauthorized persons went on to this ship, which was in the course of construction, nor was there any suggestion whatever from the refrigeration company of any such happening. Indeed, it was pointed out to this court that the refrigeration company expressly relied on the negligence of the plaintiff himself and the other workman, Edmunds, both of whom were employed by the insulation company. There was no allegation whatever of any unauthorized interference by any party outside, so that one is faced on the findings with an accident of a kind which one would think it was quite impossible could happen if the container was in order and if the gas was properly turned off by the valve and the regulator; and in the absence of any interference with either, and if all that can be said is that the container was moved and properly moved.

It is necessary to consider the case a little closely, and in so doing I bear in mind Mr. Everett's submissions. In asking the court to uphold the judgment of Stable J. he referred us to the words of Lord Moulton in *Rickards* v. *Lothian*,[22] and to what was said in the House of Lords in *Read* v. *J. Lyons & Co. Ld.*[23] In the last case there was no allegation of negligence at all, but

[22] [1913] A.C. 263, 282. [23] [1947] A.C. 156.

Mr. Everett used the report rather to draw our attention to the submissions of Sir Hartley Shawcross, then Attorney-General, who appeared for the respondents in that case.[24] I will read a few lines from the argument because they do appear to summarize the law very neatly and very accurately. The argument was put in this way: "This case is not within the rule in *Rylands* "v. *Fletcher*,[25] which is really founded on the idea that the "defendant did what he should not have done. It depends on "negligence, though the greater the danger, the greater the care "required of him. In the authorities the application of the "standard of things called dangerous in themselves has no logic "about it. The same thing has been held dangerous in itself in "some circumstances but not in others: see *Salmond's Law of* "*Torts*, 10th ed., p. 518. The true question is not whether a "thing is dangerous in itself but whether, by reason of some "extraneous circumstances it may become dangerous. There is "really no category of dangerous things; there are only some "things which require more and some which require less care."

That argument is in much the same terms as those in which Sir Percy Winfield commences chapter XXI in the fifth edition of his work on the Law of Tort, a chapter on dangerous chattels, where the author says: "There is no doubt that the law as to "liability for dangerous chattels is treated in legal literature and "practice as a separate compartment of the law of tort, but it is "not easy to explain why it is so or in what respect it is a species "of 'strict' liability. In theory the law of negligence as a tort "might be regarded as adequate to cover it. It is true that the "law expects of a man a great deal more care in carrying a pound "of dynamite than a pound of butter, or in keeping a bottle of "poison than a bottle of lemonade. But that is only another "way of saying that what is a reasonable amount of care in one "set of circumstances is not so in another set of circumstances, "and reasonable care is the sole test of negligence. And, passing "to the decided cases of dangerous chattels, we have been unable "to trace anything in the reports that is inconsistent with the "view that the law of negligence is all that is needful for the "purpose." The author then refers to *Dixon* v. *Bell*,[26] and sets out the words of Lord Dunedin in *Dominion Natural Gas Co. Ld.* v. *Collins and Perkins*.[27]

I propose to consider this case purely on the allegation of negligence which is made against the refrigeration company; I do not think that any case was proved against the insulation company. It was not alleged, or certainly it was not argued in this court, that there was any negligence on the part of the plaintiff himself. The only other employee of the insulation company who was present was Edmunds, who gave his evidence, which the judge accepted. True, Edmunds knew that the

[24] Ibid. 161, 162.
[25] L.R. 3 H.L. 330.
[26] 5 M. & S. 198.
[27] [1909] A.C. 640.

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container contained gas; he had not been warned to take any particular care about it; he moved it carefully and properly, as the judge said. The judge did not think that Edmunds had moved the cap or the regulator inadvertently; he was wholly satisfied he had not done so intentionally; there was no negligence on the part of Edmunds and none on the part of his employers.

The case against the refrigeration company is different. They had introduced on to the premises a container which contained calor gas which, if it escaped, might bring about an explosion, as it did in fact. They left it on the Friday night without any cap covering the valve. The engineer-foreman, Spencer, had taken the cable off, and he had seen, according to his evidence, that the regulator was set right and that the tap was turned off. He was asked: "What did you do when you had finished? (A.) "Well, I closed the cylinder off and released *this* valve *here* and "took the cable off—the brazing torch off—and put it in the "corner of the vegetable room. (*Indicating on cylinder.*) (Q.) "Is that the practice you have followed over the last 10 years? "(A.) That is the practice I have always followed." He said that the effect would be to shut off any escape of gas.

The contention of the refrigeration company was that the escape of gas was due to some interference. There was no interference suggested from outside. They now seek to say that either the escape was caused by the act of Edmunds, or in some other way which is left unexplained. No question was asked at the hearing to show that anyone else was on the ship or could have got into that part of the ship where this container was left. In reply to a question it was said by counsel for the refrigeration company that possibly the insulation company might be responsible, or possibly both companies might be liable, in that it must have been the act of Edmunds that brought about this escape of gas. I cannot see that upon the evidence. Furthermore, the degree of care required from the refrigeration company, who introduced that gas container, is to be measured by the danger involved in that which they brought on to the ship. The law expects of a man a great deal more care in carrying a pound of dynamite than a pound of butter; the law expects greater care if there is introduced on to an enclosed space in a ship a container with gas inside it which may escape if precautions are not taken. One precaution which could have been taken was to put on the cap, and if that had been done no movement of the container would have interfered with the valve. Another precaution which might have been taken would have been to leave the container in a safe place. The man who had put the container in the vegetable room was asked: "You knew, did you not, that "Newalls' men were going to be about all the week-end?" and he said "Yes." He said a little later in his evidence: "I would "not expect anybody else to move the cylinder." I think he meant by that, anyone other than himself. Then he was asked: "You knew in the course of the week-end that Newalls' men

" would be finishing the meat room and coming into the vegetable " room, did you not?" and he said: " I did not know whether " they would work in the meat room or the vegetable room. " (Q.) You did not think one way or the other? (A.) No."

In the result, he left the container in the vegetable room, not considering at all whether men might be working there, or whether it would be necessary to move it when the men of the insulation company worked over the week-end. It would have been reasonable, if he was going to leave a thing like that, to inquire whether anyone was going to work there; it would have been reasonable to warn people: " Do not touch this container," or: " Do not move it," if by the mere movement of it there is a chance that something in the apparatus might be moved so that there could be an escape of gas. The judge found that there was no deliberate moving of any of these things by Edmunds; at the most there was something inadvertent. If the refrigeration company's man leaves something of this kind in a position in which it is quite likely it would have to be moved, and if he does not warn anyone as to the danger of moving it, or how it should be moved, and if the thing were so constructed that when it is being moved a regulator or valve can be affected so that an escape of gas can come about, then it seems to me that the person who puts that regulator in that position is not exercising the care which he ought to exercise in regard to something of this kind.

Negligence is a failure to take that care which a reasonable man would take in the circumstances. A reasonable man who has to leave something of that kind must take more care than Spencer took. The refrigeration company said that someone must have moved the tap and/or the regulator, yet it may be that they were not both shut off as Spencer said. They said that someone moving the container could bring about an escape of gas, yet they took no care whatever to see that people who might have to move the container were warned. On the evidence there was at the most an accidental movement—although that is by no means clear—and there was an escape of gas, and that gas escaped from something introduced on the premises by the refrigeration company, who, in my judgment, did not take the care which they ought to have done in the circumstances. I feel that that being so, the plaintiff is entitled to recover damages against the refrigeration company, and I would allow this appeal and enter judgment for the plaintiff against the second defendants for the sum of £615 provisionally assessed by the judge.

MORRIS L.J. I have reached the same conclusion. In my judgment, in approaching this case it is necessary to have in mind the nature of the article with which the inquiry is concerned; the place where the article was left; the time and date when it was left, and all the other relevant circumstances. I have in mind

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the words used by Lord Macmillan in *Read* v. *J. Lyons & Co. Ld.*[28] He said[29]: "In an address characterized by much pain-"staking research Mr. Paull for the appellant sought to convince "your Lordships that there is a category of things and operations "dangerous in themselves and that those who harbour such things "or carry on such operations in their premises are liable apart "from negligence for any personal injuries occasioned by these "dangerous things or operations. I think that he succeeded in "showing that in the case of dangerous things and operations the "law has recognized that a special responsibility exists to take "care. But I do not think that it has ever been laid down that "there is absolute liability apart from negligence where persons "are injured in consequence of the use of such things or the "conduct of such operations. In truth it is a matter of degree. "Every activity in which man engages is fraught with some "possible element of danger to others. Experience shows that "even from acts apparently innocuous injury to others may "result. The more dangerous the act the greater is the care "that must be taken in performing it. This relates itself to "the principle in the modern law of torts that liability exists only "for consequences which a reasonable man would have foreseen. "One who engages in obviously dangerous operations must be "taken to know that if he does not take special precautions injury "to others may very well result."

The evidence showed that if there were an escape from the container there might be an explosive mixture of air and gas. Mr. Rogers, an expert witness called for the plaintiff, in his evidence was asked by the judge: "If it was leaking out into "the air and somebody struck a match, what would happen, "Mr. Rogers? (A.) It would explode if you had an explosive "mixture, my Lord. (Q.) What is the explosive mixture? (A.) "There is a range between 1·86 and 8·41 per cent. calor gas to "air. Below that figure it is not explosive, and above it is too "saturated to explode." That was the nature of the gas which might escape from the cylinder that was left by Mr. Spencer in the vegetable or outer room.

It is important also to see the dimensions of that place. A plan has been put before us which was used during the hearing below. It shows that the approach to the meat room is from the vegetable room. The inner dimensions of the meat room appear to be 9 ft. 6 ins. by about 12 ft., and it would appear that the height of the chamber is some 6 ft. There was a door leading from that inner meat room to the vegetable room, and then a door from the vegetable room which led to the outside air. The evidence shows that when Mr. Beckett went on Tuesday morning he found the door of the vegetable room closed. The plaintiff was asked: "Did you go to the ship on the Tuesday? (A.) Yes.

[28] [1947] A.C. 156. [29] Ibid. 172.

"(Q.) That was the 30th? (A.) Yes. (Q.) Were you actually "at the refrigeration chamber before Edmunds? (A.) Yes. "(Q.) Were there other men working outside the chamber? "(A.) Yes. (Q.) When you arrived was the chamber shut? "(A.) The door was shut but not actually locked. (Q.) Not "locked, but closed? (A.) Yes"; and then he said that he opened the outer door. There appears to have been no evidence whether the door between the vegetable room and the meat room was, or was not, closed.

The next circumstance is the time when Spencer left the calor gas cylinder. He left it on the Friday, but with knowledge that he would not be returning until the Tuesday, but that others would be returning on the Saturday and the Sunday. I would just supplement the citations of the evidence made by my Lord in regard to this matter by referring to one or two other questions and answers. Mr. Spencer was asked: "You knew then, did "you not, that Newalls' men were going to be about all week-"end? (A.) Yes. (Q.) Not only Mr. Edmunds but possibly "Mr. Beckett as well? (A.) Yes. (Q.) And possibly Mr. Fuller-"ton? (A.) Yes. (Q.) They had not been using that cylinder, "had they? (A.) Not to my knowledge." Then a little further on, having said that he had not thought one way or the other whether the men would work in the vegetable room or in the meat room, he was asked this: "When they came into the vegetable "room they would be plastering the whole of the vegetable room? "(A.) Yes, round the rooms. (Q.) And the floor? (A.) I cannot "recollect whether the floor was done or not. (Q.) You would "not dispute Mr. Edmunds if he said they would be doing all "of it, would you? (A.) No. (Q.) And on the floor was the "cylinder, amongst other things? (A.) Yes. (Q.) So clearly if "the floor was to be done the cylinder would have to be moved? "(A.) Yes. (Q.) By Mr. Edmunds or by Mr. Beckett? (A.) I "suppose so."

In those circumstances, it seems to me that Spencer was leaving an article from which gas might escape, if the tap was not fully turned; he was leaving it in a confined place; he was leaving it knowing that others would be there on later days, and that there would be an interval before anyone came, and he was leaving it knowing that it might be necessary for it to be moved.

As I read the judgment of the judge, and particularly the passages to which my Lord has referred, it seems to me clear that the judge exonerated Edmunds from any liability for negligent action, and it seems to me that those findings of the judge were amply warranted by the evidence. There is nothing to suggest that Edmunds did anything wrong in moving the cylinder. Any suggestion that may have been hinted at at one time that Edmunds or Beckett had used the cylinder on the Saturday or the Sunday for some private purpose of their own appears to have been definitely negatived by the judge, and no such suggestion is

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now persisted in. So it seems to me that Edmunds is ruled out as having been guilty of any negligent act at all. I cannot see any sufficient or satisfactory evidence that there was the presence on the ship of unauthorized persons. That matter rests really on theory or speculation.

Having regard to all those features of the case, and there being the undoubted fact that there was at some time an escape of gas, and that when Beckett went on the Tuesday morning to the inner chamber, the meat room, he acted without any negligence, any suggestion of contributory negligence on his part having been withdrawn during the hearing, the question arises whether it is shown that there was negligence on the part of someone for whom the refrigeration company are responsible. It is quite plain that Spencer could have done things in a different way. He might have moved the cylinder altogether from the chamber; he might have placed it in some store. That was, perhaps, a course that would not have occurred to him, and I am not saying that it was one that should necessarily have been adopted. He certainly might have put the cap on it. It is true that he said that no cap was supplied to him, but those who employed him could have supplied a cap for fitting on the cylinder.

But, in my judgment, the refrigeration company are responsible for the reason that the evidence leads me to the conclusion that either there was some escape of gas from the Friday afternoon onwards, or that the cylinder was left in such a state that when it was moved, and necessarily moved by someone who moved it without negligence, it would thereafter be in a condition when there would be, or might be, an escape of gas. It has been put by Mr. Marven Everett that if the cylinder was left with some leakage of gas on the Friday afternoon, then it would have been leaking continuously, and he points out that on the Saturday and the Sunday men were working in the vegetable room and were smoking, and on the Sunday were working with candles in the meat room. But that state of affairs is by no means impossible. The vegetable room opened out into the air, and a slight leak of gas might not have caused the necessary concentration in the vegetable room if the door was open continuously or from time to time, as it must have been while men were working there.

In my judgment, the facts lead to the conclusion that the cylinder was either left with an escape of gas, or it was left in such a condition that on its being moved by Edmunds without any negligence, and moved in a way that Spencer must have known was likely, then it would become and be in a condition resulting in an escape of gas. On that basis, in my judgment, the facts lead to the conclusion that there was no liability on the insulation company, but that there was liability on the refrigeration company.

I would therefore agree that the appeal must be allowed to the extent mentioned by my Lord.

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*Appeal allowed against the second defendants. Judgment entered for the plaintiff against the second defendants for £615 damages.*

Solicitors: *Isadore Goldman & Son, for Crute & Sons, Sunderland; Denis Hayes; Barlow, Lyde & Gilbert.*

C. G. M.

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[PRIVY COUNCIL.]

*F. & M. KHOURY . . . . . APPELLANTS;

AND

PHILIP SAID AZAR . . . . . RESPONDENT.

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*Oct.* 21, 22, 23; *Dec.* 9.

[AND CONNECTED APPEALS]

ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL.

*West Africa — Loans — Security — Used motor-vehicles — Priorities — "Sale" defined as "any transfer"—Mortgage not a sale—Possession of mortgagor—Not "on account of, or in trust for" mortgagee—Unregistered equitable mortgage of land—Ineffective—Defence (Control of Transfer of Used Motor-Vehicles) Order*, 1943, *as amended by Defence (Control of Transfer of Used Motor-Vehicles) (Amendment) Order*, 1944, *paras.* 2, 3—*Kumasi Lands Ordinance, No.* 17 *of* 1943, *s.* 22 (1)—*Supreme Court Rules, Gold Coast* (*c.* 4 *of Laws of Gold Coast*, 1936, *Sch. III*) *Or.* 44, *r.* 25 (1).

By an agreement under seal made between M. and the respondent for the purpose of securing repayment to the latter of a sum of money lent by him to M., to be repaid by instalments, it was provided, inter alia, that repayment was secured by the grant to the respondent of certain rights over a number of used motor vehicles and trailers belonging to M. The rights so granted included, inter alia, upon default in payment by M., the right to require him to transfer all or any of the vehicles to the respondent. M. further covenanted not to transfer, or in any way encumber the vehicles. Shortly thereafter M., in breach of that covenant, by deed assigned to the appellants the motor vehicles and trailers, together with a number of others, by way of security for the repayment of a sum of money. By that deed M. agreed, inter alia, that on default in payment, or if execution should be levied against the goods of M. under any judgment at law, it should be lawful for the appellants to take possession of the vehicles, with right of sale on seizure.

No permit for the assignment of the motor vehicles effected by

† *Present*: LORD NORMAND, LORD MORTON OF HENRYTON, and LORD COHEN.

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that deed was ever obtained or applied for under the Defence (Control of Transfer of Used Motor-Vehicles) Order, 1943, as amended, which provided by section 2 that "In this Order, unless the context otherwise requires— . . . 'Sell' includes any transfer "of the property in a used motor-vehicle," and by section 3 (1) that "No person shall sell or purchase a used motor-vehicle unless "a permit has first been obtained under this Order." Section 3 (2) provided that a used motor-vehicle should not be sold for a sum in excess of the price specified in the permit.

At the request of M. the appellants also paid off the overdraft on his bank account in consideration of his undertaking that the bank would hand over to them as security the deeds relating to certain land which the bank held as security for the overdraft. That was done, but the equitable mortgage of the property constituted by the undertaking and the deposit of the title deeds with the appellants was never registered pursuant to section 22 of the Kumasi Lands Ordinance, 1943, which provided that "No . . . mortgage, whether legal or equitable . . . shall be "of effect until the same is registered. . . ."

Thereafter, M. having given the respondent a cheque in payment of an instalment under his agreement, which was dishonoured, the respondent obtained a judgment against M. for the whole sum due to him. In the course of those proceedings the respondent obtained an interim order for the attachment of the motor vehicles, and shortly afterwards the motor vehicles and trailers comprised in his agreement and certain other motor vehicles, and also M.'s right, title and interest in the land of which the appellants held the title deeds as security for the payment of M.'s overdraft, were attached at the instance of the respondent.

The appellants thereupon issued an interpleader summons under Or. 44, r. 25 (1), of the Supreme Court Rules, Gold Coast, calling on the respondent to show cause why all the properties seized should not be released from attachment on the ground (inter alia) that the vehicles had been in M.'s possession "not on his "own account . . . but on account of, or in trust for some other "person." And following thereon the respondent brought an action against the appellants and M. claiming, inter alia, declarations that the security constituted by his agreement with M. over the motor-vehicles and trailers had priority in law and equity over any security constituted by the deed made between the appellants and M., and that he was entitled to be treated as first mortgagee:—

*Held*, first, that the mortgage effected by the appellants' deed was not a "sale" within the meaning of the Defence (Control of Transfer of Used Motor-Vehicles) Order, 1943, as amended, for the context in this case required otherwise than that "sell" should include "any transfer," and accordingly the deed was in no way affected by the provisions of the order. At the time, therefore, when the vehicles were seized and attached by the respondent the appellants, who had had no prior notice of the respondent's agreement, had a valid legal mortgage thereon which had priority over the charge created by the respondent's agreement, as the appellants had obtained the legal estate by their deed; that as against the respondent the appellants were entitled to be treated as first mortgagees of the motor vehicles and trailers; and that the vehicles mortgaged to the appellants by their deed were not in the possession of M. "on account of or in trust for" the appellants, but that they could be sold subject to the rights of the appellants as mortgagees under their deed:—

*Held*, secondly, that the equitable mortgage of the land in

favour of the appellants not having been registered in accordance with section 22 of the Kumasi Lands Ordinance, 1943, was of no effect at any material time.

Judgments of the West African Court of Appeal affirmed in part and reversed in part.

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CONSOLIDATED APPEALS (Nos. 21, 22 and 23 of 1950), by leave of the West African Court of Appeal, from three judgments of that court (Gold Coast Session) Accra (December 13, 1947).

The following introductory statement is taken from the judgment of the Judicial Committee: These were consolidated appeals from judgments and orders of the West African Court of Appeal in three proceedings, (1) an interpleader summons, the parties to which were the appellants, F. & M. Khoury, one George Bechir Moukarzel (hereafter referred to as "the debtor") and the respondent Azar (hereafter referred to as "Azar"); (2) an action (No. 35 of 1947) in which Azar was plaintiff and the appellants were defendants; (3) an interpleader summons, the parties to which were the appellants, the debtor and the respondents K. Massoud & Sons (hereafter referred to as "Massoud"). Massoud had taken no part in this appeal and the judgment of the Court of Appeal in the third proceeding mentioned above was as follows: "In this case the facts are the "same as in the case of *Azar* v. *G. B. Moukarzel and F. & M. "Khoury*, in which judgment has just been delivered in this "court. It having been agreed that the judgment in the present "case should follow that which has been delivered in the other, "there will be judgment in the same terms."

It is unnecessary to refer further to the third proceeding, as it would appear to have been conceded throughout that the case put forward by Massoud must stand or fall with the case put forward by Azar.

The events leading up to the first two proceedings were as follows. On November 16, 1946, the debtor and Azar made an agreement under seal (hereafter called "the first document") for the purpose of securing repayment to Azar of the sum of £4,000 then lent by him to the debtor together with interest thereon, by instalments of £400 each. The first of such instalments fell due on November 30, 1946, and subsequent instalments on the last day of every subsequent calendar month until September 30, 1947, when an instalment of £250 was to be paid. A final instalment of £250 fell due on October 31, 1947. It was provided that in default of any one payment being made when it became due the whole of the said principal sum or so much thereof as then might remain unpaid, together with the interest thereon then due, should become immediately payable.

Repayment was secured by the grant to Azar of certain rights over 14 used motor vehicles and trailers (hereafter called "the "motor vehicles" and "the trailers" respectively) then belonging to the debtor as set out in the schedule to the first

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document. The rights so granted were (inter alia) on such default of the debtor as aforesaid (a) to require him to transfer to Azar all or any of the motor vehicles and the trailers at a valuation, provided such transfers were approved by the competent authorities, and (b) to seize or take possession thereof, or of any of them, wherever they happened to be, and either then to exercise the right to have such motor vehicles and trailers transferred to him or, in the event of such transfer not being approved as aforesaid or if he did not wish to exercise such right, to retain possession until such time as the principal sum and interest, or so much thereof as might be due at the date of such default, should be paid or until execution should be levied thereon consequent upon any judgment or order obtained by Azar against the debtor in respect of the latter's default under the first document, whichever should first happen.

The debtor further therein covenanted with Azar not to transfer, part with the possession of charge or in any way encumber the motor vehicles and the trailers or any of them.

By a deed dated November 22, 1946, and made between the debtor and the appellants (hereafter called "the second "document") the debtor in breach of his covenant in the first document assigned to the appellants the motor vehicles and the trailers and a large number of other used motor vehicles and trailers by way of security for the payment of the sum of £16,140 and interest thereon and covenanted that he would pay to the appellants the said principal sum together with interest then due by monthly instalments of £1,500 on the last day of each calendar month, the first of such instalments to be paid on December 31, 1946.

The second document contained agreements by the debtor in the following terms:—"(3) That in case the borrower shall "make default in payment of the principal sum by instalments "as aforesaid or of the interest thereon at the times hereinbefore "appointed for payment thereof respectively or in the performance "of any agreement contained herein and necessary for main-"taining this security or shall suffer the said chattels or any of "them to be distrained for rent rates or taxes or if execution "shall during the continuance of this security have been levied "against the goods of the borrower under any judgment at law "then and in such case it shall be lawful for the lenders their "servants or agents without previous notice to the borrower to "seize and take possession of any chattels included in this "security in whatever place or places they may happen to be.

"(4) That if the lenders shall become entitled to seize the "chattels hereby assigned they and their agents may enter and "remain upon any premises where the said chattels may be and "if necessary may break open doors and windows in order to "obtain admission and after the expiration of five clear days "from the day of seizure may sell the said chattels by public "auction or private contract on or off the said premises and retain

" out of the proceeds so much of the said principal sum as may " then remain unpaid and the interest then due and all costs " and expenses which they may incur as aforesaid and the " expenses of sale and also any rent rates and taxes which they " may pay in respect of the premises where the said chattels " may be and the surplus (if any) shall be paid to the borrower."

No permit for the assignment of the motor vehicles effected by the second document was ever obtained or applied for. The Defence (Control of Transfer of Used Motor-Vehicles) Order, 1943, made under regulation 41 of the Defence Regulations, 1939 (hereafter called " the 1943 Order "), as amended by the Defence (Control of Transfer of Used Motor-Vehicles) (Amendment) Order, 1944 (hereafter called " the 1944 Order "), provides inter alia, as follows:—

" 2. In this Order, unless the context otherwise requires—

" ' Purchase ' includes any acquisition of the property in " a used motor-vehicle;

" ' Sell ' includes any transfer of the property in a used " motor-vehicle;

" ' Used motor-vehicle ' means a motor-vehicle as defined in section 2 of the Motor Traffic Ordinance which has at any " time been licensed under that Ordinance for use on a public " highway.

" 3.—(1) No person shall sell or purchase a used motor-vehicle " unless a permit has first been obtained under this Order.

" (2) No person shall sell or purchase a used motor-vehicle for " a sum in excess of the price specified in that behalf in the " permit issued by the competent authority."

" 4—(1) The person intending to sell and the person intending " to purchase a used motor-vehicle shall jointly apply to the " District Transport Control Officer of the district in which either " ordinarily resides for issue of a permit.

" (2) The application, which shall be in the form set forth " in the schedule, shall be made in triplicate.

. . . . . .

" (5) The Director of Supplies, if satisfied that the transfer " of the used motor-vehicles is essential or desirable, shall grant " his permit therefor: and such permit shall be in the form set " forth in the schedule."

Section 2 of the Motor Traffic Ordinance (Chapter 195 of the Laws of the Gold Coast, 1936 Revision) provided as follows:—

" *Interpretation.*

" In this Ordinance, unless the context otherwise requires:—

" . . . ' Motor-Vehicle ' includes every description of vehicle " propelled by means of mechanism contained within itself, other " than vehicles constructed for use on specially prepared ways " such as railways or tramways."

Before November 28, 1948, there was owing upon overdraft on the debtor's account with the Kumasi Branch of

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Barclays Bank (Dominion, Colonial and Overseas) the sum of £7,171 15s. 4d., which was secured by an equitable mortgage duly registered in accordance with section 22 of the Kumasi Lands Ordinance, 1943, upon two parcels of land belonging to the debtor and known as plot No. 571 and plot No. 586 Old Town, Section "B," Kumasi. On November 28, 1946, the debtor gave to the appellants an undertaking in the following terms:—

"Accra.
"November 28, 1946.

"F. & M. Khoury,
"Nsawam.

"Dear Sirs,

"In consideration of you paying at my request to Barclays "Bank (D.C. & O.), Kumasi Branch the sum of £7,171 15s. 4d. "(which is the amount now due from me to the bank) I hereby "undertake:—

"(1) To request the bank to hand to you as security such "documents as they possess relating to plot 571 and plot 586, "Old Town Section 'B' Kumasi.

"(2) To deposit with you without delay the title deeds of "property of which I am the lessee situate at Tamale, Bawku, "Navorongo, Bolgatanga, and the document relating to my "interest in plot 105, O.T.B., Kumasi.

"(3) To execute when called on by you a proper legal "mortgage of the properties mentioned in paras. (1) and (2) "above securing the repayment to you of £7,171. The rate of "interest in such mortgage to be 8 per cent. and the principal "to be repaid by me by monthly instalments on the last day of "each month of £1,500. The first such instalment to be paid on "December 31, 1946. I will be permitted to repay at any time "all or any of the principal money due without previous notice.

"(4) To execute a formal bill of sale covering all the transport "and trailers which I at present own together with spare parts "in stock. The bill of sale will be to cover the sum of "£16,140 0s. 0d. and the rate of interest will be 8 per cent. "and with the same provisions as to repayment of principal.

"(5) To hand over to you any sums I may receive from the "P.W.D. in connexion with the hiring by them of my transport."

"Yours faithfully,
"(Sgd.) G. B. MOUKARZEL."

Their Lordships were informed at the opening of the appeal that No. 571 was the only plot as to which any question now arose. The appellants duly paid off the bank overdraft, and the deeds relating to plot 571 were handed over to the appellants by the bank at the request of the debtor, but the debtor never executed a legal mortgage in accordance with head (3) and never executed a bill of sale in accordance with head (4). The equitable mortgage

of the properties situated at Kumasi constituted by the undertaking and the deposit of the relevant title deeds with the appellants was never registered pursuant to section 22 of the Kumasi Lands Ordinance, 1943, subsection (1) whereof was in the following terms:— "(1) No lease, transfer, devolution, "mortgage, whether legal or equitable, assignment, underlease or "surrender of land vested in the Asantehene under the provisions "of this Ordinance, shall be of effect until the same is registered "by the Commissioner of Lands, and the fees payable in respect "of any such registration shall be the fees set forth in the eighth "schedule."

On November 30, 1946, the debtor gave Azar a cheque for £400 in payment of the instalment due under the first document on that day, but that cheque was dishonoured on presentation. Azar then attempted to obtain a permit under the 1943 Order for the transfer to him of some of the motor vehicles and the trailers, but the District Transport Control Officer refused to approve such transfers as he had received about the same time several applications for the transfer of the same and other vehicles to other persons.

Accordingly, on December 10, 1946, Azar commenced an action (No. 87 of 1946) against the debtor for repayment of the whole of the moneys secured by the first document. On December 16, 1946, Azar recovered an interim judgment in this action for £3,350, on which final execution was stayed until January 17, 1947, and on December 24, 1946, he recovered a final judgment for a further sum of £691 together with the removal of the said stay.

During the course of that action Azar obtained an interim order for attachment of the 14 motor vehicles on or about December 14, 1946, and shortly thereafter eight or nine of the motor vehicles were so attached. On or shortly after December 24, 1946, at the instance of Azar, the sheriff (acting under a writ of fieri facias pursuant to the provisions of order 43, rule 5) seized and attached all the following property belonging to the debtor to satisfy the said judgment, namely:—

The motor vehicles and the trailers comprised in the first document and certain other motor vehicles and trailers and spare parts; and the debtor's right, title and interest in plot No. 571 and other lands.

The right, title and interest of the debtor in plot 571 was a sub-term of 60 years from March 7, 1945.

On December 16 or 17, 1946, the appellants caused their name or initials to be painted on certain motor vehicles belonging to the debtor which had not been attached under the interim attachment, and on December 17, 1946, the appellants locked up the stores containing the spare parts, took possession of the keys, and wrote on each door "Seized under a Bill of Sale." It would appear, however, that they took no other step to assume possession. On January 4, 1947, the appellants issued an interpleader

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summons calling on Azar to show cause why all the properties seized should not be released from attachment. The said summons was issued under order 44, rule 25 (1), of the Supreme Court Rules, Gold Coast (c. 4 of Laws of the Gold Coast, 1936, Sch. III), which was in the following terms:—

"25.—(1) In the event of any claim being preferred to, or "objection offered against, the sale of lands, or any other "immoveable or moveable property which may have been attached "in execution of a decree, or under any order for attachment "made before judgment, as not liable to be sold in execution of "a decree against the judgment debtor, the court shall, subject "to the proviso contained in the next succeeding rule, proceed "to investigate the same with the like powers as if the claimant "had been originally made a party to the suit, and if it shall "appear to the satisfaction of the court that the land or other "immoveable or moveable property was not in the possession of "the party against whom execution is sought, or of some person "in trust for him, or in the occupancy of persons paying rent to "him at the time when the property was attached, or that, being "in the possession of the party himself at such time, it was so "in his possession not on his own account, or as his own "property, but on account of, or in trust for some other person, "the court shall make an order for releasing the said property "from attachment. But if it shall appear to the satisfaction of "the court that the land or other immoveable or moveable "property was in possession of the party against whom execution "is sought as his own property, and not on account of any other "person, or was in the possession of some person in trust for "him, or in the occupancy of persons paying rent to him at the "time when the property was attached, the court shall disallow "the claim."

The Supreme Court of the Gold Coast (Smith J.) by its judgment in the interpleader summons delivered on March 19, 1947, held: (a) that the second document created a valid legal mortgage and was not affected by the 1943 Order since that Order was confined to outright sales only and did not prohibit a transfer by way of mortgage; (b) that as the undertaking had not been registered under section 22 of the Kumasi Land Ordinance, 1943, it was of no effect against the debtor's judgment creditors. Other matters were dealt with which were not now in dispute. It was accordingly decided that Azar was entitled to seize in execution plot 571 free from any right, title or interest of the appellants, but was only entitled to seize in execution the motor vehicles and the trailers subject to the appellants' prior mortgage under the second document. From that decision both the appellants and Azar appealed to the West African Court of Appeal.

On March 28, 1947, Azar commenced the above-mentioned action, No. 35 of 1947, in the Supreme Court of the Gold Coast,

Ashanti, against the appellants and the debtor, contending that even if the second document was not avoided by the 1943 Order, that Order had the effect of preventing any transfer of a legal interest in the subject-matter thereof, and that the appellants had in any event had notice of the first document at the date of the second document. Judgment in that action was given on June 17, 1947. The court (Smith J.), following its decision on the interpleader summons, held that under and by virtue of the second document the appellants had a first legal mortgage on the motor vehicles and the trailers, the judge not being satisfied that they had taken with notice of the first document, and that accordingly the second document took priority over the first document. He accordingly dismissed the action. From that judgment Azar appealed to the West African Court of Appeal.

In addition to the arguments preferred in the court below, the appellants contended that by reason of their payment off of the moneys secured by the equitable mortgage to Barclays Bank they had acquired a lien on the property therein comprised which ranked in priority to the claims of Azar.

The judgment of the West African Court of Appeal (Sir John Verity C.J., McCarthy and Coussey JJ.) in both matters was delivered on December 13, 1947. On the cross-appeals on the interpleader summons it was held: (a) That the appellants were not entitled to the benefit of the lien for which they contended, because either no such lien ever arose or, if it did, it was waived by accepting the undertaking. (b) That the judgment appealed from was correct in dismissing the appellants' claim in respect of the Kumasi Lands. (c) That the second document was void as contravening the provisions of the 1943 Order. Accordingly the appellants' appeal was dismissed, and the judgment of the court below was upheld in so far as it related to plot 571. The cross-appeal by Azar was allowed in so far as it related to the motor vehicles and the trailers, and judgment was entered for Azar on that part of the claim.

Immediately following those judgments the same court gave judgment upon the appeal in the said action, allowing the appeal and declaring that Azar was entitled to be treated as a first mortgagee and to all the rights and remedies of a first mortgagee, including the right to sell the 14 lorries and 14 trailers described in the first document, and to apply the proceeds in payment of the debt thereby secured. On the question of notice they concurred with the decision of Smith J. From those judgments the appellants appealed.

*C. P. Harvey Q.C.* and *Rodger Winn* for the appellants.

*Raymond Jennings Q.C.* and *Raymond Walton* for the respondent Azar.

Reference was made in the course of the argument to the following authorities: *Patten* v. *Bond* [1]; *Page* v. *Cooper* [2]; *Burgh*

[1] (1889) 60 L.T. 583. [2] (1853) 16 Beav. 396.

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v. *Francis*[3]; *Holroyd* v. *Marshall*[4]; *National Provincial and Union Bank of England* v. *Charnley*[5]; and *Theodore Akindele John* v. *Amodu Tijani Chief Oluwa.*[6]

December 9. The judgment of their Lordships was delivered by LORD MORTON OF HENRYTON, who stated the facts and statutory provisions set out above and continued:—The arguments put forward before the Board sufficiently appear from the views which their Lordships will now express thereon. Their Lordships will first consider the question whether the mortgage effected by the second document was a purchase or sale of used motor vehicles within the meaning of the 1943 Order as amended by the 1944 Order. It is convenient to quote again paragraph 2 of the 1943 Order: "In this Order, unless the context otherwise "requires . . . 'Sell' includes any transfer of the property in "a used motor-vehicle." It cannot be doubted that the second document might appropriately be described as a transfer of the property in used motor vehicles, as it contains an assignment of the lorries mentioned in the schedule thereto, but in the ordinary use of language it would be quite inappropriate to describe it as a sale. The definition just quoted enlarges the meaning of the word "sell," but in considering whether the definition brings within the scope of the Order any transfer which would not ordinarily be described as a sale, it is necessary to consider whether or not "the context otherwise requires." In their Lordships' view the context "otherwise requires" in the case now under consideration. Paragraph 1 of the 1944 Order provides that it "shall be read as one" with the 1943 Order.

Considering the 1943 Order, as amended, as one document, their Lordships note that paragraph 3 (2) provides: "No person "shall sell or purchase a used motor vehicle for a sum in excess "of the price specified in that behalf in the permit issued by "the competent authority." And paragraph 4 provides that the application, which must be made jointly to the District Transport Control Officer of the District by the person intending to sell and the person intending to purchase a used motor vehicle, "shall be in the form set forth in the schedule." Turning to the schedule in the altered form introduced by the 1944 Order their Lordships observe that the parties are described throughout as "intending vendor" and "intending purchaser," and they note in particular the following portions of the schedule:—

(*a*) "I, the said ..... (intending purchaser) hereby "declare that—

"(1) The reasons (in full) for intended purchase, are:

"(2) The District in which I propose to use the vehicle "is ....."

[3] (1673) 3 Swans. 536n.
[4] (1862) 10 H.L.C. 191.
[5] [1924] 1 K.B. 431.
[6] (1942) 8 W.A.C.A. 26.

(*b*) " I recommend that this transfer be/be not approved and " I agree/do not agree to accept the vehicle for petrol in my " District."

" (To be signed by the District Transport Control
" Officer of intending purchaser's District.)

(*c*) " Permission is hereby given for this transfer to take place, " provided that the purchase price of the said vehicle shall not " exceed the sum of £.....

.....
" Director of Supplies
" (Competent Authority)."

In their Lordships' view clause 3 (2) is quite inappropriate to the case of a mortgage. It is difficult to see how in such a case the competent authority could specify the maximum price at which the motor vehicle was to be " sold "; yet it is clearly contemplated by clause 3 (2) that a maximum price is to be specified in the permit. When property is mortgaged no price is paid; the lender lends a sum and the borrower assigns the property by way of security for repayment of that sum. Again, it would be inappropriate, in the case of a mortgage, for the mortgagee to specify " the District in which I propose to use the " vehicle," because it is the usual intention of both parties to a mortgage of motor vehicles that the mortgagor shall remain in possession of the motor vehicles and use them, unless and until the mortgagee takes possession of them under some power contained in the mortgage. The same difficulty arises at the point where the District Transport Control Officer of the intending purchaser's district has to agree or not to agree " to accept the " vehicle for petrol in my District." Further, the concluding words of the schedule link up with clause 3 (2) and seem to give the Director of Supplies no alternative to stating a maximum price in the case of every application.

Paragraph 66 of the Defence Regulations, 1939 (Regulations No. 25 of 1939), imposes severe penalties in the case of any breach of the 1943 Order.

For the reasons already given, and bearing in mind the principle that any real doubt as to the construction of a penal statute should be resolved in favour of the subject, their Lordships hold that the second document is in no way affected by the provisions of the 1943 Order.

The result is that when the sheriff seized the lorries and trailers on December 24, 1946, the appellants had a valid legal mortgage thereon. Counsel for Azar rightly conceded that, if this were so, the charge created by the second document would have priority over the charge created by the first document, as the appellants obtained the legal estate by the second document. Counsel was unable to contend before the Board that the appellants had notice of the first document, in view of concurrent

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findings of fact to the contrary effect in the courts of West Africa.

The appellants' next contention was that on December 17 or 18, 1946, they effectively took possession of all the lorries and trailers not included in the interim attachment of December 14, and that they were entitled so to do by virtue of clause (3) of the second document. The words in clause (3) on which counsel for the appellants relied were: "In case the borrower shall make "default in . . . the performance of any agreement contained "herein and necessary for maintaining this security." Counsel contended that by giving Azar a dishonoured cheque for the instalment of £400 which fell due under the first document on November 30, 1946, the debtor had broken an agreement which was to be implied by reason of the terms of the second document, namely, that the borrower would not do any act which would impair or render useless the power to seize contained in clause (3) of the second document. Thereupon, said counsel, the appellants' power to seize arose.

In their Lordships' view there is no substance in this argument. They incline to think that the acts done by the appellants on December 17 or 18 fell short of taking possession of the lorries and trailers, but even if possession was taken, no event had occurred to justify it. Counsel's argument gives no effect at all to the words "contained herein" in clause (3) of the second document. There is a clear contrast between express terms which are "contained in" a document and implied terms, which are not contained in the document, but are to be implied by reason of something contained in the document. Counsel entirely failed to prove any breach by the borrower before December 17, 1946, of any agreement "contained in" the document. There are other reasons why his argument on this point must fail, but their Lordships will refrain from elaborating upon a matter which seems to them plain.

It was next contended for the appellants that even if the debtor was in possession of the lorries and trailers on December 24, 1946, he was in possession "not on his own account, or "as his own property, but on account of, or in trust for" the appellants, within the meaning of order 44, rule 25, already quoted. This argument also must be rejected. A mortgagor in possession of motor vehicles is not a trustee thereof for the mortgagees, nor, if he uses the vehicles for profit, is he bound to account to the mortgagees. Their Lordships were informed at the hearing that some or all of the vehicles in question have been sold, and they think the most convenient course would be to make the first four declarations set out hereafter, giving leave to any party to apply in the Supreme Court of the Gold Coast for the appropriate orders on the footing of these declarations.

There remains only the question whether the appellants had a valid equitable mortgage on plot 571 at the relevant date, or whether the undertaking was ineffective at the relevant date, by

reason of section 22 (1) and (2) of the Kumasi Lands Ordinance, 1943. Their Lordships have no doubt that the latter is the correct view. The undertaking was an equitable mortgage of land, and it is not disputed that plot 571 was "land vested in "the Asantahene" under the provisions of the Kumasi Lands Ordinance, 1943. This equitable mortgage was not registered, at any material time, in accordance with section 22 of that Ordinance. Accordingly it was of no effect at any material time, by reason of the provisions of the same section. Counsel for the appellants sought to escape from this difficulty by an argument on the following lines. They said truly that the bank's equitable mortgage was registered in accordance with the section, and they contended that on paying off the bank the appellants "stood in "the shoes of the bank" and were entitled to the benefit of the bank's registered equitable mortgage. To this there are two answers, each of which is fatal to the appellants. In the first place, their Lordships can feel no doubt that the debtor and the appellants both intended the undertaking, and the deposit of deeds pursuant thereto, to be the only security for the debt. The bank's security consisted simply in the deposit of deeds. Once the overdraft had been paid off and the deeds had been handed over the result was that the only security for payment of the debt owing to the appellants was the undertaking, and the deposit of deeds pursuant thereto, and this was plainly the result intended by the parties. In the second place, even if the bank's security could be said to have remained on foot for the benefit of the appellants until December 17, it clearly ceased to have any existence on that date. According to the evidence of the bank manager, which was not contradicted, the Commissioner of Lands was informed on December 17, 1946, that the bank's charge had been paid off. Thereupon the registration of the bank's mortgage would be vacated. Thus it had ceased to have any existence before December 24, 1946, which is the relevant date.

For these reasons their Lordships will humbly advise Her Majesty that an order should be made in the following terms:—

"Declare (1) that the second document was not a purchase "or sale of used motor vehicles within the meaning of the 1943 "Order as amended by the 1944 Order; (2) that the appellants' "right to seize and take possession of the lorries and trailers "mortgaged by the second document had not arisen when they "purported to exercise it on December 17 or 18, 1946; (3) that "on December 24, 1946, the lorries and trailers mortgaged to "the appellants by the second document were not in the posses-"sion of Moukarzel 'on account of or in trust for' the appel-"lants, but the said lorries and trailers could only be sold subject "to the rights of the appellants as mortgagees under the second "document; (4) that as against the respondent Azar the appel-"lants are entitled to be treated as first mortgagees of the said "lorries and trailers; (5) that the appellants had no effective

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"mortgage or charge on plot 571 Old Town Section 'B' Kumasi "on December 24, 1946.

"Each party to these consolidated appeals has liberty to apply "to the Supreme Court of the Gold Coast for such order or "orders as may be appropriate on the footing of the above "declarations."

Each of the parties must pay his own costs here and in the courts of West Africa.

*Declaration accordingly.*

Solicitors: *Farrar, Porter & Co.; A. L. Bryden & Williams.*

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[PROBATE, ETC., DIVISION.]

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*Dec.* 1.
Willmer J.

## *SECONY BUNKER OIL CO. LD. *v.* OWNERS OF THE STEAMSHIP D'VORA. THE D'VORA.

*Admiralty—Jurisdiction—Necessaries—Fuel oil supplied to foreign vessel at port of registry—Claim against ship—Whether claim for "equipping"—Supreme Court of Judicature (Consolidation) Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *s.* 22 (1) (*a*) (vii) (x).

The supply of fuel oil to an oil-burning vessel does not fall within the word "equipping" in section 22 (1) (*a*) (x) of the Supreme Court of Judicature (Consolidation) Act, 1925, and accordingly where a foreign vessel was under arrest in England to satisfy claims for necessaries, the Admiralty Court had no jurisdiction to entertain a claim for the price of fuel oil supplied to her at her port of registry.

MOTION.

The plaintiffs, the Secony Bunker Oil Co. Ld., moved for judgment in default of appearance in respect of the sum of £580 13s. 1d. for fuel oil supplied by the plaintiffs to the steamship *D'Vora* at the port of Algiers, and for a sum of money due in respect of a quantity of fuel oil supplied to the *D'Vora* at the port of Haifa, Israel, where the ship was registered.

*S. Knox Cunningham* for the plaintiffs.

The defendants were not represented, and no decisions were cited.

WILLMER J. I am indebted to Mr. Knox Cunningham for a very interesting argument on what is not an unimportant point, but I am unable to accede to his submission. The result is that in this unopposed motion I am prepared to give the plaintiffs judgment only for the sum of £580 13s. 1d. in respect of the fuel oil supplied to the *D'Vora* at the port of Algiers. My reasons for

coming to that conclusion are as follows: The Supreme Court of Judicature (Consolidation) Act, 1925, by section 22 (1) (*a*) (vii),[1] confers admiralty jurisdiction on the court in respect of necessaries supplied (subject to certain provisions) to a ship elsewhere than in the port to which she belongs. But that part of the plaintiffs' claim which I am rejecting is in respect of fuel oil supplied to the ship at Haifa, which is the port at which she was registered. It is, however, contended by Mr. Knox Cunningham that under sub-paragraph (x) of section 22 (1) (*a*) of the Act the price of fuel oil delivered to the ship at Haifa can be recovered as a claim for the "building, equipping or repairing" of the ship, having regard to the fact that at the time of the institution of this suit the ship was under the arrest of the court.

The sole question to be determined in this case is whether fuel oil supplied to an oil-burning ship comes within the words "building, equipping or repairing." If it does, I have jurisdiction to give judgment for the plaintiffs for the whole amount claimed in this suit; if it does not, then it seems to me that I have no jurisdiction in respect of the fuel oil supplied to the ship at Haifa, but that the plaintiffs must be left to such remedy as they are able to exercise in the ship's own country, namely, Israel.

Clearly, the supplying of fuel oil could hardly come within the words "building" or "repairing." The argument, however, is that it comes within the word "equipping." To my mind, there is, prima facie at least, a wealth of difference between the meaning of the word "equipping" and the meaning of "supplying." A perusal of the Oxford Dictionary has not thrown any great light on the problem which I have to determine. It is to be observed, however, that among the synonyms given for "supply" in the Oxford Dictionary, one does not find the word "equip." In my judgment, there is an important difference between "equip" and "supply," "supply" being a word which is appropriate for use in connexion with consumable stores, such as fuel oil, whereas "equip," to my mind, connotes something of a more permanent nature than consumable stores. I can well understand that anchors, cables, hawsers, sails, ropes, and such things, may be said to be part of a ship's equipment, and that, none the less, though they have to be renewed from

[1] Supreme Court of Judicature (Consolidation) Act, 1925, s. 22 (1): "The High Court shall, in relation to admiralty matters, have the following jurisdiction (in this Act referred to as 'admiralty jurisdiction') . . . (*a*) jurisdiction to hear and determine any of the following questions or claims:—. . . (vii) any claim for necessaries supplied to a foreign ship, whether within the body of a county or on the high seas, and, unless it is shown to the court that at the time of the institution of the proceedings any owner or part owner of the ship was domiciled in England, any claim for any necessaries supplied . . . elsewhere than in the port to which the ship belongs; . . . (x) any claim for building, equipping or repairing . . . if at the time of the institution of the proceedings the ship is, or the proceeds thereof are, under the arrest of the court; . . ."

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Willmer J.

time to time; but such things as fuel oil, coal, boiler water and food—consumable stores—seem to me to be in quite a different category.

Mr. Knox Cunningham concedes that he can find no authority in support of his proposition that the word "equipment" is wide enough to cover such supplies, or that the word "equip-"ping" is wide enough to cover the supplying of consumable stores, such as fuel oil. I cannot help reflecting on what consequences might follow if I were to decide that the word "equip-"ment" is wide enough to cover the supply of consumable stores. If I were to lay that down as a matter of law in this context, I can well imagine that it might have wide repercussions in quite different fields of the law. Had it been the intention of the legislature that the supply of consumable stores should be included in the jurisdiction conferred under sub-paragraph (x) of section 22 (1) (*a*) of the Act, it would have been the easiest possible thing for the draftsman to have said so in unambiguous terms; but, as I have already pointed out, he has not done so. Unless consumable stores can be included under the word "equipping" they are not within the ambit of sub-paragraph (x) of section 22 (1) (*a*) of the Act.

In the result, I am not satisfied by Mr. Knox Cunningham's argument that the supply of consumable goods, such as fuel oil, is covered by sub-paragraph (x) of section 22 (1) (*a*) of the Act, and, for the reasons that I have stated, I have no jurisdiction to allow so much of his claim as is referable to the fuel oil delivered to the ship at Haifa.

*Judgment accordingly.*

Solicitors: *Allen & Overy.*

H. G.

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[PROBATE, ETC., DIVISION.]

1952
*Dec.* 3.

* J. (ORSE. B.) (BY HER NEXT FRIEND) *v.* J.

Collingwood J.

*Divorce—Nullity—Presentation of petition by next friend—Alleged insanity of petitioner—Application to dismiss petition supported by petitioner.*

A petition for nullity of marriage on the ground that the wife petitioner had not had the capacity to marry by reason of her insanity was presented by the petitioner's niece acting as her next friend. The respondent husband entered an appearance under protest on the ground that the petitioner was not of unsound mind nor suffering from any incapacity which necessitated, or justified, the proceedings being brought by the next friend, and he sought to have the petition dismissed. The petitioner supported his application in an affidavit:—

*Held*, that the respondent was entitled to have the suit dismissed if it could be shown that there was reasonable ground for supposing that the petitioner was capable of managing her own affairs.

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J. (ORSE. B.) (BY HER NEXT FRIEND) v. J.

SUMMONS (adjourned into court for judgment).

A petition for nullity of marriage on the ground that the petitioner (the wife) was alleged not to have had the capacity to marry by reason of her insanity, or in the alternative that the petitioner was alleged to have been of unsound mind at the time of the marriage, was presented by her next friend, K. E. F. K., on June 9, 1952. On July 24, 1952, a summons was taken out before the registrar for leave to amend the appearance on the respondent husband's behalf to an appearance under protest on the ground that the wife was not a person of unsound mind nor suffering from any incapacity which necessitated or justified the proceedings being brought by K. E. F. K. as next friend. No order was made on that summons save that the cause be stayed pending an application for directions under rule 27 of the Matrimonial Causes Rules, 1950.[1]

The matter came before the judge in chambers on July 30, 1952, on an application to stay or, alternatively, to dismiss the cause upon the same ground. The judge accepted the submission that rule 27 did not apply to the question in issue, namely, the wife's sanity at the date of the institution of proceedings. Application was accordingly made for the proceedings to be stayed or dismissed as being an abuse of the process of the court.

The matter came before the judge again on November 3, 1952, after an adjournment, and affidavits were read on behalf of the husband. Those affidavits included one to the wife herself (who was aged about 80 and considerably older than the husband), who stated that she had never requested the next friend or any other person to take proceedings to annul the marriage, that she did not wish the marriage annulled, and that the proceedings had caused her anxiety and distress. She further stated that she had married to protect herself from the unwelcome visits of her relatives, which, she considered, were paid for the purpose of obtaining information as to her estate. Affidavits by the husband and his mother to the same effect were also filed, and there were two affidavits by medical practitioners stating that the wife was a person of sound mind, and in no sense a mental defective, and an affidavit by her solicitor as to interviews with her which satisfied him as to her mental capacity.

*Anthony Harmsworth* for the husband.
*John Syms* for the next friend.
(Argument was heard in chambers.)

*Cur. adv. vult.*

COLLINGWOOD J., reading his reserved judgment, stated the facts and continued:—It was contended by counsel for the wife

[1] Matrimonial Causes Rules, 1950, r. 27: "An application for directions "for the separate trial of any issue "or, except in a case to which rule "14 (2) [Appearances under protest] "applies, of any question as to the "jurisdiction of the court shall be "made to a judge."

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(who admitted that he was really appearing in the interests of the next friend) that all that was necessary to entitle a person to institute proceedings such as the present suit in the capacity of next friend was to show a sufficient interest, and that as the next friend in the present case was the wife's niece and had a pecuniary interest, that concluded the matter.

In support of that contention I was referred to *Ray* v. *Sherwood and Ray*.[2] In that case it was held that a father qua father had sufficient interest to enable him to bring a suit in the ecclesiastical court, in what was known as the civil form, for the purpose of annulling the marriage of his daughter as being void on the ground of consanguinity. But the father in that case was not acting in the capacity of guardian or next friend. The daughter was of age, and the father was himself the petitioner in his own right, and his title to sustain the suit lay in his having a pecuniary interest owing to his possible liability under the Poor Relief Act, 1601, to maintain the issue of the marriage.

In the present case the petition is that of the petitioner herself, and the issue before me is the authority of the next friend to institute proceedings. It was contended on behalf of the husband that he had a right to put a summary end to the proceedings if no such authority existed. In my opinion, the authorities make it clear that he has such a right.

In *Turner* v. *Meyers*,[3] which was a suit to annul a marriage on the ground of insanity, the proceedings were first brought by the husband's father. To this it was objected on the part of the wife that the father had no right to bring such a suit, the son being of age and sui juris, unless appointed committee of his person. The court held that the suit was brought by the father to annul the marriage of a party of competent age, without setting up any special interest, but averring the insanity of the son at the time. The only question was whether the person before the court was the proper person to plead it. It was not alleged that the son was insane at the institution of the suit, and he must be presumed sane, and as such capable of bringing suits proprio jure. No one could be attorney or procurator for him but by his own appointment, and in fact the husband had taken no steps to annul the marriage, but rather adhered to it. It was held that therefore the father had not a persona standi before the court, and his suit was dismissed.

In *Fry* v. *Fry*[4] the facts were that the parties were married in June, 1889; in November of that year a son of the wife by a former marriage obtained from the registrar an order under what was then rule 196 assigning him to be his mother's guardian ad litem for the purpose of promoting a suit declaring her marriage with the respondent to be void on the ground that she was insane at the time of its being solemnized. Counsel on behalf of the

[2] (1836) 1 Curt. 173, 193.
[3] (1808) 1 Hagg.Con. 414.
[4] (1889) 15 P.D. 25.

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wife moved to rescind that order, adducing evidence to show that she was of sound mind. Butt J. discharged the order, holding that an order under the rule assigning a guardian ad litem to a person alleged to be of unsound mind should not be made where there was a bona fide and substantial dispute as to the insanity of the party.

That order was appealed from.[5] In his judgment Cotton L.J. said[6]: "This is an appeal from an order of Butt, J., discharging "an ex parte order of the registrar assigning a guardian ad litem "to a person alleged to be of unsound mind. I will not give any "opinion on the question whether, on the evidence before us, she "was of unsound mind at the date of her marriage, or whether "she is so now, for I go upon this ground, that an order ought "not to be made under rule 196 for assigning a guardian ad litem "where there is a bona fide dispute whether at the time of the "application the party is of unsound mind. The question is "whether the court shall give to some other person the conduct "of a suit, on the ground that this lady is incapable of acting for "herself, and I think the court ought not to do so where there "is a bona fide dispute whether she is not capable of acting for "herself. I do not at present feel disposed to assent to the view "of Lopes, L.J., that this rule only applies to the case of a person "found lunatic by inquisition. The rule applies equally to a "party suing and to a party defending, and it would be very "serious to hold that, if a person of unsound mind is sued, no "defence can be put in till he has been found lunatic by inquisi-"tion; but, where there is a bona fide dispute as to the sanity "of the party, I think that an order for a guardian ad litem ought "not to be made. The medical evidence adduced in support of "the application to discharge the registrar's order shews that "there is reasonable ground for contending that this lady is "capable of managing her own affairs. I think, therefore, that "the appeal must be dismissed, not on the ground that the "registrar was wrong in making the order on the materials before "him, but on the ground that the evidence adduced before the "judge shewed that the case was not one in which such an order "ought to have been made."

Lindley L.J. gave judgment to the same effect, and after stating shortly the facts he went on to say[7]: "It would be "monstrous if a self-appointed guardian was allowed to go on "with such a suit when a defence like that is made. The son "may apply for an inquisition, and if she is found lunatic by "inquisition the committee can sue, and if no committee is "appointed a suit may be promoted by a guardian ad litem."

Lopes L.J., at the end of his judgment, said[8]: "As regards "the other point, assuming the rule to apply to the case, I agree "with the Lords Justices that the power given by it ought not

[5] (1890) 15 P.D. 50.
[6] Ibid. 51.
[7] Ibid. 52.
[8] Ibid. 53.

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" to be exercised where there is a bona fide dispute as to " sanity."

The question arose in a different form in *Richmond* v. *Branson & Son*.[9] That was an action by a plaintiff described as " of " unsound mind not so found," by her next friend against a firm of solicitors for delivery up of certain deeds and documents of title deposited by her with them as her solicitors, it being alleged that she was, and had for many years been, insane. By their defence the defendants admitted possession of the documents, but pleaded that she was not at any material time a person of unsound mind. On a motion by the plaintiff to strike out so much of the defence as did not admit the unsoundness of mind of the plaintiff, and for judgment on the admissions in the defence, Warrington J. held that the defendants by raising the issue as to unsoundness of mind were in effect denying the authority of the plaintiff's solicitors to bring the action, and that was not an issue which it was competent to them to raise at the trial of the action. The important part of the judgment, so far as the present question is concerned, is where Warrington J. said [10]: " If there were nothing " else, the plaintiff would, in my opinion, upon these admissions, " plainly be entitled to judgment against the defendants for " delivery up of those documents to the person she indicates as " the person to receive them. The defendants, however, set " up, or attempt to set up, as an issue in the action the question " whether or not the plaintiff is in fact of unsound mind. In other " words, they dispute the authority of the solicitors instructed by " the next friend, and that of the next friend himself, to institute " the action. Now is that an issue which it is competent to the " defendants to raise at the trial? In my opinion it is not. The " action, in whatever form it is brought, is the action of the " plaintiff. If a solicitor is acting without authority in an action " brought by a plaintiff who is not alleged to be of unsound mind, " either the plaintiff or the defendant is entitled to have that " action summarily stayed, and to an order that the solicitor " should pay the costs of the action as between solicitor and " client. There is really, in principle, no distinction between an " action brought by a plaintiff of unsound mind, or alleged to be " of unsound mind, by her next friend, and an action brought by " an ordinary plaintiff. In both cases the real question, if there " is any question at all, is that of the authority of the solicitor. " Of course, in the case of a person suing by a next friend there " is the further question of the authority of the next friend, and " in those cases it is competent either to the plaintiff himself, " that is to say the person who is assumed to be non compos " mentis or not sui juris, or to the defendants to put a summary " end to the proceedings, and, in the case of a next friend, he " also would be subject to an order to pay the costs."

[9] [1914] 1 Ch. 968. [10] Ibid. 973.

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In my opinion, therefore, the husband is entitled to have the suit dismissed if it can be shown that there is reasonable ground for supposing that the wife is capable of managing her own affairs. At the present moment the evidence as to this is all one way, but I was informed that the legal advisers of the wife's next friend were under a misapprehension as to the necessity of bringing evidence at the adjourned hearing, and I will therefore afford them an opportunity of filing affidavits in answer to those which have been filed on behalf of the respondent.

Solicitors: *Long & Gardiner, for Norman F. Steward, Wolverhampton; Donald, Darlington & Nice.*

J. B. G.

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[CHANCERY DIVISION.]

## * GODFREY PHILLIPS LD. *v.* THE INVESTMENT TRUST CORPORATION LD.

1952
*Nov.* 11;
*Dec.* 10.

Wynn-Parry J.

[1951 G. 2978.]

*Company — Dividends — Underpayment to cumulative preference shareholders due to erroneous method of computation—Aggregate sum representing deficiency of dividends—How distributable.*

Between the years 1939 and 1951, the holders of "B" cumulative preference shares in a company, whose dividends ranked in priority to those of the holders of junior issues of shares and stock, received dividends on a certain basis. In 1948 the correctness of the method of computation was challenged and it was held, in legal proceedings, that such method was erroneous, and that the holders of "B" shares had been underpaid since 1939. An action was begun by the company to determine (1) from what date the dividend must be regarded as being deficient (1939 or 1948); (2) to whom the balance of the dividend ought to be distributed; and (3) the rate of income tax which the company was entitled to deduct when making the distribution:—

*Held*, (1) that, before any further distribution of profits was made, the amount by which the payment of the dividend in respect of the "B" shares over the period from 1939 fell short of the sum which ought to have been paid should first be distributed; (2) that the aggregate sum was divisible exclusively among the holders of "B" shares appearing as such on the register of members at the time of the declaration of the dividend, by which the aggregate sum would thus be distributed; (3) that the rate of income tax which the company was entitled to deduct, when distributing the aggregate sum by way of dividend, was the standard rate in force when the dividend was declared.

*Matthews* v. *Great Northern Railway Co.* (1859) 28 L.J.Ch. 375 distinguished.

*Friends Provident and Century Life Office* v. *Investment Trust Corporation Ld.* [1951] W.N. 476 ([1951] 2 All E.R. 632) referred to.

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SPECIAL CASE.

The plaintiff company, Godfrey Phillips Ld., sought the opinion of the court on certain questions of law arising out of the decision of the House of Lords in *Friends Provident & Century Life Office* v. *Investment Trust Corporation Ld.*,[1] in an appeal in which the second and third defendants were appellants and the first defendant and the company were respondents. That decision determined the correct mode of computing the cumulative dividend payable on the " B " cumulative preference shares of the company. The effect of that decision was that the dividend must be regarded as having been underpaid for several years past and the questions on which the company now desired to obtain the opinion of the court were (a) from what date the dividend must be regarded as being deficient; (b) whether the balance of the dividend should be distributed among the holders of the said shares registered at the respective times when the deficient dividends were paid or paid wholly to those registered at the time when the said balance was hereafter paid; and (c) a question relating to the rate of income tax to be deducted when the distribution was made.

The present issued share capital of the company is £2,365,990 divided into 250,000 cumulative preference shares of £1 each, 300,000 " B " cumulative preference shares of £1 each, 300,000 " C " cumulative preference shares of £1 each, £1,431,827 ordinary stock and 841,630 ordinary shares of 2s. each. All the said shares are fully paid up. The ordinary shares and ordinary stock rank pari passu in all respects.

The rights conferred on the holders of the respective classes of shares are set out in article 5 of the present articles. The rights conferred on the holders of the " B " cumulative preference shares have been in the same form ever since they were created and issued in 1919.

By article 5 (A) (ii), it was provided: " The ' B ' cumulative " preference shares confer the right to a fixed cumulative preferential dividend at such rate that after deduction of income tax " thereon at the current rate for the time being (irrespective of " any allowance or rebate in the case of a particular shareholder) " the amount remaining shall be the clear sum of 6 per cent. " per annum on the capital paid up thereon less the amount " of any income tax for the time being payable in excess of " 6s. in the £ computed on the gross sum of 6 per cent. per " annum on such capital, such dividend to rank next after the " dividend payable in respect of the said 250,000 cumulative " preference shares and in priority to the dividend on the said " 300,000 ' C ' cumulative preference shares and also on the " ordinary shares for the time being of the company, but to no " further right to participate in the profits of the company."

[1] [1951] W.N. 476 ([1951] 2 All E.R. 632).

The standard rate of income tax first rose above 6s. in the £ for the fiscal year 1939/40 and has remained above that rate ever since. From 1939 until April 30, 1951, the company calculated the dividend on the " B " shares in accordance with the following example for a holding of 100 shares, a dividend for a full year and a standard rate of tax of 9s. in the £.

| | £ | s. | d. |
|---|---|---|---|
| 6 per cent. on 100 shares of £1 each ..... | 6 | 0 | 0 |
| Equivalent to gross (at 6s. in the £) ..... | 8 | 11 | 5 |
| Less income tax at 6s. in the £ ..... | 2 | 11 | 5 |
| | 6 | 0 | 0 |
| Less income tax at 3s. in the £ calculated on gross sum of £8 11s. 5d. ..... | 1 | 5 | 8 |
| Net dividend to shareholder | 4 | 14 | 4 |

In 1948 a holder of " B " cumulative preference shares challenged this method of computation, and, as a result of proceedings instituted in the Chancery Division for a declaration as to the true construction of article 5 (A) (ii), the effect of the above-mentioned decision of the House of Lords was that the dividend on the " B " cumulative preference shares ought to be computed in the following manner:—

| | £ | s. | d. |
|---|---|---|---|
| 6 per cent. on 100 shares of £1 each ..... | 6 | 0 | 0 |
| Less income tax at 3s. in the £ to be borne by the shareholders and being the excess of the standard rate of tax over a rate of 6s. in the £ calculated on £6 ..... | | 18 | 0 |
| Net dividend to shareholder | 5 | 2 | 0 |

For every year in which the dividends on the " B " cumulative preference shares were underpaid, the dividend on the " C " cumulative preference shares (which rank subsequently to the " B " shares) was paid in full, and interim and final dividends were paid on the ordinary stock and shares.

Notices of annual general meetings of the company held before the year 1951, were not sent to holders of the " B " cumulative preference shares, and the holders thereof did not, during the period between 1939 and 1950 inclusive, vote as such on any resolutions of the company in general meeting, except the special resolution adopting the present articles.

The plaintiff company claimed by their writ:—

(1) A declaration that, in calculating the aggregate sum which ought to be paid to the holders of the " B " cumulative preference shares in the capital of the company, as representing the

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amount by which the sums already paid by the company on account of the cumulative preferential dividend on such shares fell short of the sums which ought to have been paid on account thereof, the earliest half-yearly payment on account of such dividend, which was to be regarded as having been deficient (such payment being hereinafter referred to as "the relevant payment") was made on October 31, 1948:

(2) Alternatively, a declaration that the relevant payment was that made on October 31, 1939 . . . [the date of the half-yearly payment made next after the standard rate of income tax first rose above 6s. in the £.]

(3) A declaration that the said aggregate sum was divisible exclusively amongst the holders of the said "B" cumulative preference shares appearing as such on the register of members of the plaintiff company at the time of payment of the said aggregate sum.

(4) Alternatively, a declaration that so much of the said aggregate sum as represents the deficiency of a particular half-yearly payment of the said dividend was divisible amongst the persons who appeared as holders of the said "B" cumulative preference shares on the said register at the time when that half-yearly payment was paid, whether or not such persons should appear as such at the time of payment of the said aggregate sum.

(5) A declaration that the rate of income tax which the plaintiff company was entitled to deduct from the said aggregate sum was the standard rate in force at the date of payment thereof.

(6) Alternatively, a declaration that the rate of income tax which the plaintiff company was entitled to deduct from so much of the said aggregate sum as represented the deficiency of a particular half-yearly payment of the said dividend was the standard rate in force at the date when that half-yearly payment was paid.

*R. J. T. Gibson* for the plaintiff company.

*Ralph Instone* for the Investment Trust Corporation Ld., a holder of "B" cumulative preference shares.

*R. W. Goff* for holders of "C" cumulative preference shares and ordinary shares.

*Victor Coen* for the executors of a former holder of "B" cumulative preference shares, who had sold the shares between 1939 and 1951.

The following decisions were cited in argument:—*Lagunas Nitrate Co. Ld.* v. *Schroeder & Co. and Schmidt* [2]; *Evling* v. *Israel & Oppenheimer Ld.* [3]; *Matthews* v. *Great Northern Railway Co.* [4]; *Ashbury* v. *Watson.* [5]

*Cur. adv. vult.*

[2] (1901) 85 L.T. 22 (17 T.L.R. 625).
[3] [1918] 1 Ch. 101 (34 T.L.R. 109).
[4] (1859) 28 L.J.Ch. 375.
[5] (1884) 28 Ch.D. 56.

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December 10. WYNN-PARRY J. read the following judgment:—

I propose to deal first with paragraphs 1 and 2 of the writ, which ask for alternative declarations.

[After summarizing paragraphs 1 and 2 of the writ and referring to *Friends Provident and Century Life Office* v. *Investment Trust Corporation Ld.*[6] his lordship continued:] It is well established that, in respect of a right to dividend on a share, no debt is created until a dividend is declared. Over the maximum period involved, which goes back to October 31, 1939, too small a dividend was declared on each occasion. In respect of each dividend actually declared a debt was created in favour of each holder of "B" preference shares; but in respect of what I may call "the shortfall," on no such occasion was any debt created. Full effect was not given to the rights of the holders of the "B" preference shares, but the continued existence of those rights was not affected by reason of such failure.

It follows that, apart from any question of waiver or estoppel, which I will consider later, the holders of the "B" preference shares could insist as against the company and the holders of the shares and stock of the inferior classes that, before any further distribution of profits should be made, the amount by which the payment of dividend in respect of the "B" preference shares over the period from October 31, 1939, was short should first be distributed in respect of those shares.

It is argued, however, that having regard to the facts set out in the special case, outside which, of course, I cannot go, the holders of the "B" preference shares cannot so insist, because they have barred themselves by acquiescence or laches or waiver or are estopped from asserting their right so as to insist in respect of any earlier period than that beginning on October 31, 1948. In his argument, Mr. Goff, who appeared for the holders of the "C" preference shares and of ordinary shares and stock, sought to rely on *Matthews* v. *Great Northern Railway Co.*,[7] the headnote of which reads as follows: "By an Act of Parliament it "was enacted, that it should be lawful for any shareholder who "should have paid up one half the amount of any share or "shares of the G. N. R. Co., to require each share to be con-"verted into two half-shares, whereof the one half which should "be so fully paid up should be denominated deferred half-"share, and the other half of such share should be denominated "guaranteed half-share; and thenceforth in respect of each "whole share so divided, the whole of the interest and dividends "which would in each year have accrued should be applied in or "towards payment, in the first place, of interest or dividend "after the rate of £6 per cent. per annum on the amount paid "upon the half-share so denominated 'guaranteed,' and the "remainder, if any, should alone be payable to the half-share "so denominated 'deferred,' provided that the company should

[6] [1951] W.N. 476 ([1951] 2 All E.R. 632).

[7] 28 L.J.Ch. 375.

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"not pay any other or greater amount of interest or dividend "upon the two half-shares than was for the time being paid on "each undivided share:—*Held*, upon the construction of this "section, that the holders of guaranteed half-shares were "entitled to be paid their £6 per cent. in each year not only "out of the dividends accruing in that year, but out of all "subsequent dividends; and, therefore, if in any year the divi- "dends were more than sufficient to pay £6 per cent. on the "guaranteed half-shares, the surplus must be applied in pay- "ment, in the first place of all arrears due on those half-shares "in respect of past deficiencies before any dividend could be "declared on the deferred half-shares.

"The holders of the guaranteed half-shares having in a "former year acquiesced in the declaration of a dividend on the "deferred half-shares, whilst there was an arrear of dividend due "on the guaranteed half-shares,—*Held*, that although they had "precluded themselves from making any claim in respect of "those particular arrears, they had not thereby renounced their "rights in respect of subsequent arrears."

The argument for the defendants is reported as follows: "Mr. Rolt, Mr. Denison and Mr. T. Stevens, for the defendants, "contended that, according to the true construction of the Act "of Parliament of 1848, the guaranteed dividends for each year "were to be made good only out of the dividends declared for "that year, and if in any year there was not sufficient to pay "£6 per cent. the holders of B stock were not entitled to have "the arrears paid up out of dividends declared in subsequent "years. This construction was acquiesced in in 1854, and could "not now be dissented from."

Most of the judgment of Wood V.-C. was devoted to a consideration of the scope of the rights of the holders of the guaranteed half-shares and the deferred half-shares. Towards the end of his judgment, however, he says this: "Then comes "the question of laches. It does not appear that I can hold "parties to be precluded, because they stand by acquiescing in "a certain sense, that is to say, not asserting their rights upon "a construction adverse to their view taken by the directors as "it was taken in the report of 1854. When I say adverse, I do "not quite coincide with what Mr. Denison urged, that it does "not appear that there was any assertion of right. The directors "announced their view, and nobody said anything. They were "content to take their dividend. Upon that I hold that they "cannot call back the dividends which have been paid down to "that time, but I do not think that that precludes them for all "time from saying that they have not renounced their rights, or "that the persons who may have bought A shares with the "notion that their rights were different from what the court has "now held them to be, can say to the B shareholders, You "who, rather than go into litigation, acquiesced in having the "money, which might have been paid in a particular way,

" appropriated in a different way during a certain period of time, " are therefore bound in all time to give up that right. There is " nothing in the shape of misrepresentation or fraudulent holding " out to make me say, there is an equity to be fastened on all the " B shareholders for all time by reason of their acquiescing in " the view which might have been then taken."

It is to be observed that in the argument it was urged that there had been acquiescence in the past, but that this was put forward with a view to sustaining the point that such acquiescence operated to alter the rights of the holders of the guaranteed stock for the future. The Vice-Chancellor's judgment proceeds on the basis that there had been acquiescence as regards the prior period, for which conclusion he gives no express reason, but that such acquiescence could not affect the future. He treats it as a case in which a plea of laches could have been advanced against any attempt to " call back " the dividend, to use his own phrase.

I have felt it necessary to refer to that case, because, as I have said, it was relied on in argument, and because the doctrine of acquiescence appears to have been relied on by the Vice-Chancellor. It is not, however, necessary for me, I think, to say more about that case than this; that in my view it does not touch the present case, in which neither acquiescence nor laches can, to my mind, play any part. The matter may be tested in this way. So long as no dividend or an insufficient dividend is declared, a " B " preference shareholder has no right to sue for the recovery of any money. His only right would be to sue for a declaration that the company is not entitled to pay any dividend on any inferior class of shares without first satisfying in full the rights of the holders of " B " preference shares, and for an injunction on the footing of such a declaration. Such an action would be for the enforcement of a legal right, and the injunction would be sought merely in aid of that legal right. Now where an injunction is sought merely in aid of a legal right, then lapse of time, unaccompanied by anything else, does not bar the right to the injunction, at any rate at the trial of the action, unless it would have barred the corresponding action at law. (See *Birmingham Canal Co.* v. *Lloyd*,[8] *Great Western Railway Co.* v. *Oxford, Worcester and Wolverhampton Railway Co.*,[9] and *Fullwood* v. *Fullwood*.[10])

In such a claim as I am considering, no statutory period of limitation would be applicable, and, therefore, prima facie, the holders of " B " preference shares would be entitled to maintain their claim in respect of the amount by which they have been underpaid.

It was argued that either they must be taken to have waived their rights as regards past years, or else as regards those years they would be estopped from asserting their rights. As regards

[8] (1812) 18 Ves. 515.
[9] (1853) 3 De G.M. & G. 341.
[10] (1878) 9 Ch.D. 176.

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waiver, I can find nothing in the special case to indicate that there has been anything in the nature of waiver. As regards estoppel, it is clear that the holders of " B " preference shares could not be precluded from asserting the true construction of the articles of association, because that construction has been pronounced on by the House of Lords and must apply for the future. Even if an estoppel could be pleaded in respect of the past years, I am unable to see how it could be established on the evidence in the special case and the accompanying documents. I cannot find any such representation of fact as would be necessary to found an estoppel, nor, assuming that difficulty to be overcome, is there any sufficient evidence that the company altered its position to its detriment.

An argument was advanced on behalf of the holders of " B " preference shares, who have parted with their shares, which I had great difficulty in following. It involved the assertion, no doubt in a writ, by such a holder that the company owed him the amount by which he had been underpaid in the past as a debt presently payable. This assertion the argument admitted was completely false; but it was contended that the company could not, itself, assert the falsity. Apparently, the action would have progressed by the company putting in a defence pleading that no dividend had been declared; whereupon the ex-" B " preference shareholder would have put in a reply pleading that the company was estopped from setting up the plea of no declaration of dividend. This analysis must demonstrate the hopelessness of such an argument, because it involves completely forgetting that estoppel can only be a matter of defence and cannot be used, even in a reply, to found a cause of action.

I therefore conclude that the relevant payment was that made on October 31, 1939, and I shall therefore make a declaration in the sense of paragraph 2 of the writ.

I now proceed to deal with paragraphs 3 and 4 of the writ, which raise the question whether the aggregate sum to which I have referred is divisible exclusively among the holders of the " B " preference shares appearing as such on the register of members of the company at the time of payment of the aggregate sum, or whether, in fact, persons who were holders of " B " preference shares during the material period, but who have sold them, are entitled to share in such distribution in the manner specified in paragraph 4 of the indorsement on the writ.

Subject as below mentioned, in my view, this question must be answered in the former sense, for the simple reason that when the aggregate sum is distributed, the distribution will—as, indeed, it must—take the form of a dividend, and although that dividend will be calculated by reference to a period extending back to October, 1939, it will be a dividend solely in respect of the year in which profits are declared for division, the amount being by virtue of article 5, as construed by the House of Lords, determined by the whole amount of the aggregate sum: see *In re*

*Wakley*.[11] Such a dividend could only be paid to those persons who are registered as the holders of "B" shares at the time of the declaration of the dividend. I shall, therefore, make a declaration in the sense of paragraph 3 of the indorsement on the writ, but the declaration will refer to the time of the declaration of the dividend by which the aggregate sum is distributed instead of to the time of payment of the aggregate sum.

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As regards paragraphs 5 and 6 of the indorsement on the writ, it follows from what I have said in dealing with paragraphs 3 and 4 that the rate of income tax which the company is entitled to deduct when distributing the aggregate sum by way of dividend is the standard rate in force when the dividend is declared.

*Declaration accordingly.*

Solicitors: *Gouldens.*

J. L. D.

[11] [1920] 2 Ch. 205 (36 T.L.R.325).

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[QUEEN'S BENCH DIVISION.]

## * MARCEL (FURRIERS) LD. *v.* TAPPER.

1952
*Nov.* 28;
*Dec.* 3.

Hilbery J.

[1952 J. No. 3352.]

*Sale of goods—Contract—No memorandum in writing—Commission to make fur coat—Whether contract for work and labour or sale of goods—Sale of Goods Act*, 1893 (56 & 57 *Vict. c.* 71), *s.* 4 (1).

The defendant, on behalf of his wife, ordered from the plaintiffs, a firm of furriers, a mutation mink coat. The defendant's wife selected skins of the colour she desired and specified the style of coat she required, directing that it should be made with the skins running horizontally. Her instructions were carried out, but the coat was eventually rejected by her. The plaintiffs brought an action against the defendant claiming £950 for work done and materials supplied in the making of the coat. By his defence the defendant pleaded that the contract was one for the sale of goods of the value of £10 or over and was unenforceable pursuant to section 4 of the Sale of Goods Act, 1893, by reason of the fact that there was no note or memorandum in writing of the contract signed by the party to be charged or his agent:—

*Held*, that although a high degree of skill and craftsmanship might be required in the making of the coat, the contract was no more than one for the making of an article for the special use of the customer by someone whose business it was to make it. The nature of the transaction, therefore, was that it was one for the making and supply of a particular article at a price and not one for work and labour done and materials supplied, and there being no memorandum in writing to satisfy the requirements of section 4 of the Sale of Goods Act, 1893, the contract was unenforceable.

ACTION.

The evidence given on behalf of the plaintiffs was to the following effect:—The plaintiffs, Marcel (Furriers) Ld., were



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retail furriers with a shop in New Bond Street, where they kept a stock of furs ready made up for sale and also made up furs for customers. In May, 1951, the defendant, one Tapper, and his wife called at the plaintiffs' showroom for the purpose of ordering a mutation mink coat for Mrs. Tapper. Mutation mink is a cross-bred, farm bred mink and the crossing produces skins in various shades of colours known by various designations. Mrs. Tapper chose a fur of a colour known as "Royal Pastel" and then selected the style of coat she desired, namely, a hip-length jacket, and asked that the coat should be made with the skins running horizontally. J. Marcel, the managing director of the plaintiff firm, was of opinion that the suggested way of making the coat was not suitable in the case of mutation mink. Mrs. Tapper, however, insisted on the coat being made as she desired, and her instructions were duly carried out. Eventually the defendant and his wife refused to accept the coat.

On June 24, 1952, the plaintiffs issued a writ against the defendant in which they claimed £950 as the amount alleged to be due and owing for work done and materials supplied in respect of a hip-length mutation mink jacket (Royal Pastel). By his defence, the defendant denied that the plaintiffs did any work for, or supplied any materials to, him at his request, and in the alternative pleaded that, if the facts alleged by the plaintiffs were well-founded, any obligation arising therefrom was an obligation under a contract of sale of goods of the value of £10 or upwards and was not enforceable against the defendant by virtue of section 4 (1) of the Sale of Goods Act, 1893, in view of the fact that there was no note or memorandum in writing of the contract signed by the party to be charged or his agent in that behalf.

*R. F. Levy Q.C.* and *Leonard Caplan*, for the plaintiffs, cited *Clay* v. *Yates*,[1] *Lee* v. *Griffin*[2] and *Robinson* v. *Graves*.[3]

*Morris Finer* for the defendant.

At the conclusion of the plaintiffs' case Hilbery J. said that, assuming the facts of the case to be as set out above, and without hearing evidence for the defendant, he was prepared to deliver judgment on the question of law raised by the defendant in his defence.

HILBERY J. The question which I have to determine is whether or not the substance of the contract in this case was that it was a contract for skill and labour to be exercised for the production of the article, or whether it was a contract for the production of something to be sold to the customer. If the claim falls within the first of those two classes, then section 4 of the Sale of Goods Act, 1893, does not apply. If, however, it comes

[1] (1856) 1 H. & N. 73.
[2] (1861) 1 B. & S. 272.
[3] [1935] 1 K.B. 579 (51 T.L.R. 334).

within the second class, then section 4 applies, as was held in *Lee* v. *Griffin*.[4] That case was considered in *Robinson* v. *Graves*,[5] and in speaking of the two classes into which this transaction might be said to fall I was paraphrasing a passage in the judgment of Greer L.J. in the last-mentioned case. It is somewhat significant that the present case is almost exactly the same as that of a man going to his tailor and ordering a suit of clothes, and it is observable that in *Lee* v. *Griffin*,[6] which was concerned with the supply of a set of artificial teeth, Crompton J. at the end of his judgment said: "Here, however, the subject matter of the "contract was the supply of goods. The case bears a strong "resemblance to that of a tailor supplying a coat, the measure-"ment of the mouth and fitting of the teeth being analogous to "the measurement and fitting of the garment."

There is no doubt that a high degree of skill and craftsmanship goes into the making up of a fur jacket such as was to be made for the defendant in this case. It was really a case, however, of no more than making an article for sale to the defendant on his special order, and I cannot discover anything to distinguish it from the case of an ordinary article which it is part of someone's business to supply and which that person has to make to special measurements for the customer. It requires skill, labour and material, of course, to make it, but the purpose of the transaction is the supply of the complete article for the price; and that is exactly what it was here. The invoice which was sent reads: "Hip-length mutation mink jacket (Royal Pastel) £950." It is an article for which £950 is demanded, and it is the invoice price of the article. It is not a charge made for work and labour done and materials supplied, coupled with the addition of the necessary sum for the purpose of tax.

In the circumstances of the present case, although section 4 is not a plea to which a court gives effect with any feeling that it is doing what, in the ordinary sense of the word, is justice, none the less, in upholding the plea, it is doing what is justice according to law and I am bound to give effect to it. I think that the plaintiffs' claim must fail and that there must be judgment for the defendant.

*Judgment for defendant.*

Solicitors: *Edward Davis, Nelson & Co.; Arnold A. Finer.*

P. B. D.

[4] 1 B. & S. 272.
[5] [1935] 1 K.B. 579.
[6] 1 B. & S. 272.

[PROBATE, ETC., DIVISION.]

1952
Dec. 2.

Willmer J.

## * FROST *v.* FROST.

*Legal Aid—Costs—Divorce—No order for costs inter partes—Order for taxation as between solicitor and client—Legal Aid and Advice Act,* 1949 (12 & 13 *Geo.* 6, *c.* 51), *Sch. III—Legal Aid (General) Regulations,* 1950 (*S.I.* 1950, *No.* 1359), *reg.* 18 (3).

The court has power to order a taxation of an assisted person's costs as between solicitor and client although no order for costs is made inter partes.

*Brown* v. *Brown* [1952] W.N. 204 ([1952] 1 T.L.R. 930) ([1952] 1 All E.R. 1018) applied; *Metcalf* v. *Wells* [1952] W.N. 516 ([1952] 2 T.L.R. 781) ([1952] 2 All E.R. 889) not followed.

At the end of a matrimonial cause in which a wife's petition for a judicial separation on the ground of cruelty had been dismissed, Willmer J. decided that no order should be made for costs inter partes. It was further ordered that the sum of £25 security in court should be paid out. The wife was an assisted person, but the husband was not. His Lordship referred to *Metcalf* v. *Wells* [1] and raised the question whether he had power to make an order in accordance with regulation 18 (3) of the Legal Aid (General) Regulations, 1950,[2] for the taxation of the wife's costs as between solicitor and client.

*Norman Williams,* for the wife, referred to *Brown* v. *Brown* [3] and submitted that the court had such power.

*Ian S. Warren* for the husband.

WILLMER J. So far as an order for costs between the parties is concerned, in my judgment this is not a proper case in which to make any order. I am informed that there is in fact £25 security in court; but bearing in mind that the wife is an assisted person under the legal aid scheme, it does not seem to me that the wife's solicitors need the protection of an order for costs, even up to the amount of the security. Indeed, with the arrival of the legal aid scheme it may be said that the most important reason for ordering security for a wife's costs has disappeared. At any rate, I do not propose to make any order against the husband in this case. That being so, as between the parties there will be no order as to costs.

On that basis, I was a little troubled by a decision of Roxburgh J. in *Metcalf* v. *Wells.*[4] According to the report it would appear that the judge decided that, where no order for costs inter

[1] [1952] W.N. 516 ([1952] 2 T.L.R. 781) ([1952] 2 All E.R. 889).

[2] Legal Aid (General) Regulations, 1950, reg. 18 (3): "Any order for the "payment of the costs of any pro- "ceedings to which an assisted person "is a party shall include a direction "that his costs are (in addition to "any other direction as to taxation "contained in the order) to be taxed "as between solicitor and client in "accordance with the provisions of "the Third Schedule to the Act."

[3] [1952] W.N. 204 ([1952] 1 T.L.R. 930) ([1952] 1 All E.R. 1018).

[4] [1952] W.N. 516.

partes was made in a case to which the Legal Aid and Advice Act, 1949, applied, the result was that regulation 18 (3) of the Legal Aid (General) Regulations, 1950, was not brought into force; and he appears to have expressed the view that, apart from that regulation, there was no other regulation requiring or empowering the court to make an order for taxation of the assisted person's costs against the fund. In that particular case he refused to do so, but his attention does not seem to have been called to the decision of the Court of Appeal in *Brown* v. *Brown*,[5] which I have had the opportunity of considering. That decision makes it quite plain that even where no order for costs inter partes is made, the court, if the whole purpose of the Legal Aid and Advice Act, 1949, is not to be defeated, must at least have power to order a taxation against the fund. One of the members of the court took the view that "no order as to costs" amounted to the same thing as an order for the payment of costs, so as to bring regulation 18 (3) into operation and make it obligatory to order a taxation. It is not necessary for me to express any opinion whether that is the right view, or whether the proper view is that the court is merely empowered to make an order, i.e., has a discretion to do so.

Even assuming the latter view to be the correct one, I feel satisfied that this is a case in which I ought to make an order if I have a discretion to do so.

It is true that I made some comments in the course of my judgment yesterday to the effect that a great amount of costs had been expended over this case for a very small result, because the effect of the relief asked for, even if obtained, would make very little difference to the position of the parties. I pointed out that the relief claimed did not involve any change of status. Even so, I think that Mr. Williams' reply to that comment is unanswerable, namely, that his client had a legal right to bring her case before this court. It is not a case in which one could say that she never had any grounds for taking proceedings; and if she had such grounds, the matter could only be determined by fighting the case and obtaining the finding of the court.

That being so, I certainly cannot say that the solicitors were guilty of anything in the nature of improper conduct in continuing to present the petition, even though it failed; it is only right, therefore, that they should have the protection of the Act, and should be given their appropriate opportunity of recovering their costs.

Accordingly, I direct that there shall be the usual taxation as between solicitor and client, according to Sch. III. There will be an order for payment out of the £25 security to the husband's solicitors.

Solicitors: *J. N. Nabarro & Sons; Nutt & Oliver.*

J. B. G.

[5] [1952] W.N. 204.

[QUEEN'S BENCH DIVISION.]

1952
*Dec.* 10,
11, 12.

Hallett J.

# * EAST MIDLANDS GAS BOARD *v.* DONCASTER CORPORATION.

[1950, E. 748.]

*Nationalization—Gas—Acquisition of undertaking of local authority—General rate fund—Claim by gas board for amounts debited in gas undertaking accounts and credited in other accounts—Determination of claim by Minister of Health—Ouster of jurisdiction—Doncaster Corporation Act*, 1926 (16 & 17 *Geo.* 5, *c. xxvii*), *ss.* 71, 72, 73, 75—*Local Government Act*, 1933 (23 & 24 *Geo.* 5, *c.* 51), *s.* 185—*Gas Act*, 1948 (11 & 12 *Geo.* 6, *c.* 67), *s.* 37 (1) (2).

The Gas Act, 1948, which made provision for the compulsory acquisition of gas undertakings throughout the country and for the vesting of them in gas boards on May 1, 1949, provided by section 37 (1) that where after February 10, 1948, a local authority had without the approval of the Minister of Health debited any amount in the accounts of its gas undertaking and credited such amounts in any other of its accounts, the local authority should be liable to pay that amount to the appropriate gas board; and by section 37 (2) that any claims by such gas board should be made within 12 months from the vesting date, and if not settled by agreement, should be determined by the Minister of Health.

The defendants, a local authority, after February 10, 1948, debited two amounts shown in the separate account of their gas undertaking and credited those amounts to their general rate fund revenue account and their water undertaking revenue account respectively, but contended that all those accounts were constituent parts of their general rate fund. The plaintiffs, the appropriate area gas board, claimed the two amounts under section 37 (1) within the statutory period of 12 months; and the claim not being settled by agreement was under subsection (2) determined by the Minister and in favour of the gas board:—

*Held*, that the claim being a claim under section 37 (1) made within the statutory period, and having been determined by the Minister under subsection (2), the court had no jurisdiction to determine whether it was a valid claim under the section.

*Semble*: Where a local authority, acting in accordance with statutory requirements, have after February 10, 1948, kept separate accounts for, inter alia, a gas undertaking and for general rates and other accounts (although they may all be parts of the general rate fund), and at the material time revenue from the gas undertaking has not been merged in the other accounts, section 37 (1) is clearly applicable to debits of amounts in the gas account and credits of those amounts to other accounts.

*North-Eastern Gas Board* v. *Leeds Corporation* [1952] 2 T.L.R. 536 ([1952] 2 All E.R. 326) referred to.

ACTION.

By section 17 of the Gas Act, 1948, the gas undertaking of the defendants, the Doncaster Corporation, vested in the plaintiffs, the East Midlands Gas Board, as the appropriate area board constituted under the Act, on May 1, 1949.

On a date or dates after February 10, 1948, the corporation,

without the approval of the Minister of Health, debited sums of £8.487 2s. 9d. and £2,144 0s. 3d. shown in the separate account of their gas undertaking and credited them to the surplus account of the general rates fund and the water undertaking of the corporation respectively.

The gas board claimed each of the sums under section 37 (1) of the Gas Act, 1948,[1] which provided for the "control of dividends and interest and safeguarding of assets pending transfer" of all gas undertakings to the appropriate gas boards. The claim was made on August 23, 1949, in a letter to the Town Clerk of Doncaster, and further correspondence took place, but the claim was not settled by agreement. Accordingly each party formulated their case in documents of March 15, 1950, and June 6, 1950, which were laid before the Minister of Health. The Minister, in pursuance of subsection (2) of section 37, determined the claim in favour of the gas board on July 6, 1950.

The corporation continued in its refusal to pay the amounts claimed, and the gas board thereupon began proceedings claiming the total of the two amounts, namely, £10,631 3s. and interest thereon from the date of the Minister's determination. The corporation by their defence contended that any debit or credit entries under the heading of gas undertaking in their accounts were made in constituent parts of one account, namely, the corporation's general rate fund, and that under the provisions of a special Act, the Doncaster Corporation Act, 1926,[2] and section

[1] The Gas Act, 1948, provides: "37 (1). Where at any time after "the tenth day of February, 1948, a "local authority have, without the "approval of the Minister of Health, "debited any amount in the accounts "of the gas undertaking of the authority and credited that amount in any "other account of the authority, the "local authority shall be liable to "pay that amount to the appropriate "board, except in so far as it is "properly so debited and credited by "way of an adjustment of the accounts "of the authority in respect of any "transaction carried out or service "provided partly for the purposes of "the gas undertaking and partly for "other purposes.

"(2) Any claim under this section "by the appropriate board against "the local authority shall be made "before the expiration of a period of "12 months beginning with the vesting date, and if so made and not "settled by agreement, shall be "determined by the Minister of "Health."

[2] The Doncaster Corporation Act, 1926, provides: "71. As from the "first day of April, 1927 all money "received by the corporation on "account of the revenue of the "following undertakings (namely)— "(1) the light railways undertaking; "(2) the water undertaking; (3) the "gas undertaking; (4) the electricity "undertaking; (5) the market undertaking; and (6) the baths undertaking; shall be carried to and shall "form part of the borough fund and "all payments and expenses made "and incurred in respect of those "undertakings shall be paid out of "that fund.

"72. As from the first day of April, "1927, the corporation shall keep "their accounts so as to distinguish "capital from revenue and as regards "the revenue account to show under "a separate heading or division in "respect of each of the following "undertakings (that is to say) the "light railways undertaking the "water undertaking the gas undertaking the electricity undertaking "the market undertaking and the "baths undertaking (each of which "is in this section separately referred "to as 'the undertaking') on the "one side all receipts in respect of "the undertaking and on the other "side all payments and expenses in "respect of the undertaking such

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185 (1) of the Local Government Act, 1933,[3] all revenues from such undertakings were made part of that fund; that the gas undertaking was kept under a separate heading as required by that special Act; and that accordingly the debit and credit entries referred to in the claim by the gas board did not involve taking

" payments and expenses being " divided so as also to show in each " case the amounts expended in " respect of each of the following " purposes (that is to say):—(*a*) The " working and establishment expenses " and cost of maintenance of the " undertaking; (*b*) The interest on " moneys borrowed and applied by " the corporation for the purposes of " or connected with the undertaking " and in the case of the gas under- " taking on the existing gas bonds " referred to in the Act of 1904; " (*c*) The requisite appropriations in- " stalments or sinking fund payments " in respect of moneys borrowed and " applied for the purposes of the " undertaking and in the case of the " gas undertaking the requisite pro- " vision for the redemption of the " existing gas bonds referred to in " the Act of 1904; (*d*) All other " expenses (if any) of the undertaking " properly chargeable to revenue; " (*e*) The amount (if any) paid to a " reserve fund which the corporation " are hereby authorized to maintain " (if the corporation think fit) in res- " pect of the undertaking by setting " aside such an amount as they may " from time to time think reasonable " and investing the same and the " resulting income thereof in statu- " tory securities and accumulating the " same at compound interest until the " fund so formed amounts to the " maximum reserve fund for the time " being prescribed by the corporation " not exceeding a sum equal in the " case of the water undertaking and " the electricity undertaking respec- " tively to one-tenth and in the case " of the gas undertaking to one-fifth " of the aggregate capital expended " for the time being by the corpora- " tion upon the undertaking which " fund shall be applicable to answer " any deficiency at any time happen- " ing in the income of the corporation " from the undertaking or to meet any " extraordinary claim or demand at " any time arising against the cor- " poration in respect of the under- " taking or for payment of the cost " of renewing any part of the works " forming part thereof or for any ex- " tension or improvement of the said " works or otherwise for the benefit of " the undertaking and so that if that " fund be at any time reduced it may " thereafter be again restored to the " prescribed maximum and so from " time to time as often as such reduc- " tion happens: Provided that the cor- " poration may resort to any such " fund for the above purposes not- " withstanding that the same may not " at any time amount to the limit (if " any) hereinbefore prescribed.

" 73. Whenever the total receipts " from revenue in respect of the " electricity undertaking in any year " shall exceed the total of the pay- " ments and expenses on account of " revenue in respect thereof in that " year as shown by the accounts to " be kept in pursuance of the section " of this Act of which the marginal " note is 'Separate accounts in res- " 'pect of certain undertakings' (in- " cluding any payments to a reserve " fund) by an amount exceeding five " pounds per centum per annum upon " the aggregate capital expenditure of " that undertaking the corporation " shall make such reductions or " adjustments in the charge for the " supply of electrical energy as in " their judgment will reduce the " excess of the said receipts over the " said payments to an amount not " exceeding the amount of the said " five per centum.

" 75. In all cases in which the cor- " poration keep separate accounts for " separate purposes they shall so far " as reasonably practicable apportion " between those accounts or carry to " either of them any receipts credits " payments and liabilities which from " time to time ought to be so appor- " tioned or carried."

[3] The Local Government Act, 1933, provides: "185 (1). All " receipts of the council of a borough, " including the rents and profits of " all corporate land, shall be carried " to the general rate fund of the " borough, and all liabilities falling " to be discharged by the council shall " be discharged out of that fund.

" (2) An account, called the " 'general rate fund account,' shall " be kept of all receipts carried to, " and payments made out of, the " general rate fund: . . ."

any revenue out of the corporation's gas undertaking and crediting them to the other accounts as alleged. It was contended, therefore, that since the subject-matter of the claim had become part of the general rate fund, it was not a subject-matter to which section 37 (1) of the Gas Act, 1948, applied, and in consequence the determination by the Minister under subsection (2) was not binding on the corporation.

*Sir Frank Soskice Q.C.* and *J. P. Ashworth* for the gas board.

*Arthur Capewell Q.C.*, *F. N. Keen* and *W. Sugden* for the corporation.

The following cases were cited in argument:—*Seward* v. *"Vera Cruz"* [4]; *Blackpool Corporation* v. *Starr Estate Co.* [5]; *Hinckley Urban District Council* v. *West Midlands Gas Board* [6]; *Crisp* v. *Bunbury* [7]; *Joseph Crosfield & Sons Ld.* v. *Manchester Ship Canal Co.* [8]; *Allchin* v. *Coulthard* [9]; *North-Eastern Gas Board* v. *Leeds Corporation.* [10]

HALLETT J. This action raises a question which may be of some importance. The Gas Act, 1948, was passed for the purpose of compulsorily acquiring the gas undertakings of the country, whether owned by private companies or by local authorities, and vesting them in certain gas boards, of which the plaintiffs are one. The vesting date was ultimately fixed as May 1, 1949. The Act had its first reading on January 23, 1948, and that is no doubt the reason why that date appears in section 36 of the Act. When the Act was first introduced it did not contain section 37, but on the second reading on February 10, 1948, the Minister intimated that he intended to introduce into the Act certain further provisions with respect to the transfer of assets before the vesting date, and no doubt that was the reason why the date, February 10, 1948, ultimately appeared in section 37, though I am told that the section was not moved into the Bill until May 12, 1948.

It is reasonably clear that, if the new area gas boards were going to be possessed on the vesting date of the assets of the former gas undertakings, those who were interested in the former gas undertakings might seek before the vesting date to put some of their assets out of the reach of the gas boards. One can conceive that that would be the more likely in the case of local authorities, because whereas companies owning gas undertakings were to receive compensation, local authorities were to have no compensation for losing what, in many cases, might have been

[4] (1884) 10 App.Cas. 59.
[5] [1922] 1 A.C. 27 (38 T.L.R. 79).
[6] [1951] Ch. 577 ([1951] 1 T.L.R. 771) ([1951] 1 All E.R. 788).
[7] (1832) 8 Bing.Cas. 394.
[8] [1904] 2 Ch. 123; [1905] A.C. 421 (22 T.L.R. 192 (No. 2) ).
[9] [1942] 2 K.B. 228; [1943] A.C. 607 (59 T.L.R. 396) ([1943] 2 All E.R. 352) (25 Tax Cas. 445).
[10] [1952] 2 T.L.R. 536 ([1952] 2 All E.R. 326).

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very valuable assets, except that there was a lump sum made available for compensation in respect of severance. That danger —that, before the assets vested under section 37, some of them might have been put out of the reach of the gas boards—was appreciated by Parliament, and there are a few sections in the Act which are under the heading "Control of dividends and interest and safeguarding of assets pending transfer." The heading has no statutory authority, as I understand, but it does usefully summarize the objects obviously sought to be attained by sections 33 to 38 of the Act. I need not read section 37, but it is to be observed that it has two subsections, and there arise therefore in this action two points to be determined. The first subsection lays down that in certain events the local authority, in this case the defendants, shall be liable to pay certain amounts to the appropriate board, in this case the plaintiffs, with an exception which both parties are agreed has no materiality for the purposes of the present case. Sir Frank's first point was that on a true construction of section 37 (1) of the Gas Act, 1948, and on the true view of the facts here, there had arisen on the part of the defendants a liability to pay to the appropriate board the two sums claimed in this action.

But there is another subsection, which reads as follows: "Any claim under this section by the appropriate board against the local authority shall be made before the expiration of a period of 12 months beginning with the vesting date, and if so made and not settled by agreement, shall be determined by the Minister of Health." Sir Frank's second point was that, whether the claim was or was not a valid claim under the provisions of the first subsection having regard to the facts of this case, the validity of the claim was by the second subsection expressly referred by the legislature to the Minister of Health for determination; and accordingly, on well known principles, and in the light of abundant authority, this court had no jurisdiction to decide whether the claim was or was not a valid claim, because, the validity of the claim being referred by statute to the Minister of Health, it had in fact been considered by the Minister of Health, who had determined it adversely to the defendants.

I do not think that the law on the subject is in any doubt. I may, perhaps, first refer to a very old case of *Crisp* v. *Bunbury*,[11] which was referred to with approval in *Joseph Crosfield & Sons Ld.* v. *Manchester Ship Canal Co.*[12] The decision, as I understand it, can be summarized as follows: if two persons agree that any dispute which may arise between them in respect of any matter shall be referred to the determination of a third person, then such an agreement will not oust the jurisdiction of the court; but since the court attaches importance to the sanctity of contract, the court will, generally speaking, in the

[11] 8 Bing.Cas. 394.
[12] [1904] 2 Ch. 123; [1905] A.C. 421 (22 T.L.R. 192 (No. 2)).

exercise of its discretion and in aid of that sanctity of contract, stay an action which is brought in contravention of, or on non-compliance with, what has been agreed. That is what happens in the usual case where there is what is commonly called an arbitration clause, and one party, notwithstanding the arbitration clause, seeks to resort to the courts.

On the other hand, where the legislature has thought it proper to lay down that the determination of a certain question should be made by some authority other than the courts, then the courts have no jurisdiction to override what Parliament has so laid down, and they have no jurisdiction to determine that which Parliament has said shall be determined by some other person or body. If the other person or body, being in the nature of an inferior tribunal, proceeds to exceed its authority or not to exercise it properly, then, in certain appropriate cases, the Queen's Bench Division of the High Court of Justice, acting through the Divisional Court, can restrain the person or body so acting by processes which are well known; but, apart from that authority which can be exercised over inferior tribunals, the court cannot proceed as an appellate authority to review and, if it thinks right, overrule the determination of a person or body to whom Parliament has entrusted the determination of the particular problem.

I think that the logical order in which to consider those two points is the inverse of that in which I have stated them, and to consider first the second point, namely, that whether the claim here made by the plaintiffs is or is not a valid claim, the validity of that claim has in fact been determined in favour of the plaintiffs, in default of agreement, by the Minister of Health, and this court has no jurisdiction to investigate its validity.

I turn back to the subsection. In the first place, it is plain that a claim to the two amounts was made by the plaintiffs, and it is also clear that the claim was made before the expiration of the period of 12 months beginning with the vesting date, May 1, 1949.

[His Lordship stated the facts as to the correspondence between the parties and that they formulated their cases to the Minister, and continued:] There is no doubt, and I so hold, that the claim was made before the expiration of a period of 12 months beginning with the vesting date. It has not been disputed that it was a claim by the appropriate board; and there is no doubt that it was made against the local authority. There is also no doubt that, having been made within the prescribed period, it was not settled by agreement. On the contrary, as I have pointed out, each party put their submissions into writing and those submissions were laid before the Minister of Health. It seems to me, therefore, that the only point which remains as regards the position under subsection (2) of section 37 is whether it is a claim under this section, that is to say, under section 37.

Mr. Capewell has argued the matter with the greatest care, but I am not convinced that the claim which was determined by

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the Minister of Health was not a claim under section 37. It seems to me that it clearly was a claim under section 37. According to the defendants it was a claim which, having regard to the terms of section 37 and to the facts of this case, ought to have been disallowed, that is, that it was not a valid claim. But that it was a claim under section 37 by the appropriate board against the local authority and made before the expiration of 12 months beginning with the vesting date, and that it was not settled by agreement, is beyond doubt. In those circumstances, it seems plain that it was a claim which fell to be determined by the Minister of Health; and since Parliament has said that this claim shall be determined by the Minister, it is not in my judgment a claim which this court has any jurisdiction to determine. The Minister having determined that it was a good claim, this court has no authority to say that in the opinion of this court it is a bad claim and to give judgment for the defendants accordingly.

If I am right about that, it is an end of this action; but since the question whether it was in fact a valid claim has been fully argued by both counsel, and in case it should be held elsewhere that I am wrong about the first point, I think that I ought also to discuss the other point. First, on the legal position, before the Doncaster Corporation Act, 1926, there were in existence certain enactments providing for the application of the revenue from the corporation's revenue-producing undertakings—the water undertaking, gas undertaking, light railways undertaking and the electricity undertaking. The enactment which dealt with the application of the revenue of the gas undertaking was an Act of 1904, by section 177 of which the corporation were bound to "apply all money received by them on account of revenue in "respect of their gas undertaking in manner and in the order "following (that is to say)," and there followed certain provisions which I need not read; and the section concluded with these words: "And the corporation shall carry to the borough fund "so much of any balance remaining in any year of the income "of the undertaking (including the interest on the reserve fund ". . .) as may in the opinion of the corporation not be required "for carrying on the undertaking and paying the current expenses "connected therewith." Thus, under section 177 of the Act of 1904 the corporation were under an obligation to carry to the borough fund, which is what would now be called the general rate fund, any balance remaining in any year of the income of the undertaking which was not required by the corporation for carrying on the undertaking and paying the current expenses connected therewith.

By section 79 of the Doncaster Corporation Act, 1926, the enactments to which I have referred relating to the application of revenue from the revenue-producing undertakings were repealed, including section 177 of the Act of 1904, and thereafter the corporation were left free to deal with the revenue. By

section 71 of the Act of 1926 it was laid down that as from a certain date " all money received by the corporation on account " of the revenue of the following undertakings (namely) "—and the section then names six revenue-producing undertakings, of which the third is the gas undertaking—" shall be carried to and " shall form part of the borough fund and all payments and " expenses made and incurred in respect of those undertakings " shall be paid out of that fund."

The Local Government Act, 1933, in section 185 as regards borough councils and in section 188 as regards urban district councils, contains substantially similar provisions. By section 185: " (1) All receipts of the council of a borough . . . shall be " carried to the general rate fund of the borough, and all liabilities " falling to be discharged by the council shall be discharged out " of that fund. (2) An account, called the ' general rate fund " ' account,' shall be kept of all receipts carried to, and payments " made out of, the general rate fund." Section 72 of the Doncaster Corporation Act, 1926, however, provides that separate accounts shall be kept in respect of the undertakings therein mentioned, the light railways undertaking, the water undertaking, the gas undertaking, the electricity undertaking, the market undertaking and the baths undertaking, and it lays down what those accounts shall contain. The object of such separate accounts being kept is fairly apparent, and was summarized by Lord Greene M.R. in *Allchin* v. *Coulthard*,[13] and has also been considered by Wynn-Parry J. in *North-Eastern Gas Board* v. *Leeds Corporation*,[14] where he quoted the passage from Lord Greene's judgment.

Section 73 of the Act of 1926 is concerned with the disposal of surplus revenue of the electricity undertaking in reduction of electricity charges, but, apart from that, there is no provision limiting the way in which the corporation may deal with the revenue from their revenue-producing undertakings. Separate accounts of those undertakings had to be kept, even apart from section 72 of the Doncaster Corporation Act of 1926, in order to satisfy other obligations of the corporation. For instance, as regards gas, accounts had to be furnished by the corporation to the Board of Trade as to undertakings under the Gas Regulation Act, 1920, s. 15 (1); and as regards the light railways undertaking accounts had to be furnished to the Minister of Transport under section 78 of the Doncaster Corporation Act of 1926; and, as I have already pointed out, under section 73 of the Corporation Act of 1926 it still is necessary that they should have separate accounts of the electricity undertaking. That, then, is the position as to their obligation to keep separate accounts.

I now turn to what they in fact did. They did keep separate

[13] [1942] 2 K.B. 228, 232 (58 T.L.R. 285); [1943] A.C. 607 (59 T.L.R. 396) ([1943] 2 All E.R. 352) (25 Tax Cas. 445).

[14] [1952] 2 T.L.R. 536, 540 ([1952] 2 All E.R. 326).

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accounts of their various revenue-producing undertakings and also of other departments of their activities. The abstract of the treasurer's account for the year ended March 31, 1948, is before me. The table of contents starts with "Gas works "account," and goes on with "water works account," "elec- "tricity account," and so forth. The first section of the book is described as "General rate fund (gas works section)." Then there is the revenue account and certain other accounts for the gas works undertaking. I think myself that that heading, "General rate fund (gas works section)," is used because of the provisions of section 71 of the Corporation Act, and it would indeed in any case probably have been necessary because of the provisions of section 185 of the Local Government Act, 1933; but however that may be, there is no doubt whatever that there is in this volume a separate section for the accounts of the gas works undertaking and, indeed, it appears that that section of the volume was originally in fact physically separate for the purpose of its submission to the appropriate committee of the corporation for approval. So all through this volume there are these different sections for different undertakings, some of them revenue-producing and some not revenue-producing; and finally there is the aggregate balance sheet as at March 31, 1948. On the liabilities side of the account, and on the property, assets and outlay side, the heading in the left-hand column is "Account "or Fund. Gas, water, electricity, trackless trolley," and so forth.

To my mind it is quite unarguable that there was not a separate gas account and also a separate general rate account. Mr. Capewell urged very strongly, and with the authority behind him of the first of the two cases I mentioned in this connexion, *Allchin* v. *Coulthard*,[15] that there was only one fund, apart possibly from the reserve fund, as to which I think he would concede that there was a special position; but apart from the reserve fund, he submitted, on the strength of section 71 of the special Act, as he would have submitted on the strength of section 185 of the general Act, that there was only one fund, namely, the general rate fund; and I will assume, without deciding it, that in that submission he was correct. But whether there be only one fund or not, I am abundantly satisfied on the evidence here that there was more than one account, and in particular that there was a gas account, a water works account, and the other account, the general rate account.

I have referred so far to the abstract of accounts for 1948, but the corporation, of course, have disclosed also their books of account, and there was, among other books, a gas section ledger and a gas section cash book; there was a water works ledger and a water works cash book, and there was a general rate fund ledger and a general rate fund cash book. Extracts of the

[15] [1942] 2 K.B. 228 (58 T.L.R. 285).

relevant entries from those books have been made and were put before me.

I must consider now what actually happened with regard to the amounts with which I am concerned. In the first place, in the gas account for the year ending March 31, 1948, the net revenue account, there is shown a balance, being a net profit of £8,487 2s. 9d. The question then arises: what happened to that net profit of the gas undertaking? There is no doubt as to what happened to it, because the gas ledger shows that that net profit for the year was transferred to the general rate fund as shown by a cash book entry; and, having been transferred to the general rate fund, it is agreed that it forms part of the figure of £79,099 2s. 0d.—trading surpluses account—in the general rate fund summary revenue account, as a contribution in aid of rates. The same thing appears also from the ledger and cash book entries relating to the gas undertaking and to the general rate fund. In other words, it is plain that the £8,487 2s. 9d. was debited, as one of the witnesses for the defendants agreed, in the gas account, and the same amount, though concealed in a larger amount, was credited in the general rate fund revenue account.

The other item in dispute is somewhat more difficult to deal with, although I have come to the conclusion that there is no difference in principle which affects the matter. It appears that at some time before 1946 the corporation had been compelled to pay excess profits tax in respect of their revenue-producing undertakings. That liability to excess profits tax only arose in respect of revenue-producing undertakings and, therefore, the revenue-producing undertakings furnished the money necessary for the purpose of paying it. At the time with which I am concerned there had become payable a refund of excess profits tax. As I understand it, it seems to be agreed that the undertakings of the corporation, both for the purpose of the payment of excess profits tax and also for the purpose of a refund when a refund becomes due, are considered together. Under the provisions of the Finance (No. 2) Act, 1945, ss. 39 and 40, no post-war refund was to be made to any person unless undertakings and authorities were given in connexion with the use of the net amount of the refund for the purposes of a specified trade or business; and the undertaking in substance which had to be given was that the net amount of the refund would be used in developing or re-equipping the trade or business and, until so used, would be so dealt with as to remain available for use, when required, in developing or re-equipping the trade or business.

The corporation received two amounts by way of a refund of excess profits tax. The first amount was an actual cash payment. The second amount was recovered by way of deduction from a liability of the corporation to the inland revenue authorities, and it is because of those two different ways in which the refund was received that the facts have been a little complicated by the splitting up of the amount claimed by the plaintiffs under

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the second head into two items, the first being £1,012 4s. 5d., and the second £1,131 15s. 10d. The corporation having received back the two sums, those refunds were apportioned by the borough treasurer among the revenue-producing undertakings in the accounts of those undertakings. The borough treasurer took the view that he was bound to apportion those refunds by virtue of section 75 of the Doncaster Corporation Act of 1926, and, as at present advised, I am disposed to agree with him. But he further told me (and I need hardly say that the only two witnesses called were both as candid and as helpful as one would have expected) that even if he had not been compelled to do it, as he thought he was by section 75 of the Act, he would have done it anyhow as the right thing to do. On the other hand, Mr. Hill, who was called before me as a financial expert, took the view that it was a wrong thing to do. As I said during the course of the hearing, I am not going to decide which is the correct method of accountancy as between those two experts. It is sufficient for my purpose to say that, as is plain and admitted in fact, £2,144 0s. 3d. was apportioned to the gas account and appears in the accounts of the gas section under the heading "E.P.T. post-war refund suspense account." There seem to be obvious reasons why it should be put to suspense, because under the section of the Finance Act it had either to be spent on development, etc., or had to be kept available for that purpose; and I imagine that the normal way of keeping a sum available for a purpose in the future is to put it into a suspense account. Anyhow, the total was put into a suspense account.

Having been put into a suspense account, what happened to it? The ledger of the gas undertaking shows us. On March 31, that account was debited with £2,144 0s. 3d. in respect of a cash transfer to water revenue. One can trace it out at the other end, because when one looks in the water works ledger and also, of course, in the water works cash book, one sees: "To "various accounts excess profits tax, post-war refunds, gas, £2,144 0s. 3d." So there is a debit in the gas account of that sum in respect of a transfer to water revenue, and a credit in the water account in respect of that sum received from gas, just as there is a credit there of a certain sum received in respect of trackless trolley, and so forth. In the abstract it is perhaps a little more difficult to follow, but there is no doubt now as to the facts.

Those being the facts, I come back to section 37. Before I do so, I should say that while counsel on both sides have done their best to give me assistance by way of authority, I have not found any case which really assists me directly in the present instance. Perhaps I should refer to two cases. The latest is *North-Eastern Gas Board* v. *Leeds Corporation*,[16] a decision of Wynn-Parry J. in May of this year. In that case the transfer

[16] [1952] 2 T.L.R. 536 ([1952] 2 All E.R. 326).

or the dealing on the part of the local authority with the sums there in question had taken place long before February 10, 1948. As I understand it, the corporation there transferred the sums in question to their general rate fund in 1947. Accordingly, section 37 of the Gas Act, 1948, had no relevance; but what the Gas Board there had to demonstrate was, to quote the words of Wynn-Parry J.,[17] " that the corporation had no power to perform these " operations "—that is, the transfers—" at the time when they " did so "; and, for reasons which were set forth in his judgment, he came to the conclusion that in 1947 they had power to perform the operations which they did perform and that, the moneys having as a result of those operations been merged in the general rate fund—" lost " was the word, I think, used by Lord Greene in the earlier case [18]—the gas board could not disentangle them and claim them as assets of the gas undertaking which vested by reason of the vesting sections of the Act of 1948. If I have rightly summarized the substance of that case, it clearly is of no help to me here. I assume here, without deciding it, as I think I have already said, that but for the passing of the Gas Act, 1948, and in particular but for the results of section 37, the corporation could have merged the two amounts now in question in the general rate fund and, if it was desired, and as they actually did, could have merged one of them in the general rate fund and the other in the accounts of the water undertaking. But that is not the question I have to decide. I have to decide what is the effect on the liability of the defendants of section 37 of the Act.

The other case to which Mr. Capewell referred was *Allchin* v. *Coulthard*.[19] That was in respect of an income tax question, and affords support for what Mr. Hill told me as to the use which is usually made by corporations of what I understand are called among corporation financial experts the " Chesterfield Clauses "; but again, I can find no help in that case on the problem with which I am concerned. What I must do is to take the words of the section and see if there is any doubt as to their meaning or as to their application to the present facts.

The opening words of section 37 are: " Where at any time " after the tenth day of February, 1948,"—there has been no dispute here that what the defendants did with regard to the two sums in question was done after February 10, 1948—" a local " authority have, without the approval of the Minister of Health," —again there is no dispute that whatever the local authority, the defendants, did was done without the approval of the Minister of Health—" debited any amount in the accounts of the gas " undertaking of the authority . . ." I ask myself first: have the local authority debited the first of the two sums in question in the accounts of the gas undertaking of the authority? One does not like to say anything that is obvious, especially when Mr.

[17] [1952] 2 All E.R. 326, 328.
[18] [1942] 2 K.B. 228, 232.
[19] [1942] 2 K.B. 228.

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Capewell has argued so clearly the contrary; but apart from that, I would have said it was obvious on the materials before me—the extracts and books of the corporation—that they did debit the first of the amounts in question in the accounts of the gas undertaking of the authority. It appears to be equally clear that they did debit the second of the amounts in question in the accounts of the gas undertaking of the authority. Here is the gas ledger, the account of the gas undertaking. Here are two debits both on March 31, 1948, one in respect of a cash transfer to the general rate fund and the other in respect of a cash transfer to the water revenue. Using the English language in the ordinary sense, I cannot see how there could be a clearer debiting of the two amounts in the accounts of the gas undertaking of the authority.

The section continues: where a local authority have "debited "any amount in the accounts of the gas undertaking of the "authority and credited that amount in any other account of "the authority"—here, again, it seems to me perfectly plain. Have this local authority, the defendants, credited the £8,487 2s. 9d. debited in the account of the gas undertaking in any other account of the authority? The answer is that all the entries show that they have. They credited it in what they call here the general rate fund account of the authority. How there could be a clearer crediting in another account of the authority I cannot imagine. Then as regards the second amount in dispute, £2,144, as I have said, there was clearly a debiting in the account of the gas undertaking, and it seems to me there was equally a clear crediting in another account of the authority, namely, the water works account. Whether you look at the ledger or at the cash book, described as the water works cash book, or the water section ledger, you see there clearly credited the very sum with the word "gas" against it which you see debited in the account of the gas undertaking. In this event, the section goes on, "the local authority shall be liable to pay that amount "to the appropriate board," with an exception which, as I have said, is immaterial.

If one looks at the words of the section, it seems plain that in upholding the claim of the plaintiffs in the present case the Minister of Health was correct. It is idle to discuss what might have been the result if the words of the section had been different from what they are. I have to decide this case on what Parliament has chosen to say. Parliament chose to use what appears to me to be very plain language, and the facts of this case seem without any doubt to fall within the scope of that very plain language.

For those reasons, I think that the plaintiffs in this case should succeed on both grounds. First, I think that they must succeed because there has been a determination by the Minister of Health in their favour on their disputed claim, and a determination of such dispute has by statute been left to the Minister of Health and this court has no right to differ from his decision, or, indeed

to review it; and, secondly, because in my judgment, even if, contrary to the view which I take, it were open to me to review the decision of the Minister of Health, I have no doubt that his determination was in fact correct.

For those reasons there will be judgment for the plaintiffs for the amount claimed.

*Judgment for the plaintiffs.*
*Stay of execution granted for six weeks*

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Solicitors: *Sherwood & Co., for A. Gwynne Davies, Leicester; Sharpe, Pritchard & Co., for Town Clerk, Doncaster.*

M. M. H.

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[QUEEN'S BENCH DIVISION.]

* THOMAS *v.* BRITISH THOMSON-HOUSTON CO. LD.

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*Dec.* 4, 5, 8.

[1951, T. 2165.]

Havers J.

*Factory—Definition—Directors' restaurant—Premises within the curtilage of a factory—User—Not a "factory"—Factories Act,* 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 67), *s.* 151 (1), (6).

A factory contained within its curtilage a canteen called the Vicarage Restaurant, for the exclusive use of administrative and executive staff. One of the three dining rooms in the restaurant building was occasionally used as a conference room where representatives of the shop stewards and the management met; and there was also in the building a games room reserved for the use of apprentices. A general handyman employed by the owners fell from a ladder while cleaning one of the windows of the Vicarage Restaurant, and he claimed damages for personal injuries which he alleged were due (inter alia) to a breach by his employers of their statutory duty under section 26 of the Factories Act, 1937.

*Held,* applying the tests laid down by MacKinnon L.J. in *Wood* v. *London County Council* [1941] 2 K.B. 232 (57 T.L.R. 499) ([1941] 2 All E.R. 230) and by the Divisional Court in *London Co-operative Society Co.* v. *Southern Essex Assessment Committee* [1942] 1 K.B. 53 ([1941] 3 All E.R. 252), that looking at the Vicarage Restaurant as a complete whole and at the purposes for which it was used, and considering whether it was essential for the welfare of the admittedly industrial workers of the factory, the Vicarage Restaurant was not within the definition of a factory in section 151 (1) of the Factories Act, 1937, for although it was within the curtilage of a factory it was, within the meaning of subsection (6) of section 151, used for some purpose other than the process carried on in the factory.

ACTION.

The plaintiff, aged 69 years, had been employed by the defendants, manufacturers of electrical equipment and appliances

[Reported by Miss C. J. ELLIS, Barrister-at-Law.]

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who had a large factory at Neasden, Middlesex, for 17 years, originally as a storeman and since 1947 as a handyman in connexion with a directors' canteen at the factory known as the Vicarage Restaurant. On March 12, 1951, the plaintiff was cleaning one of the windows of the restaurant, for which purpose he was using an extension ladder, when he slipped and fell to the ground, sustaining concussion and other injuries.

He claimed damages for personal injuries alleging that by reason of the negligence and breach of statutory duty under section 26 of the Factories Act, 1937,[1] the ladder moved causing him to fall, or alternatively (by amendment), that if the ladder was in the position alleged by the defence where it could not move, then in that position it was too short. The defendants (inter alia) denied that the Vicarage Restaurant was a factory within the meaning of the Factories Act, 1937, and the case is reported only on that point.

*H. S. Ruttle* for the plaintiff.

*Montague Berryman Q.C.* and *M. J. Anwyl-Davies* for the defendants.

HAVERS J., after considering the evidence and the facts relating to the alleged negligence at common law, continued:— One question of considerable difficulty has arisen with regard to the question of statutory duty, namely, whether or not these premises (I am referring to the Vicarage Restaurant) were a factory within the meaning of section 151 of the Factories Act, 1937. I will consider first of all the facts before I come to the law. The defendants own and conduct a very extensive factory in which they manufacture and assemble various electrical equipment and parts. Before 1938 the property which is now known as the Vicarage Restaurant did not belong to the defendants, but in that year they purchased it. The Vicarage Restaurant previously had been walled off from the defendants' factory, but after 1938, when this was acquired, what had been the bowling green of the vicarage was excavated to make way for the erection of a new building which is now known as No. 55, and there is a projecting part of that building which, at the time of the accident, the ground then being excavated, was fenced off. Since the defendants have acquired this extra piece of ground and built this new building, the original wall of the vicarage has been pulled down and a new entrance has been made to the Vicarage Restaurant. But it is clearly now, as I think, within the curtilage

[1] Factories Act, 1937, s. 26: "(1) There shall, so far as is reasonably practicable, be provided and maintained safe means of access to every place at which any person has at any time to work. (2) Where any person is to work at a place from which he will be liable to fall a distance more than ten feet, then, unless the place is one which affords secure foothold and, where necessary, secure hand-hold, means shall be provided, so far as is reasonably practicable, by fencing or otherwise for ensuring his safety."

of the factory proper, if I may use that expression to describe what was the factory before the purchase of those new premises.

A considerable amount of evidence has been called as to the user of this Vicarage Restaurant, and a plan has been put in from which it appears what was the nature of the accommodation provided. (I need not trouble about the attic, which I was told was only used for storing junk). On the first floor there was a flat, which was used by the caretaker, which consisted of a kitchen, bedroom, and dining room. There was a dining room which was used by the women supervisors employed by the defendants, and there was also a restaurant, manageress's office and store. On the ground floor there were three dining rooms, dining room No. 1, No. 2, and No. 3. No. 1 dining room was used by the higher executive staff, No. 2 dining room by the senior staff, and No. 3 by the sales staff, who were all either executive or administrative persons. The factory itself employed some 2,500 workers, and it will be observed that there were canteens strictly within the factory premises themselves which were used for the purposes of the workmen who engaged in the industrial part of the business. One significant piece of evidence was that though ordinary people employed in the industrial part of the factory might occasionally have to go to the Vicarage Restaurant, they would only be entitled to do so if they went on the instructions or directions of somebody in order to carry out some duty in the restaurant. They would not be permitted to enter the Vicarage Restaurant for any other purpose; they had canteens of their own in a different part of the factory.

The plaintiff said that there were a number of foremen who were entitled to use, and did use, this Vicarage Restaurant for the purposes of lunch—I ought to say that these three dining rooms were chiefly used for lunches, and occasionally for teas, by the persons of the category which I have described, and by executives of the company. In addition, there were certain other people who were entitled to use the dining room, but with one exception, a Mr. Wright, they were all persons who, I think, came under the description of administrative heads. Mr. Wright was a foreman of the tool room; he was a shop foreman, but his position was a special one. He was a very old hand of the company's, and he had made application to the company to be allowed to use the Vicarage Restaurant and they had made a concession to him by way of indulgence as a result of his long service with the company. Otherwise, as I find, there were no shop foremen who used the Vicarage Restaurant or were entitled to use it. I was told that some 90 lunches were served each day, but there were also some additional lunches served to guests, and there were usually some guests every day.

Apart from those dining rooms on the ground floor there was a games room, which was reserved for apprentices, not for the purpose of eating meals there but as a games room. As is usual in a large company like this where there are apprentices, there

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were apprentices who were engaged in learning the various duties of the various departments of which this factory was composed—engineering, draughtsmanship, manufacturing, and so on—but they were all trained in order to obtain the necessary knowledge and experience to take up some post at the end of their training. It is quite true, as Mr. Ruttle said, that some of them were engaged in the ordinary industrial side of the work where they were learning and gaining experience. They were paid for that and assisted, of course, in the production of the articles manufactured by the company.

There was one other feature of the user which makes this case a little more difficult to decide than otherwise it would have been, and that is that one of those dining rooms was used occasionally, either once every three months or sometimes once every month, as a conference room in which the representatives of the shop stewards and representatives of the management met to discuss matters of mutual interest between them. Those matters might include wages, welfare, or conditions of service. As I have said, so far as the women on the upper floor were concerned, they were all administrative members of the staff, senior secretaries and so on.

That is the nature of the premises and its user. I have now to consider whether it comes within the definition of a factory in section 151 of the Factories Act, 1937. Of course, this Vicarage Restaurant in its dictionary sense is obviously not a factory nor is it, if one uses the ordinary language as a description, a factory or anything like it. But that does not end the matter, because one has to see whether or not it comes within the definition in section 151 of the Factories Act, which provides: "(1) Subject to the provisions of this section, the expression "'factory' means any premises in which, or within the close "or curtilage or precincts of which, persons are employed in "manual labour in any process for or incidental to any of the "following purposes, namely:—(*a*) the making of any article "or of part of any article; or (*b*) the altering, repairing, "ornamenting, finishing, cleaning, or washing, or the breaking "up or demolition of any article; or (*c*) the adapting for sale of "any article; being premises in which, or within the close or "curtilage or precincts of which, the work is carried on by way "of trade or for purposes of gain and to or over which the "employer of the persons employed therein has the right of access "or control." Then subsection (6) provides: "Where a place "situate within the close, curtilage, or precincts forming a factory "is solely used for some purpose other than the processes "carried on in the factory, that place shall not be deemed to "form part of the factory for the purposes of this Act, but shall, "if otherwise it would be a factory, be deemed to be a separate "factory." I think there is no doubt that the Vicarage Restaurant comes within the first part of section 151. I think it

is within the close, curtilage, or precincts and, therefore, prima facie is a factory.

I have now to consider whether the first part of subsection (6) takes it out of that category. The question, for me to decide, therefore, is: is it solely used for some purpose other than the processes carried on in the factory? On that question I have had a number of authorities cited to me. The first case was *Cardiff Revenue Officer* v. *Cardiff Assessment Committee*,[2] a decision of the Divisional Court, consisting of Avory and Talbot JJ. That was a question of a rating under the Rating and Valuation (Apportionment) Act, 1928. The headnote reads: "Printing offices and works "in which a newspaper was composed, printed, and published, "were included in the Special List under the Rating and Valua- "tion (Apportionment) Act, 1928, as an industrial hereditament, "and an apportionment was made of the net annual value of the "hereditament according as its various parts were used for "industrial or non-industrial purposes." The second part of the finding was, "that the annual value of the hereditament must "be apportioned according to the occupation and use thereof for "industrial purposes, and the occupation and use for other "purposes; that those portions of the premises which were "occupied and used for printing, composing, engraving, pub- "lishing and circulating were used for industrial purposes and "entitled to be derated, but that those portions of the premises "which were occupied and used for the editorial department, "general administrative offices and clerical staff, advertising "department, stationery counter, and returns store were used "for non-industrial purposes and not entitled to be derated."

Avory J. said[3]: "My opinion is that in each of these cases "the items which are included under the head of 'Printing, com- "'posing, engraving, etc.,' are all clearly used for industrial "purposes, with the exception in the *Western Mail* case of the "item of 270 sq. feet which is described as a 'canteen,' and in "the *David Duncan* case with the exception of the item of 1,152 "sq. feet which is described as 'mess-room and cook-house.'" Talbot J. said[4]: "I do not wish to add anything to what "has been already said about the details of the apportionment, "but I would add one thing with the consent of my brother "Avory. I think that what he said with regard to the mess-room "and cook-house in the case of *David Duncan & Sons* may not "have been wholly unambiguous. I have his authority for "saying this, and it is also my own view; I do not think that "he intended to say that the mess-room and cook-house neces- "sarily came out of the industrial part of the building. Whether "they do or not must depend upon the persons for whose accom- "modation they are provided and used: according to whether "they relate to the industrial part, the factory proper, if I may

[2] [1931] 1 K.B. 47.
[3] Ibid. 70.
[4] Ibid. 78.

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" use the term, or to the clerical and editorial part of the " hereditament."

That case was followed in 1941 by *London Co-operative Society Ltd.* v. *Southern Essex Assessment Committee.*[5] There the headnote reads: " A laundry conducted by a co-operative society " included a canteen which was used solely for supplying refresh- " ments to the workers in the laundry which was admittedly an " industrial hereditament within section 3 (1) of the Rating and " Valuation (Apportionment) Act, 1928. All the food supplied " in the canteen had to be purchased, and all purchases ranked " for the usual dividends paid in respect of purchases made at the " co-operative society's retail shops:—*Held*, that the canteen was " not a place which was ' solely used for some purpose other " ' than the manufacturing process or handicraft, carried on in ' " the laundry within section 149 (4) of the Factory and Workshop " Act, 1901, and, therefore, that it was entitled to be derated as " being part of the industrial hereditament. *Per* Tucker J.: " The decisive element is that the canteen was essential for the " welfare and efficiency of the workers engaged in the admittedly " industrial part of the undertaking." That was the criterion which Tucker J. applied. He said[6]: " The difficulty which " I have felt is whether this is not a pure question of fact with " regard to which it is difficult to say that quarter sessions have " come to a wrong conclusion, but on the whole I agree that, " on the facts as set out, a question of law is raised and quarter " sessions came to an erroneous decision on it. The element " which, to my mind, is decisive is that the facts stated show that " the canteen was necessary and essential for the welfare and " efficiency of the workers engaged in the admittedly industrial " part of the undertaking. It is true that the words in the case " are that the appellants consider the canteen necessary for the " welfare of the workers and that quarter sessions have not " expressly said that they consider it essential, but to say on that " account that they have not so found is to take too narrow a view " of their finding. Having regard to the whole of the facts as set " out, I think it is apparent that in this particular case this " canteen was an essential and necessary part of the factory."

My attention was also called to *Street* v. *British Electricity Authority*[7] on rather a different point; I do not think that I need refer to that case. There was another case to which Mr. Berryman attached great importance, *Wood* v. *London County Council.*[8] That was a case where it was a kitchen in a hospital, and the headnote reads: " While the plaintiff, a kitchen-maid " employed by the defendants, a public authority, was mincing " meat with an electrically operated mincing machine in the " kitchen of a hospital belonging to the defendants, the minced

[5] [1942] 1 K.B. 53 ([1941] 3 All E.R. 252).

[6] [1942] 1 K.B. 53, 60.

[7] [1952] 2 Q.B. 399 ([1952] 1 T.L.R. 799) ([1952] 1 All E.R. 679).

[8] [1941] 2 K.B. 232 (57 T.L.R. 499) ([1941] 2 All E.R. 230).

" meat being intended for consumption on the premises by the " patients at and/or the staff of the hospital, her hand was " caught in the machine and she was injured:—*Held*, that the " kitchen was not ' a factory ' within section 151 (1) (*a*) and (*b*) " and (9) of the Factories Act, 1937, and, therefore, that the " defendants were under no obligation under section 14 of the " Act to fence securely any dangerous machinery therein," and the decision of Tucker J. was reversed on that point. Tucker J. had held that persons were employed in " ' manual labour in any " ' process for or incidental to . . . (*a*) the making of any article " ' [i.e., mince] . . . or (*b*) the altering . . . of any article [i.e., " ' corned beef],' " and was, therefore, a " ' factory.' ". It seems to me that, generally speaking, the ordinary work in a kitchen does necessarily involve some alteration of the article. Potatoes, meat, fruit, and things like that, in their raw state, come out in their cooked state and there must necessarily be, therefore, some sort of alteration in the article. And if you have a restaurant there is always, I think, an adaptation for sale and, of course, there is also a necessary amount of washing-up machines, and so on. But, notwithstanding that, the Court of Appeal held that in the facts of that case that kitchen was not a factory.

MacKinnon L.J. said [9]: " It is contended that this kitchen " was a ' factory ' within the definition in section 151 (1) " of the Factories Act, 1937. The sidenote to that section is: " ' Interpretation of expression " Factory." ' [His lordship " read the material part of subsections (1) and (9).] It is said " that the plaintiff was employed in manual labour and that is " true. Next, it is said that she was employed in manual labour " in a process for or incidental to one of the purposes mentioned " in section 151 (1) (*b*), and I think the principal thing relied on " is ' the breaking up or demolition of any article.' It was also " said that the subsequent words of subsection (1) about the need " of the work being carried on for purposes of trade or gain were " rendered inapplicable because these premises were in the " occupation of the London County Council, and, therefore, " within section 151 (9)." His lordship went on to consider a number of other matters, and he pointed out, if that was a factory, the great difficulty that there would be and the apparent inapplicability of a number of the sections of the Factories Act to a kitchen of that type which was in a hospital, and in particular he said: " I may point out that by section 70, which is " under the headings ' Hours and holidays ' and ' Employment " ' of women and young persons,' it is provided that the period " of employment shall not exceed 11 hours in any day, and " shall not begin earlier than seven o'clock in the morning, nor " end later than six o'clock in the evening, or, on Saturday, " one o'clock in the afternoon. Those are provisions which I " should think it would be quite impossible to apply to the work

[9] [1941] 2 K.B. 232, 235, 236, 237.

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"being carried on in the kitchen of this asylum, in particular "the provision that no work shall be done earlier than 7 a.m. "or after 6 p.m."

Then he went on to say: "Those are some of the extra- "ordinary results which follow if this kitchen is a 'factory,' "quite apart from one's surprise, from the point of view of "common sense, that an ordinary kitchen (although, no doubt, "a kitchen on a very considerable scale, because there are over "two thousand people to cook for) could be within the definition "of a factory at all. Mr. Paull was quite consistent in his "argument, because he did not shrink from agreeing to my "suggestion that, if this was a little cottage hospital, conducted "by some rural district council with perhaps two people in its "small kitchen, those premises would be a 'factory' for there "would be persons employed in manual labour in a process "incidental to one of the following purposes, namely, the "washing of an article, that is to say, the ordinary washing up "of the few plates and dishes used in the hospital. I fully "recognize that, in construing an Act, one is not to be deflected "from giving it its proper meaning by looking at the absurd "lengths to which the definition may drive one, but I do not "think it is improper to take into account the whole nature of "these premises and the nature of the work that is going on in "them. In my view, a kitchen is not within this definition of "a 'factory' because dishes are washed up in it or because "articles are altered, finished or cleaned in it, or because articles "are ornamented, as, for instance, by providing icing sugar on a "cake or parsley as a garniture for dishes. A kitchen which is "carried on in a large way by people running a restaurant by "way of trade or for purposes of gain would not, by reason of "those words, become a factory within that section." I have to take into account the whole nature of this Vicarage Restaurant and the nature of the work going on in it.

Then, the other way, Mr. Ruttle relied on *Simmonds Aerocessories (Western) Ld.* v. *Pontypridd Area Assessment Committee and Another.*[10] That was a decision of the Divisional Court, and there the question was whether a canteen which was restricted to the use of the appellants' employees and which comprised two large dining rooms in which hot and cold meals were served, cloak rooms, and other accommodation, "was a factory within "the meaning of the Factory and Workshop Act, 1901." There was electrical machinery used in the kitchen of the canteen. The judgment of the court (Viscount Caldecote C.J., Macnaghten and Atkinson JJ.) was read by Atkinson J., who stated the facts, and continued: "Subject to certain exceptions "specified in section 3 (1) of the Rating and Valuation (Appor- "tionment) Act, 1928, an 'industrial hereditament' means a "hereditament used and occupied as a factory or workshop,

[10] [1944] K.B. 231, 235 (60 T.L.R. 192) ([1944] 1 All E.R. 264).

"these expressions having the same meaning as in the Factory "and Workshop Acts, 1901–1920. The first question, therefore, "is whether this canteen is a factory or workshop. Both expres- "sions include (inter alia) any premises wherein manual labour "is exercised by way of trade, or for purposes of sale for gain, "in or incidental to any of certain purposes, including the making "of any article or the adapting for sale of any article. It is "plain that much manual labour is exercised in the canteen for "the purpose of making articles of food and for the purpose of "adapting articles of food for sale, and that such labour is "exercised by way of trade. The canteen is, therefore, a factory "or workshop." It does not appear, I was told, and I have not been able to see it myself, that *Wood* v. *London County Council* [11] was cited in that case.

Then in *Stanger* v. *Hendon Borough Council* [12] there is a reference in the course of Somervell L.J.'s judgment to *Wood* v. *London County Council.*[13] Somervell L.J. said,[14] after considering the ratio decidendi in *Nash* v. *Hollinshead* [15]: "That process of "reasoning was employed in the case of *Wood* v. *London County* "*Council* [16] by MacKinnon L.J. The question there was whether "a kitchen was a factory. A kitchen is no doubt a place in "which things are made and altered. MacKinnon L.J. based "his decision on a consideration of the Acts as a whole. He "said, for instance, if this is a factory, no woman or young "person can be employed later than six o'clock in the evening, "and no woman can be employed on Sunday. This and other "provisions, in his opinion, made it quite clear that kitchens "were outside the Factories Act. That being so, there does not "seem to me any case or principle laid down which is in itself "in favour of Mr. Capewell's argument."

Mr. Ruttle cited one other case to me, *Thurogood* v. *Van Den Berghs & Jurgens Ltd.*[17] The headnote in that case reads: "A "factory used for the manufacture of margarine contained "within its curtilage a separate building in which maintenance "work in connexion with the main part of the factory was "carried out. An electrician employed by the owners was "engaged in that maintenance building in testing an electric fan "which normally worked in a ventilator in one of the rooms in "the factory where one of the processes in the manufacture of "margarine was carried on." Devlin J. dismissed the action, holding that the maintenance building was a separate factory, and the Court of Appeal reversed that, holding that it was not a separate factory but was a part of the factory. My attention was called to the judgment of Cohen L.J. where he said [18]: "It

[11] [1941] 2 K.B. 232.
[12] [1948] 1 K.B. 571 (64 T.L.R. 164) ([1948] 1 All E.R. 377).
[13] [1941] 2 K.B. 232.
[14] [1948] 1 K.B. 571, 578.
[15] [1901] 1 K.B. 700 (17 T.L.R. 352).
[16] [1941] 2 K.B. 232.
[17] [1951] 2 K.B. 537 ([1951] 1 T.L.R. 557) ([1951] 1 All E.R. 682).
[18] [1951] 2 K.B. 537, 544.

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" is not disputed that the defendants' margarine factory is a " factory within the first part of that definition; but the defen- " dants contend, first, that the separate building in which repairs " to machinery are carried out (I shall refer to it henceforth as " the ' engineering shop ') is to be deemed to be a separate " factory by reason of section 151 (6)." Then he dealt with the process by which the judge arrived at his conclusion[19]: " Devlin J. " recognized that, if the case cited had been a decision under " the Factories Act, it would have been almost conclusive in " favour of the plaintiff in the present case. But he said ' it is " ' a decision under a rating Act, and I do not think, paradoxical " ' though it may sound, that a definition section which is " ' common to two Acts is necessarily to be given the same " ' meaning in both. The way in which sections taken from an " ' earlier Act should be construed in the later Act has been the " ' subject of varying judicial comment.' He then proceeded to " consider a number of authorities, and came to the conclusion " that he had a free hand. In none of the cases which he cited, " however, were any words so definite as ' shall have the same " ' meaning ' used." I do not think that I need deal with the passage which considered the question of construction on the principle that this Act imposes penalties.

On the authority of that case Mr. Ruttle contended that the question which I have to consider is: was this Vicarage Restaurant solely used for some purpose for or incidental to the process carried on in the factory? I think that this is very much a borderline case. The main difficulty arises from two elements in the case, namely, that the apprentices had a games room there and that one of the dining-rooms was occasionally used for the purposes of these joint conferences. However, applying the test which has been applied, and looking, as I do, at this question as MacKinnon L.J. did, looking at the complete whole and seeing the purposes for which it was used, and also bearing in mind the test of the Divisional Court, whether it was essential for the welfare of the admittedly industrial workers, I have come to the conclusion, though it is a borderline case, that I do not think it is a factory. I hold that it is within the curtilage of the factory and comes within section 151 (1). I think that it is solely used for some purpose other than the processes carried on in the factory and, therefore, the first part of subsection (6) takes it out of the statutory definition of a factory into which it had been grouped by subsection (1) of section 151 and it is not, in my view, brought back again by the latter part of subsection (6). I have followed the principles which have been enunciated by these cases, particularly *Wood* v. *London County Council*,[20] and I have come to the conclusion that it cannot be said that this restaurant is a separate factory. In these circumstances, there is, if I am

[19] Ibid. 546. [20] [1941] 2 K.B. 232.

correct, no statutory duty on the defendants under the Factories Act, 1937, with regard to the plaintiff.

[His lordship then considered the position which would have arisen if he had decided that there was a statutory duty resting on the defendants, and came to the conclusion that even assuming that there was such a duty, the plaintiff had not proved breaches of section 26 of the Act of 1937. His lordship further considered the question of negligence and found that the defendants had not been guilty of any breach of duty at common law. His lordship further said that if he had found in favour of the plaintiff he would have assessed the damages at £901.]

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*Judgment for the defendants.*

Solicitors: *Evill & Coleman*; *Stuart H. Lewis.*

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[COURT OF CRIMINAL APPEAL.]

## * REGINA *v.* RUSSELL.

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*Dec.* 17.

Lord Goddard C.J., Hilbery and Hallett JJ.

*Criminal law—Sharepushing—"Reckless making of . . . forecasts"—Whether "recklessness" in statutory context connotes dishonesty—Prevention of Fraud (Investments) Act*, 1939 (2 & 3 *Geo.* 6, *c.* 16), *s.* 12 (1).

Three defendants, company directors, were prosecuted on charges in connexion with the issue of shares, contrary to the Prevention of Fraud (Investments) Act, 1939, s. 12 (1). The first two counts alleged dishonest concealment of material facts and the making of statements which each knew to be untrue. Count 3 alleged the inducing of persons to enter into agreements to acquire shares by the "reckless making of a misleading and deceptive forecast." The chief magistrate held that on the charges involving recklessness the prosecution must show circumstances from which a jury could infer that the defendants, in doing what they had done, did not care whether what they said was true or false, and had no honest belief in its truth. He accordingly discharged one of the defendants and committed the others for trial.

Before proceeding to trial with a jury, the trial judge held, on a motion to quash the indictment, that the word "reckless" in section 12 (1) must bear its full meaning and be construed as covering the case where there was a high degree of negligence without dishonesty.

The jury found the two defendants guilty on the first two counts alleging dishonest concealment of material facts, but returned no verdict on the count alleging recklessness.

On appeal against conviction by one of the defendants:—

*Per curiam, obiter*, agreeing with Donovan J., on a true construction of section 12 (1) the word "reckless" covers a case where there has been a statement, promise or forecast made with a high degree of negligence without dishonesty.

Donovan J. [1952] W.N. 506 affirmed.

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APPEAL against conviction by Donovan J. and a jury, Central Criminal Court.

The appellant, Charles Frederick Russell, formerly director of a company, Specialloid Ld., together with one Bates, also a director of the company, and Colonel Charles Sweeny, a director of an issuing house, Federated Trust, were prosecuted at Bow Street Magistrate's Court on charges of offences in connexion with the issue of shares (including the reckless making of forecasts), under the Prevention of Fraud (Investments) Act, 1939, s. 12 (1).[1]

In his judgment on June 27, 1952, the chief magistrate (Sir Lawrence Dunne) referred extensively to the speech of Lord Herschell in *Derry* v. *Peek*,[2] as to the burden of proof of fraud which a plaintiff must discharge to sustain a civil action of deceit, and also to *Williams Bros. Direct Supply Stores Ld.* v. *Cloote*.[3] He expressed the view that on the charges in question involving recklessness, the prosecution must show circumstances from which a jury could infer that the defendants in doing what they had done did not care whether what they said was true or false, and had no honest belief in its truth.

He discharged the defendant Charles Sweeny, and committed the defendants Bates and Russell for trial.

Counts 1 and 2 of the indictment respectively alleged against the accused the dishonest concealment of material facts and the making of a statement which each knew to be untrue. Count 3 was as follows: "*Statement of Offence.* Recklessly attempting "to induce persons to invest money contrary to section 12 (1) of "this Act. *Particulars of offence*: Bates and Russell, on a day "between April 1, 1945, and November 30, 1945, in the County "of London, in a letter headed 'Joseph Sebag & Company, "'Statistical Department,' dated November, 1945, attempted to "induce persons to enter into agreements for acquiring ordinary "shares in Specialloid Ld. by the reckless making of a forecast "which was misleading and deceptive, namely, that the directors "of Specialloid Ld. anticipate that the profits for the year ended "March 31, 1946, should not be less than those shown in the "auditors' report for the preceding year, namely, £65,349, before "charging income tax."

[1] The Prevention of Fraud (Investments) Act, 1939, s. 12, provides: "(1) "Any person who, by any statement, "promise or forecast which he knows "to be misleading, false or deceptive, "or by any dishonest concealment of "material facts, or by the reckless "making of any statement, promise or "forecast which is misleading, false "or deceptive, induces or attempts to "induce another person—(*a*) to enter "into or offer to enter into—(i) any "agreement for, or with a view to, "acquiring, disposing of, subscribing "for or underwriting securities or "lending or depositing money to or "with any industrial and provident "society or building society, or (ii) "any agreement the purpose or pre-"tended purpose of which is to secure "a profit to any of the parties from "the yield of securities or by refer-"ence to fluctuations in the value of "securities, . . . shall be guilty of an "offence. . . ."

[2] (1889) 14 App.Cas. 337, 359 (5 T.L.R. 625).

[3] (1944) 60 T.L.R. 270.

At the trial before Donovan J. on September 22, 1952, the Solicitor-General, opening the case for the prosecution, submitted that count 3 was an alternative to counts 1 and 2, in that it would be possible to convict under count 3 even if each accused were acquitted under counts 1 and 2, though counts 1 and 2 obviously involved an express charge of dishonesty, whereas count 3 did not. A man might make a false, misleading and deceptive forecast through recklessness falling short of dishonesty, and he would be content under count 3 to allege such recklessness, which even though it fell short of dishonesty, was still caught by the words of section 12 (1).

Counsel for each of the defendants contended that in view of the prosecution's avowal that the word "reckless" in the section did not necessarily connote dishonesty, count 3 alleged an offence unknown to the law, and that the whole indictment, including counts 1 and 2, was therefore bad and should be quashed.

DONOVAN J. gave judgment on the motion to quash the indictment on September 23, 1952.[4] He held that count 3 was good, the issue being purely one of the construction of section 12 (1) of the Act of 1939, and in particular the passage "the reckless "making of any statement, promise or forecast which is mis- "leading, false or deceptive. . . ."

His Lordship then referred to passages from the speeches of Lord Bramwell and Lord Herschell in *Derry* v. *Peek*,[5] and said that he was not constrained by what was there said to decide that in section 12 (1) the word "reckless" connoted only something dishonest.

Section 12 (1) dealt with three categories of persons who have induced or attempted to induce other persons to invest money. The first was the person who made a statement which he knew to be misleading, false or deceptive; the second the person who dishonestly concealed material facts; and the third the person who recklessly made a statement or forecast which was misleading, false or deceptive. Categories 1 and 2 obviously referred to persons who were dishonest. But after referring to a person who had knowingly made a false statement, or who had dishonestly concealed material facts, the legislature, introducing its third category by the disjunctive "or," changed its language altogether. It did not specify a person who knowingly made a misleading, false or deceptive statement, promise or forecast, or dishonestly made it. It simply specified persons who recklessly made these things.

It would be quite understandable if Parliament, intending to do something about misleading, false and deceptive forecasts, took the view that, as a practical matter, it ought to go a step further than in the case of false statements and dishonest concealment of facts, and, in addition to striking at the dishonest prophet, do something to insure that even the honest ones should

[4] [1952] W.N. 506.

[5] 14 App.Cas. 337, 345, 359.

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take due care to see that their forecasts were not misleading, false and deceptive. If, on the other hand, they were reckless, they should be liable to a penalty. There was nothing in this so repugnant to natural justice that he ought to limit the meaning of words which Parliament had used. It had, after all, given the courts ample latitude in the matter of punishment, enabling them to discriminate properly between moral turpitude and mere recklessness. It was not without interest to observe that Lord Herschell in *Derry* v. *Peek* [6] foreshadowed that Parliament might one day provide against negligence which was merely a breach of moral duty. Such weight as attached to that which he had just said was not diminished because this part of section 12 (1) dealt also with statements and promises.

With those considerations in mind, and remembering all that had been urged on behalf of the accused, he could not accede to the argument that the word "reckless" in section 12 (1) should receive a restricted meaning connoting only such recklessness as was dishonest. He thought it must be left to bear its full meaning, and be construed, therefore, as covering also the case where there was a high degree of negligence without dishonesty.

He thus held count 3 of the indictment to be good, and gave judgment for the Crown.

At the conclusion of the 15-day trial, Donovan J. in his summing-up to the jury, directed them as to the law on count 3 and the meaning of "reckless." The jury on October 13, 1952, found the defendants Bates and Russell guilty on the first two counts in the indictment, but did not return a verdict on count 3. Donovan J. sentenced them to 12 months' imprisonment.

The defendant Russell appealed, and the second ground of appeal in the original notice of appeal was that the judge had misdirected the jury as to the law relating to count 3 of the indictment.

*F. H. Lawton* for the appellant. The second ground of appeal relates to the judge's direction in law, but as the jury have not in fact returned a verdict on that count, all that can be done before this court is to invite the court's attention to that count.

[LORD GODDARD C.J. That is really one of the most important points in this case, except that it does not arise. If we were to give an opinion on it, it would be said to be merely obiter. It was unfortunate that the magistrate did give judgment on it, because if we had given a judgment we would differ from him.]

*Sir Reginald Manningham-Buller Q.C., Sol.-Gen., R. C. Vaughan Q.C.* and *Neville Faulks* for the Crown. They were not called on to reply.

[6] Ibid. 376.

The case is reported only in respect of the *obiter dicta* of the court relevant to the meaning of "reckless."

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LORD GODDARD C.J., in the course of delivering the judgment of the court:—A certain Colonel Sweeny was originally charged with these defendants, but was dismissed from the case by the chief magistrate on grounds which, if we could go into them in this case we gladly would, because it is obvious the judge took a different view with regard to the law which the chief magistrate had expressed when he discharged Colonel Sweeny; and, as the judge did express a view on the motion to quash the indictment, I see no reason why the court should not say that they agree with the view of the judge on the statute. But no doubt the matter will arise again substantively in the future, and can then be dealt with; it does not arise here because the jury were not called on to deal with whether the statements were made recklessly because they were made fraudulently, and the statute distinguishes between a fraudulent statement and a reckless statement. In substance, Colonel Sweeny obtained the information, he being a director of the company called Federated Trust, who were the underwriters in this matter. The information which was contained in this letter, which was on Joseph Sebag & Co.'s notepaper was compiled by Colonel Sweeny. It was revised, and so forth, by the two defendants, and that was the information on which Federated Trust subscribed, and the information which in fact did go to the public after the shares were placed on the market.

*Appeal dismissed.*

Solicitors: *Claude Hornby & Co.; Solicitors, Board of Trade.*

M. M. H.

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[CHANCERY DIVISION.]

* *In re* MASTERS, DECD.

1952
*Dec.* 18.

[1951, M. 1285.]

Danckwerts J.

*Administration — Intestacy — Corporate administrator and trustee — Right to remuneration—Trustee Act*, 1925 (15 *Geo.* 5, *c.* 19), *s.* 42.

The court has jurisdiction under section 42 of the Trustee Act, 1925, to authorize proper remuneration to be paid to a corporate body which has been appointed by the court to be administrator and trustee of the estate of an intestate.

There is also inherent jurisdiction in the court to authorize such remuneration, whether the appointment has been made by the court or not.

*In the Estate of Young* [1934] W.N. 106 (50 T.L.R. 424); *In re Freeman's Settlement Trusts* (1887) 37 Ch.D. 148; *Marshall* v. *Holloway* (1820) 2 Sw. 432, and *In re Macadam* [1946] Ch. 73 (62 T.L.R. 48) ([1945] 2 All E.R. 664) applied.

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MASTERS, DECD., *In re.*

ADJOURNED SUMMONS.

Leslie Ninian Masters died on March 9, 1949, intestate, leaving surviving him a widow and three children who were at that time infants. On November 22, 1949, a grant of administration of his estate was made to two administrators, as infants were involved in the beneficial interests; the administrators so appointed being Coutts & Co., a trust corporation (the present applicants), and the widow. No order for the remuneration of the applicants was made at the time of the grant.

The estate was substantial, being sworn at £95,000 gross and £80,000 net. After meeting death duties and costs of administration, there remained £45,500 as the capital value of the estate when this summons was taken out in April, 1951. The question raised was whether, under the provisions of section 42 of the Trustee Act, 1925,[1] or under the inherent jurisdiction of the court, there was jurisdiction now to authorize the applicants to charge proper remuneration for acting as administrators and trustees.

*D. H. McMullen* for the applicants.

*Michael Browne* for the widow and eldest son (now of age).

*M. O'C. Stranders* for the infant sons.

The cases cited in argument are referred to in the judgment.

DANCKWERTS J. It is quite plain, in view of the size of the estate, that it was reasonable in the circumstances to employ the services of a trust corporation, the applicants, as there was a good deal of work to be done in the administration of the estate in the carrying out of the trusts under the Trustee Act, 1925.

The summons raised a number of matters of an administrative kind which have mostly been dealt with in chambers already; but one of them is the question of remuneration of Coutts & Co., acting as administrators and trustees. That has been adjourned into court because of a doubt raised as to the jurisdiction of the court to authorize remuneration to be paid out of the estate to the applicants. It is quite plain there is jurisdiction to authorize such remuneration under section 42 of the Trustee Act, 1925.

[His Lordship read sections 42, 68 (17) and 69 (1) and continued:] Those provisions show quite plainly that the duties of

[1] Trustee Act, 1925, s. 42: "Where "the court appoints a corporation, "other than the Public Trustee, to "be a trustee either solely or jointly "with another person, the court may "authorize the corporation to charge "such remuneration for its services "as trustee as the court may think "fit."

S. 68 (17): "'Trust' does not "include the duties incident to an "estate conveyed by way of mortgage, "but with this exception the expres- "sions 'trust' and 'trustee' extend "to implied and constructive trusts ". . . and to the duties incident to "the office of a personal represen- "tative, and 'trustee,' where the "context admits, includes a personal "representative. . . ."

S. 69 (1): "This Act, except where "otherwise expressly provided, applies "to trusts including, so far as this "Act applies thereto, executorships "and administratorships constituted "or created either before or after the "commencement of this Act."

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an administrator are included in the duties of a trustee for the purposes of this Act, and that therefore section 42 will apply, as regards the power to award remuneration, to the case of a trust corporation which is appointed to be administrator of an estate.

That view has in fact been adopted in the Probate Division by Langton J. in *In the Estate of Young*,[2] when the court was appointing the National Bank of Scotland, a trust corporation, to be administrator of two estates; and the judge ordered the grants to issue, directing that the grantees should, in both cases, have power to charge according to their authorized scale.

Apart from the statutory jurisdiction conferred by section 42 of the Trustee Act, 1925, it is also quite plain there is inherent jurisdiction in the court to authorize remuneration of a trustee, whether appointed by the court or not. Authority for that is to be found in *In re Freeman's Settlement Trusts*[3] and *Marshall* v. *Holloway*.[4] The same course was really adopted in *In re Macadam*,[5] reported on the question of the accountability of the trustee for certain directors' fees; but the report[6] shows that Cohen J. left to be decided the question whether in the circumstances of that case he should authorize the trustee in fact to retain the directors' fees under the inherent jurisdiction of the court, and that course was to my knowledge adopted and the remuneration was in fact authorized.

I also remember a case before Eve J., in which I appeared as counsel, before the passing of the Act of 1925 in which, though I do not remember the exact name of the trust, I do remember that the very same bank, Coutts & Co., trustees of a particular trust estate, were authorized by Eve J. to receive remuneration.

There is, in my view, no doubt whatever about the inherent jurisdiction of this court to authorize remuneration. That, therefore, decides the question of jurisdiction and I must now proceed to consider on what scale I should allow remuneration in the present case.

*Application granted.*

Solicitors: *Ravenscroft, Woodward & Co.; Gibson & Weldon, for Bellamy-Knights & Griffin, Shoreham; Farrer & Co.*

F. R. D.

[2] [1934] W.N. 106 (50 T.L.R. 424).
[3] (1887) 37 Ch.D. 148.
[4] (1820) 2 Sw. 432.
[5] [1946] Ch. 73 (62 T.L.R. 48) ([1945] 2 All E.R. 664).
[6] Ibid. 82, 83.

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Harman J.

# * BADDELEY AND OTHERS (TRUSTEES OF THE NEWTOWN TRUST) *v.* INLAND REVENUE COMMISSIONERS.

*Revenue—Stamp duty—Charity—Conveyances of property to trustees on trusts for "... social and physical training and recreation" and "the moral social and physical well being of persons resident "in" named localities who "are members or likely to become "members of the Methodist Church"—Not for relief of poverty—Recreation not charitable—Whether "members of the Methodist "Church" a section of the community—Conveyances properly assessed to ad valorem stamp duty as voluntary conveyances or conveyances on sale—Finance Act*, 1947 (10 & 11 *Geo.* 6, *c.* 35), *ss.* 52 (1), (2); 54 (1).

By the first of two deeds of even date land on which were a mission church, lecture room and store was transferred to trustees: and by the second four other pieces of land were transferred to them, and it was directed that a specified sum be held as though it were capital money arising from the sale of those pieces of land.

Shortly, the trusts were, of the first deed: (*a*) the promotion of the religious, social and physical well-being of persons resident in West Ham and Leyton by the provision of facilities for religious services and instruction; (*b*) the social and physical training and recreation of such persons so resident as were (i) in the opinion of the leaders for the time being of the Stratford Newtown Methodist Mission members or likely to become members of the Methodist Church and (ii) of insufficient means otherwise to enjoy the advantages provided by the trust; (*c*) the promotion and encouragement of all forms of such activities as were calculated to contribute to the health and well-being of such persons: and of the second deed, (*a*) the promotion of the moral, social and physical well-being of persons resident in the same boroughs and with the same qualifications as to religious belief and means as in the first deed: (i) by the provision of facilities for moral, social and physical training and recreation and (ii) by permitting and encouraging all forms of such activities as were calculated to contribute to the health and well-being of such persons.

The Commissioners held that both deeds fell to be stamped under Sch. 1 to the Stamp Act, 1891, as either conveyances on sale or voluntary conveyances to be treated as such under section 74 of the Finance (1909–1910) Act, 1910; and that they were accordingly liable to ad valorem duty at the rate of £1 for every £50 under section 52 of the Finance Act, 1947. The trustees appealed against the assessments, contending in each case that the stamp duty ought to be at one half that rate, on the ground that the conveyances were made to "a body of persons established for charitable purposes only "or to the trustees of a trust so established" within section 54 (1) of the Finance Act, 1947. Thus, the question in each case was whether the appellants were trustees of a trust established for charitable purposes only.

*Held*, dismissing the appeals, (1) that the trusts of the deeds were not for the relief of poverty, as no question of need was involved; *Spiller* v. *Maude* (1886) 32 Ch.D. 158n. and *In re de Carteret* [1933] Ch. 103 (48 T.L.R. 555) distinguished; (2) that, as one of the purposes was "recreation," they were not for objects

which were charitable in the legal sense, and so did not come within the fourth category of Lord Macnaghten's classification in *Special Commissioners of Income Tax* v. *Pemsel* [1891] A.C. 531, 583 (7 T.L.R. 657) as being "for other purposes beneficial to the community." *Trustees of Londonderry Presbyterian Church House* v. *Inland Revenue Commissioners* (1946) 27 T.C. 431 ([1946] N.Ir. 178) followed. *Williams' Trustees* v. *Inland Revenue Commissioners* [1947] A.C. 447 (63 T.L.R. 352) ([1947] 1 All E.R. 513); *Shillington* v. *Portadown Urban District Council* [1911] 1 Ir.R. 247; *In re Hadden* [1932] 1 Ch. 133 (48 T.L.R. 9) and *In re Nottage* [1895] 2 Ch. 649 (11 T.L.R. 519) considered.

*Semble*, that Methodists resident in West Ham and Leyton constituted a section of the community, united by adherence to or inclination towards a form of Christianity and having a territorial qualification; so that the court, had it held that recreation was a charitable object, would have held in the present case that the purpose was public recreation.

APPEALS by cases stated.

These were appeals by way of cases stated from decisions of the Inland Revenue Commissioners, under the Stamp Act, 1891, that two conveyances, both dated August 21, 1951, and made in favour of the appellants, fell to be stamped under the First Schedule to the Act, as either conveyances on sale or voluntary conveyances to be treated as such under section 74 of the Finance (1909–1910) Act, 1910, and, accordingly, were liable to ad valorem duty at the rate of £1 for every £50 under section 52 of the Finance Act, 1947. The appellants contended in each case that the stamp duty ought to be at one half of that rate, on the ground that the conveyances were made to "a body of persons established "for charitable purposes only or to the trustees of a trust so "established" within the meaning of section 54 (1) of that Act.[1] In each case, therefore, the question was whether the appellants were trustees of a trust established for charitable purposes only.

The first deed transferred to the trustees land on which were already built a mission church, lecture room and store. The second transferred four pieces of land and dealt with a sum of

[1] Finance Act, 1947, s. 52 (1): "Subject to the following provisions "of this Part of this Act, the stamp "duties chargeable under the provi- "sions mentioned in this section shall, "as from the first day of August, "1947, be double the duties which "would have been chargeable immedi- "ately before that day. (2) The said "provisions are—(*a*) the following "headings or parts of headings in the "First Schedule to the Stamp Act, "1891, namely, . . . (ii) Conveyance "or Transfer, whether on sale or "otherwise; (iii) Conveyance or "Transfer on sale. . . ."

S. 54 (1): "This Part of this Act "so far as it increases any duty "chargeable under or by reference to "the heading 'Conveyance or Trans- "fer whether on sale or otherwise,' "the heading 'Conveyance or Transfer "'on sale,' or the heading 'Lease or "'Tack,' in the First Schedule to the "Stamp Act, 1891, shall not apply in "any case where the conveyance, "transfer or letting is made or agreed "to be made to a body of persons "established for charitable purposes "only or to the trustees of a trust so "established: Provided that no in- "strument not stamped with the duty "to which it would apart from this "subsection be liable shall be deemed "by virtue of this subsection to be "duly stamped unless it has in "accordance with the provisions of "section 12 of the Stamp Act, 1891, "been stamped with a particular "stamp denoting that it is duly "stamped."

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£10,000 as an endowment fund. Both conveyances bore the same date and were intimately connected, though the trusts were not stated in the same terms. The appellants, who were throughout called "the trustees," were directed to allow the property in each case "to be appropriated and used by the leaders for the "time being of the Stratford Newtown Methodist Mission under "the name of 'The Newtown Trust'," which was in the deeds referred to as "the Foundation." From that point the words of the two deeds diverged. The first, which was the conveyance of the mission church, lecture room and store, provided as follows in clause 2 (*a*) and (*b*): "The trustees shall permit the said "property to be appropriated and used by the leaders for the "time being of the Stratford Newtown Methodist Mission under "the name of 'the Newtown Trust' (hereinafter called 'the "'Foundation') for the promotion of the religious social and "physical well being of persons resident in the County Boroughs "of West Ham and Leyton in the County of Essex by the "provision of facilities for religious services and instruction and "for the social and physical training and recreation of such afore-"mentioned persons who for the time being are in the opinion "of such leaders members or likely to become members of the "Methodist Church and of insufficient means otherwise to enjoy "the advantages provided by these presents and by the provision "of facilities for religious social and physical training and "recreation and [sic] by promoting and encouraging all forms of "such activities as are calculated to contribute to the health and "well being of such persons. . . . (*b*) The trustees may from time "to time: (i) maintain the said property or any part thereof as a "centre for religious services and instruction and for social and "physical training and recreation."

The second deed, which dealt with the four pieces of land adjacent to the mission hall comprised in the first deed and described as being "laid out as a playing field and upon parts "of which a pavilion and a groundsman's bungalow have been "erected" provided by clause 2: "(*a*) The trustees shall permit "the said property to be appropriated and used . . . for the "promotion of the moral social and physical well-being of persons "resident in the County Boroughs of West Ham and Leyton in "the County of Essex who for the time being are in the opinion "of such leaders members or likely to become members of the "Methodist Church and of insufficient means otherwise to enjoy "the advantages provided by these presents by the provision of "facilities for moral social and physical training and recreation "and by promoting and encouraging all forms of such activities "as are calculated to contribute to the health and well-being of "such persons. . . . (*b*) The trustees may from time to time: "(1) maintain the said property or any part thereof as a ground "for moral social and physical training and recreation." The £10,000 was to be held on trust as though it were capital money arising from the sale of land settled by the second deed.

On both of the cases stated, each of which was dated August 13, 1952, the questions for the opinion of the court were (1) Was the conveyance liable to duty as assessed by the Commissioners? (2) If not, to what duty was it liable?

*S. Pascoe Hayward Q.C.* and *W. F. Waite* for the appellants.
*Geoffrey Cross Q.C.* and *J. H. Stamp* for the Crown.

The following cases, as well as those referred to in the judgment, were cited in argument: *In re Baynes* [2]; *In re Hood* [3]; *In re Strakosch* [4]; *In re Orrel* [5]; *In re South American and Mexican Co., ex parte Bank of England.* [6]

December 18. HARMAN J., reading his judgment, after stating the facts, continued:—There are in both deeds limitations over on the failure of the primary trust, but in my judgment these do not affect the present question. Charity, we are taught, covers a multitude of sins, but whether that doctrine ought to extend to the draftsman of these documents may, I think, well be doubted. It was conceded by the Crown during the argument before me that the first deed contained words to which no meaning could be attached, and which must have been inserted by mistake. The words are these "and by the provision of "facilities for religious social and physical training and "recreation and." If these words are treated as cut out of the clause the trusts may be paraphrased as follows:

(*a*) The promotion of the religious social and physical well-being of persons resident in the County Boroughs of West Ham and Leyton by the provision of facilities for religious services and instruction.

(*b*) The social and physical training and recreation of such persons so resident as are (i) in the opinion of the leaders members, or likely to become members of the Methodist Church, and (ii) of insufficient means otherwise to enjoy the advantages provided by the trust.

(*c*) The promotion and encouragement of all forms of such activities as are calculated to contribute to the health and well-being of such persons.

The trusts of the second deed are more shortly stated and may be thus paraphrased:

(*a*) The promotion of the moral social and physical well-being of persons resident in the same boroughs and with the same qualifications as to religious belief and means as in the first deed.

(1) By the provision of facilities for moral social and physical training and recreation and

[2] [1944] 2 All E.R. 597.
[3] [1931] 1 Ch. 240.
[4] [1949] 1 Ch. 529 (65 T.L.R. 389) ([1949] 2 All E.R. 6).
[5] (1879) 12 Ch.D. 681.
[6] [1895] 1 Ch. 37.

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(2) By promoting and encouraging all forms of such activities as are calculated to contribute to the health and well-being of such persons.

For the purposes of what follows I may exclude trust (*a*) in the first deed which would seem to be a charitable object as being for the advancement of religion. What then remains? In my judgment, the two deeds in other respects are in terms so alike that they can be considered together. Are the objects stated exclusively charitable, that is to say, are there objects for which the trustees could allow the property to be used which are not charitable objects? They could, in my judgment, without a breach of trust, allow the property to be used either for the physical training or for the recreation of persons resident within the named boroughs, provided those persons either are of the Methodist belief in the leaders' opinion, or in that opinion likely to become so, and are also of insufficient means to enjoy the advantages provided. These advantages may, in my judgment, include so far as the hall is concerned social activities such as tea parties or dances, or recreations such as whist drives, table tennis or billiards; and so far as the playing field is concerned (which I note in passing was formerly the property of a body called the Gaiety Lawn Tennis Club Ld.) lawn tennis or any other open air game.

It was not argued before me that by reason of the connexion of the Foundation with the Methodist Church these trusts could be said to be for the advancement of religion, an argument advanced without success in the North Irish case *Trustees of the Londonderry Presbyterian Church House* v. *Inland Revenue Commissioners* [7] which I shall have to refer to again. But it was sought to uphold them on two grounds: first, that they were for the relief of poverty, and, second, that they came within the fourth category of Lord Macnaghten's classification in *Special Commissioners of Income Tax* v. *Pemsel* [8] as being "for other "purposes beneficial to the community."

I will deal first with the poverty qualification. This is based on the words in the Statute of Elizabeth the "relief of aged "impotent and poor people." I must ask myself whether these words cover the provision of facilities for playing, for instance, billiards or lawn tennis for people who could not otherwise afford to do so. If there were no authority, I should at once answer that this was not relief of the poor. "Relief" seems to connote need of some sort, either need for a home or for the means to provide for some necessity or quasi-necessity and not merely an amusement however healthy it is.

The definition of poverty for the present purpose is not without authority. It does not mean absolute want or grinding

[7] (1946) 27 T.C. 431 ([1946] N.Ir. 178).

[8] [1891] A.C. 531, 583 (7 T.L.R. 657) (3 T.C. 53, 96).

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need. For instance, Sir George Jessel M.R. appears to have held in *Spiller* v. *Maude* [9] (reported as a note to *Pease* v. *Pattinson*) that a fund was charitable although recipients of bounty under it might have an income up to £250 a year. The authorities on the subject are collected in Maugham J.'s decision in *In re de Carteret*,[10] where he came to the conclusion that there might be a good charity for the relief of poverty though the persons to be benefited are by no means destitute. It is, however, to be observed that the class of persons whom Maugham J. there declared to be the objects of charity were widows with young children whose income was not more than £120 a year, and who were thus very much in need of an allowance to help them bring up their children. In my judgment Mr. Stamp was justified in his submission that this is not a poverty case at all, because no question of need is involved.

There remains the question whether the trust is charitable on the other ground alleged. As to this the House of Lords has recently pointed out in *Williams' Trustees* v. *Inland Revenue Commissioners* [11] that an object may be of great public utility but still not be a charity. The headnote reads as follows: "Every "object of public general utility is not necessarily a charity, "for in order to be charitable a trust must be within the spirit "and intendment of the statute 43 Eliz. 2, c. 4. Accordingly, no "trust can be charitable unless it is beneficial to the community "in a way which the law regards as charitable."

Lord Simonds says [12]: "My Lords, there are, I think, two "propositions which must ever be borne in mind in any case "in which the question is whether a trust is charitable. The "first is that it is still the general law that a trust is not "charitable and entitled to the privileges which charity confers, "unless it is within the spirit and intendment of the preamble "to the statute of Elizabeth (43 Eliz. c. 4), which is expressly "preserved by section 13 (3) of the Mortmain and Charitable "Uses Act, 1888. The second is that the classification of "charity in its legal sense into four principal divisions by Lord "Macnaghten in *Income Tax Commissioners* v. *Pemsel* [13] must "always be read subject to the qualification appearing in the "judgment of Lindley L.J. in *In re Macduff* [14]: 'Now Sir "'Samuel Romilly did not mean, and I am certain Lord "'Macnaghten did not mean, to say that every object of public "'general utility must necessarily be a charity. Some may "'be, and some may not be.' This observation has been "expanded by Lord Cave L.C. in this House in these words: "'Lord Macnaghten did not mean that all trusts for purposes

[9] (1886) 32 Ch.D. 158n.
[10] [1933] Ch. 103 (48 T.L.R. 555).
[11] [1947] A.C. 447 (63 T.L.R. 352) ([1947] 1 All E.R. 513).
[12] [1947] A.C. 447, 455 (63 T.L.R. 352, 354) ([1947] 1 All E.R. 513, 518).
[13] [1891] A.C. 531, 583 (3 T.C. 53, 96).
[14] [1896] 2 Ch. 451, 466 (12 T.L.R. 452, 453).

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" ' beneficial to the community are charitable, but that there " ' were certain beneficial trusts which fell within that category; " ' and accordingly to argue that because a trust is for a purpose " ' beneficial to the community it is therefore a charitable trust " ' is to turn round his sentence and to give it a different " ' meaning. So here it is not enough to say that the trust in " ' question is for public purposes beneficial to the community " ' or for the public welfare; you must also show it to be a " ' charitable trust. See *Attorney-General* v. *National Provin-* " ' *cial and Union Bank of England.*' [15] But it is just because " the purpose of the trust deed in this case is said to be bene- " ficial to the community or a section of the community and " for no other reason that its charitable character is asserted. " It is not alleged that the trust is (*a*) for the benefit of the " community and (*b*) beneficial in a way which the law regards " as charitable. Therefore, as it seems to me, in its mere state- " ment the claim is imperfect and must fail."

If I were free to do so, I should hold that recreation is not a charitable object. It was argued before me that this is not so having regard to the views of the legislature on this subject, and I was referred to two Acts, first, the Physical Training and Recreation Act, 1937, which set up a national council for physical training and recreation and empowered the Board of Education and local authorities to spend money on playing fields for the use of organizations having athletic objects, and, secondly, to the Education Act, 1944, by section 53 of which the education authorities are enjoined in connexion with schools to provide adequate facilities for recreation and to provide playing fields for persons enjoying State education. I do not feel impressed by these statutes which provide, no doubt, admirable activities in connexion with education and for the benefit of the public, but the State nowadays spends a deal of money on objects which no one could consider charitable in the legal sense.

I was also referred to *Shillington* v. *Portadown Urban District Council* [16] in which Barton J. held that the application of money for providing the means of healthy recreation was a good public charitable purpose in the context in which it appeared in that will. Barton J., after reciting the words of the will, which were, " For the purpose of fostering, encouraging " and providing the means of obtaining healthy recreation, " including the teaching of singing in classes or choruses, for the " residents of the town of Portadown and the surrounding " districts, and for the purpose of providing music and instru- " ments (in so far as my trustees think advisable) for the town " band," said [17]: " This direction to the trustees as to the " application of the balance or residue of the income of the trust " estate constitutes, in my opinion, a valid charitable devise and

[15] [1924] A.C. 262, 265 (40 T.L.R. 191, 192).

[16] [1911] 1 Ir.R. 247.

[17] Ibid. 256.

" bequest. The testator's purpose was a charitable or public " purpose. He wished to benefit the residents of his native town " and of its immediate neighbourhood. The benefits which he " intended to confer on them were such as he believed to be of " public advantage. That belief was rational and not contrary to " the laws of the land or the principles of morality."

I was referred further to the case of *In re Hadden* [18] where Clauson J. held that provision of means for public recreation is a charitable object within the Statute of Elizabeth. After referring to *Shillington* v. *Portadown Urban District Council*,[19] and to certain Acts of Parliament, and in particular to the Mortmain and Charitable Uses Act, 1888, he said: " That " section enacts that Part II of the Act, which relates to " assurances to charitable uses, shall not apply to an assurance " of a limited amount of land for the purposes of a park, garden, " or other land dedicated or to be dedicated to the recreation of " the public. That enactment seems to me necessarily to involve " that in the view of the legislature dedication of land to the " recreation of the public is dedication to a charitable use; and in " face of that enactment I am, I conceive, bound to hold (nor " am I at all reluctant so to do) that the provision of means for " public recreation is a charitable object within ' the meaning, " ' purview and interpretation ' of the preamble to the Act of " 43 Eliz. c. 4."

Against these authorities must be set the decision in *In re Nottage* [20] distinguished by Clauson J. on the ground that " mere " sport was no doubt not charitable. I find it difficult to see why the addition of the word " mere " constitutes a distinction, and why public recreation is not tantamount to " mere " sport. Watching a football match on Saturday afternoon may claim to be the most popular public recreation in this country, but I feel that a fund devoted to providing gate money could not be held to be a charitable activity without passing that bursting point referred to by Lord Russell in *In re Grove-Grady*.[21] However this may be, I am not without guidance in the form of *Trustees of Londonderry Presbyterian Church House* v. *Inland Revenue Commissioners* [22] where the Court of Appeal of Northern Ireland held that property conveyed subject to trusts very similar to the present, was not exempt from tax under a statute similar to the English statute. The trusts are stated as follows in the headnote: " The Appellant Trustees held certain properties " ' upon trust to permit the same or any part thereof to be used " ' as a Hall for meetings or for Social or Recreation purposes in " ' connexion with the various Presbyterian Churches in the City " ' of Londonderry and the surrounding district or as a Hostel or " ' Boarding House or as a Library or for such other . . .

[18] [1932] 1 Ch. 133, 141 (48 T.L.R. 9, 10).
[19] [1911] 1 Ir.R. 247.
[20] [1895] 2 Ch. 649.
[21] [1929] 1 Ch. 557 (45 T.L.R. 261).
[22] (1946) 27 T.C. 431 ([1946] N.Ir. 178).

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" ' purposes as the Board of Governors . . . shall . . . think " ' fit, it being the true intention and meaning of these presents " ' that the said premises shall be used for the purposes of " ' assisting and helping in religious moral social and recreative " ' life of those connected with the Presbyterian Church in the " ' City of Londonderry and surrounding district in such manner " ' as the said Board of Governors . . . shall . . . think " ' right '."

Lord MacDermott, then a judge of first instance, held these to be charitable trusts as falling within Lord Macnaghten's fourth category, but he was reversed in the Court of Appeal. I find the following passage in the judgment of Andrews L.C.J.[23]: " The " authorities, whose number is legion, upon whether particular " trusts fall within or without Lord Macnaghten's fourth " category, baffle all efforts on my part to reconcile them with " one another, and no useful purpose would be served in the " circumstances by reviewing them. Judicial minds have " operated not always consistently on facts admittedly different; " and the result can only be described as in a measure chaotic. " I shall simply content myself with saying that I find nothing " in the statutes referred to which would assist me in holding " that the trusts in the present case for religious, moral, social " and recreative purposes, excluded as I have held them to be " from Lord Macnaghten's third class, fall within the fourth " class as a valid charitable trust. The test is not whether the " objects or purposes aimed at are beneficial to or receive the " general acceptance of the community. It is simply whether " they conform or not to the requirements and essentials of a " legal charity." This is a tax case which I find to be of high persuasive authority, and I think that I ought to follow it, and to hold that the trusts in the present case are not charitable.

Had I favoured the appellants on this point as to recreation, there would still remain a difficult question as to whether the purpose was " public recreation." *Williams' Trustees* v. *Inland Revenue Commissioners*[24] above cited shows that one of the qualifications is that the object must be public; that is to say, it must benefit the community or a class of the community. This is, perhaps, best stated in *Verge* v. *Somerville*.[25] Applying the opinion there expressed to the present facts, this trust is confined to the inhabitants of two boroughs—so far so good—but not to all the inhabitants, but only to persons of insufficient means and either Methodists or likely to become Methodists. Now these three qualifications must all rest on the decision of the leaders. Whether a man is of insufficient means and a Methodist can, I suppose, be satisfactorily ascertained as a fact. Whether he is likely to become a Methodist is not ascertainable with any

[23] (1946) 27 T.C. 431, 446 ([1946] N.Ir. 178, 187).

[24] [1947] A.C. 447 (63 T.L.R. 352) ([1947] 1 All E.R. 513).

[25] [1924] A.C. 496, 499 (40 T.L.R. 279).

certainty, and it is argued that a body of persons so qualified cannot claim to constitute a class of the community, but are a mere shifting body of individuals.

It has recently been held in *Oppenheim* v. *Tobacco Securities Trust Co. Ld.*[26] that the nexus of employment was not sufficient, and it is said that this is far more definite than the nexus of being likely to become a Methodist. This question has been much canvassed recently, beginning with the judgment of Lord Greene M.R. in *In re Compton*[27] and going on with the case of *In re Hobourn Aero Components Limited's Air Raid Distress Fund*[28] and I do not pretend to be a master of all its niceties. Nor is it necessary that I should decide it having regard to the view already expressed.

It was, however, fully argued before me, and it may be right, that I should state my conclusion. On the whole, it seems to me that this is a section of the community. Its members are united by adherence to or inclination towards a form of Christianity. They must have a territorial qualification, as was held in *Goodman* v. *Mayor of Saltash*[29] and they must pass a means test. The nexus is not a personal one. I cannot subscribe to the view expressed by Babington L.J. in the Irish case already cited that adherence to the Presbyterian faith in the town of Derry will not do. I prefer the contrary views of Lord MacDermott and Andrews L.C.J. If Presbyterians in Derry are not a class for this purpose, then Jews in Whitechapel are not, nor Christians in Hoxton, and it seems to me that this kind of reasoning leads to absurdity. Accordingly, if I had held that recreation was a charitable object, I should have held that the purpose here was public recreation.

As it is, I dismiss the appeals.

*Appeals dismissed.*

Solicitors: *Kenneth Brown, Baker, Baker*; *Solicitor of Inland Revenue.*

K. R. A. H.

[26] [1951] A.C. 297 ([1951] 1 T.L.R. 118) ([1951] 1 All E.R. 31).

[27] [1945] Ch. 123 (61 T.L.R. 167) ([1945] 1 All E.R. 198).

[28] [1946] Ch. 194 (62 T.L.R. 313) ([1946] 1 All E.R. 501).

[29] (1882) 7 App.Cas. 633.

[QUEEN'S BENCH DIVISION.]

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*Dec.* 2, 3, 4, 16.

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# * J. H. PIGOTT & SON *v.* DOCKS AND INLAND WATERWAYS EXECUTIVE.

[1952, P. No. 1864.]

*Shipping—Dock—Statutory authority—Tug and towage—Shipping and unshipping of goods—Exclusion of privately owned tugs—Humber Commercial Railway and Dock Act*, 1901 (1 *Edw.* 7, *c. ccii*), *ss.* 66, 70—*Harbours, Docks, and Piers Clauses Act*, 1847 (10 *&* 11 *Vict. c.* 27), *s.* 33.

The defendants, a statutory dock authority, administered a dock under special Acts as modified and amended by other and general Acts, the special Acts incorporating the Harbours, Docks and Piers Clauses Act, 1847, except so far as expressly varied by or inconsistent with them. From 1951, the plaintiffs as tug owners had provided services for towing in and out of the dock vessels engaged in shipping and unshipping goods at the dock. In March, 1952, the defendants sought to exclude the plaintiffs' tugs from competing with their own tugs save on their own terms. They claimed the right to do so as owners of the dock and by virtue of the provisions of sections 66 and 70 of the special Act, the Humber Commercial Railway and Dock Act, 1901.

*Held*, that by virtue of section 33 of the Act of 1847 all persons and vehicles, including tugs, were entitled, on payment of the appropriate dues, to freedom of access to the dock for the shipping and unshipping of goods. Nothing in the special Acts made it compulsory for ships to use the defendants' tugs, or expressly or by implication entitled the defendants to exclude the tugs of others. Accordingly, the plaintiffs were entitled in the ordinary course of their business to employ their tugs in providing towage services to vessels entering or leaving the dock for the shipping or unshipping of goods and/or embarking or landing of passengers.

Dicta in *British Trawlers Federation Ld.* v. *London & North-Eastern Railway Co.* [1933] 2 K.B. 14; sub nom. *London & North Eastern Railway Co.* v. *British Trawlers' Federation Ld.* [1934] A.C. 279 (50 T.L.R. 275) relied on.

*Great Central Railway Co.* v. *North-Eastern Steam Fishing Co.* (1906) 22 T.L.R. 520 distinguished.

ACTION.

The facts, as stated by Sellers J., were as follows:—

The plaintiffs, J. H. Pigott & Son, carried on a family business as steam tug owners, which had provided tug services at Union Dock, Grimsby, since 1886. During 1951 and 1952, they extended their services to the Immingham Docks in the County of Lincoln. The defendants, the Docks and Inland Waterways Executive, administered Immingham Docks, under delegation from the British Transport Commission, under and subject to statutory powers and restrictions derived as follows: The Humber Commercial Railway and Dock Act, 1901, authorized the construction of a dock adjoining the existing docks at Grimsby. The Humber Commercial Railway and Dock Act,

1904, empowered the Humber Commercial Railway and Dock Company to construct a new dock and abandon that which had been authorized under the Act of 1901. Both the Acts by section 2 respectively incorporated the Harbours, Docks and Piers Clauses Act, 1847 [1] (except so far as expressly varied by or inconsistent with the Acts), and by section 17 of the Act of 1904 various sections, including sections 66 and 70 [2] of the Act

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[1] The Harbours, Docks and Piers Clauses Act, 1847, s. 33, provides: "Upon payment of the rates made "payable by this and the special Act, "and subject to the other provisions "thereof, the harbour, dock, and pier "shall be open to all persons for the "shipping and unshipping of goods "and the embarking and landing of "passengers."

[2] The Humber Commercial Railway and Dock Act, 1901, provides:—

S. 66: "With regard to the management use and regulation of the "dock works of the company and "the regulation and control of vessels "resorting thereto the company may "have and exercise the following "powers:—

"(1) Subject to the right of the "owner or master of any vessel to "employ his crew in the performance "of any of the services hereinafter "mentioned the company may if and "when they think fit employ or "license any tugs boatmen riggers "hobblers and other proper persons "for the purpose of effectually and "speedily working any vessel within "the limits of the dock-master's "authority or within or into or out "of the dock or for removing any "such vessel from time to time from "any place in the dock to any other "place in the dock in such manner as "they may consider will best effect "the purposes aforesaid and the "master or owner of any such vessel "shall pay to the company or such "licensed persons such reasonable "sum in respect to any such service "as the company may authorize or "demand:

"(2) For the better navigation of "vessels in the dock and within the "limits of the dock-master's authority "and for the use and accommodation "of vessels frequenting the dock the "company may from time to time "license such number of boatmen "riggers hobblers and other proper "persons for such periods yearly or "otherwise and on such terms and "conditions as they may think fit and "may charge such sum for every such "licence at a rate not exceeding five "shillings per annum as they may "think fit Provided always that the "company may at any time revoke "any such licence Provided also that "nothing in this Act shall entitle "such boatmen riggers hobblers and "other persons to act as pilots or to "supersede or take the place of any "licensed pilot Provided also that "nothing in this Act shall interfere "with any existing rights of pilots or "pilotage:

"(3) Whenever any delay which in "the opinion of the dock-master is "unnecessary or excessive shall take "place in the working or removing "any vessel within the limits of the "dock-master's authority or in the "discharging or loading and trimming "or in any service necessary to be "performed in connexion with any "vessel or cargo of such vessel either "from the inadequacy or improper "conduct of the persons employed or "from the negligence or default of "the master or person in charge of "such vessel the company may em-"ploy a sufficient number of suitable "persons to work or remove or to "discharge or load or perform any "service in connexion with any vessel "or the cargo of such vessel or to "assist in working or removing dis-"charging or loading or trimming the "same and the master or owner of "such vessel shall on demand pay to "the company such reasonable sum "for any or every of such services as "the company may demand and the "master or person in charge of such "vessel who shall not properly clear "the deck of his vessel by stowing "away all such articles as may im-"pede the delivery or loading of the "cargo thereof upon being required "so to do by the dock-master shall "for every such offence be liable to a "penalty not exceeding five pounds:

"(4) The company may by agree-"ment with the owner consignor or "consignee of any coal coke culm "steel iron ore or other ore timber "goods wares and merchandise to be "shipped into or unshipped from any "vessel in the dock or with the dock "or with the owner or master of any

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of 1901, were made to apply to the dock, railway and other works authorized by the Act of 1904 as if they had been re-enacted in that Act. Provision was made for the abandonment of the original works, and section 53 of the Act of 1904 and the third schedule to that Act authorized a lease for 999 years of the new dock and works to the Great Central Railway Company. By the Railways Act, 1921, and S.R. & O. 826 of 1923, the London & North-Eastern Railway acquired the rights of both the lessors and the lessees and became owners of the whole undertaking. By the Transport Act, 1947, the dock became vested in the Transport Commission, and by an executive order came under the control of the defendants in 1948.

The defendants owned two tugs which, until 1951, performed most of the towage services required at Immingham Docks, and the tugs of the plaintiffs and others from Hull made only occasional visits. But during 1951/52 the export of coal from Grimsby, mainly coastwise, greatly increased, the British Electricity Authority in particular loading regular cargoes of coal from the port. In response to direct requests, and because there was an obvious need for tugs, the plaintiffs acquired two small-sized tugs suitable for the type of vessels frequenting Immingham Docks. Their tugs were available, frequently patrolling the river off Immingham Docks awaiting engagement, and were much employed. Although the traffic of the docks had greatly increased, the defendants' own tugs were often idle during 1951/52, having lost the trade to their competitors the plaintiffs, who were apparently supplying a more attractive service.

" vessel disembark discharge and land " weigh ship put on board and trim " such coal coke culm steel iron ore " or other ore timber goods wares and " merchandise and may recover and " receive for all or any of such ser- " vices and for any other work labour " or service performed by the company " in respect of such coal coke culm " steel iron ore or other ore timber " goods wares or merchandise and " for the use of any shipping loading " trimming or discharging appliances " works or conveniences such reason- " able rates as may be agreed upon " between the company and such " owner consignor consignee or master " respectively as though the same " were tonnage rates payable under " this Act."

S. 70: " The company for the pur- " poses of and in connexion with the " dock may build purchase contract " for or hire or license and may main- " tain and use steamers tugs lighters " and other ships and boats and may " fix such rates or charges as may " appear to them reasonable for or in " respect of the use thereof and such " rates or charges shall be paid by " the owner agent master consignee " or other person having charge of " any vessel obtaining or demanding " the assistance or use of any such " steamers tugs or lighters or other " ships or boats to the company or the " person with whom they may con- " tract (as the case may be) and such " rates and charges shall be due and " payable whether such steamers tugs " lighters or other ships or boats shall " be actually employed or not Pro- " vided the assistance or use thereof " shall have been required and shall in " consequence of such requisition have " been tendered by the master or other " person having the command of such " steamer tug lighter or other ship or " boat Provided always that nothing " in this Act contained shall be deemed " or construed to authorize the com- " pany to require any owner agent " master consignee or other person " having charge of any vessel lighter " or river craft to employ hire or use " any such steamer tug lighter or " other ship or boat."

In March, 1952, the defendants threatened generally to exclude tugs (which were in substance the plaintiffs' tugs only) from providing tug services for vessels entering and leaving Immingham Docks and to restrict and reserve the necessary towage services to their own tugs or tugs hired by them under a formal hiring agreement. They submitted a draft of such an agreement to the plaintiffs, and in form stated that they were prepared to enter into agreement with the plaintiffs for the hire of their tugs. The defendants' documents disclosed, however, that they had little intention of calling on the services of the plaintiffs' tugs under any agreement entered into, preferring to hire tugs from a firm in the somewhat more remote port of Hull.

The plaintiffs thereupon instituted proceedings for a declaration that on payment of the rates made payable under the Humber Commercial Railway and Dock Act, 1901, and any statutory amendment or modification thereof, they were entitled in the ordinary course of their business to employ their tugs in providing towage services to vessels entering or leaving Immingham Docks for the shipping and unshipping of goods and/or the embarking or landing of passengers.

By their defence the defendants admitted that the object of excluding the plaintiffs' tugs was to prevent competition so that full employment might be provided for their own tugs. They further admitted that there was a greater demand for towage services than they could supply with their own tugs, but stated that they proposed to meet that by an arrangement for hiring additional tugs as and when required from Hull. They relied on the powers conferred on them by statute and on their powers as owners of the dock.

*Sir Robert Aske Q.C.* and *G. G. Honeyman* for the plaintiffs.

*A. A. Mocatta Q.C.*, *J. P. Ashworth* and *R. J. Parker* for the defendants.

The following cases were cited in argument:—*Great Central Railway Co.* v. *North-Eastern Steam Fishing Co. Ld.*[3]; *Dick* v. *Badart*[4]; *Port of London Authority* v. *Cairn Line of Steamships Ld.*[5]; *Municipal Corporation of City of Toronto* v. *Virgo*[6]; *London Association of Shipowners and Brokers* v. *London and India Docks Joint Committee*[7]; *British Trawlers Federation Ld.* v. *L. & N. E. Ry. Co.*[8]; *L. & N. E. Ry. Co.* v. *British Trawlers' Federation Ld.*[9]; *Barker* v. *Midland Railway*[10]; and *Perth General Station Committee* v. *Ross.*[11]

*Cur. adv. vult.*

[3] (1906) 22 T.L.R. 520.
[4] (1888) 10 Q.B.D. 387.
[5] [1918] 1 K.B. 497 (29 T.L.R. 229).
[6] [1896] A.C. 88 (12 T.L.R. 46).
[7] [1892] 3 Ch. 242 (8 T.L.R. 717).
[8] [1933] 2 K.B. 14.
[9] [1934] A.C. 279 (50 T.L.R. 275).
[10] (1856) 18 C.B. 46.
[11] [1897] A.C. 479 (13 T.L.R. 546).

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December 16, 1952. SELLERS J. stated the facts and continued:—The whole question depends on whether the defendants, as the body responsible for the dock undertaking, are entitled to exclude tugs of the plaintiffs and others, and reserve towage services to their own tugs or such as they wish to hire to assist the services.

The plaintiffs claim that section 33 of the Harbours, Docks and Piers Clauses Act, 1847, gives them a right to take their tugs into the defendants' docks for such purposes at least as they have been recently engaged in and for which alone they contemplate using them in the future. The marginal note to the section is as follows: "Harbour, dock, and pier to be free to public on "payment of rates." The section provides: "Upon payment "of the rates made payable by this and the special Act, and "subject to the other provisions thereof, the harbour, dock, and "pier shall be open to all persons for the shipping and unshipping "of goods, and the embarking and landing of passengers." The section provides that the docks shall be open to all persons. It does not say "to all ships or vessels," but it clearly includes them. The freedom of access is limited by the words "for the "shipping and unshipping of goods." To be open for the shipping and unshipping of goods a dock must of necessity be open for many and varied activities in and about the dock without which there could be no shipping or unshipping of goods. There could be no shipping of goods without a ship or without goods. Both must enter the dock. In ordinary circumstances, and certainly those which exist at Immingham, goods destined for shipment require a vehicle of some kind to get them to the ship's side, and in many cases, and frequently at Immingham, a ship requires a tug or tugs to get her to her berth for loading. Likewise goods have to be removed by vehicle from the quay after discharge, and ships have to be moved out after loading or discharge.

A tidal river flows past the entrance to Immingham Docks, and a vessel entering and leaving has to allow for the effect of the current on the ship's course and manoeuvres. There is a risk of fouling the piers or jetties at the entrance, and to ensure safe movement to and from a berth in the dock a tug is frequently used by a vessel entering or leaving, and some vessels use more than one tug. For shipping and unshipping to take place in any commercial or business sense, it is necessary to employ skilled stevedores and labourers to load, discharge, trim, stow or otherwise handle the cargo on the ship and on the quay.

In interpreting the section, I would hold that any of the persons providing any of the facilities which I have mentioned and the persons engaged in such activities are persons to whom a dock must be open if it is to be open for the shipping and unshipping of goods. I can see no real distinction between the contractor who, by his vehicles, brings in the goods for shipment or removes them after discharge, the tug owner who, by his tugs,

brings in and takes out vessels engaged in the shipping and unshipping of goods, and the shipowner who brings his ship to the port aided or unaided by tugs. They are all performing services without which goods cannot be shipped or unshipped by vessels using the port; and the section makes no discrimination between persons. Providing that they resort to the docks for the shipping and unshipping of goods they are on an equality, and the shipowner does not appear to have any greater or better right than a stevedore or a haulage contractor, or, I could add, a tug owner, though the rights of all are subject to the payment of the appropriate dues which the dock authority may prescribe and subject to any regulation and control which the authority may have power, expressly or impliedly, to exercise.

The section in question has been considered by the courts and once by the House of Lords, but the present case is not, I think, precisely covered by authority; and, having stated the view to which I incline on the construction and application of the section, I must see whether authority supports or refutes it.

In *London and North-Eastern Ry. Co.* v. *British Trawlers Federation Ld.*[12] Lord Tomlin, referring to section 33 of the Act of 1847, said[13]: "I do not think that the words 'shipping' and "'unshipping' are to be confined to the narrow operation of lifting "goods from the quay to the ship or from the ship to the quay, "nor do I think that the access under the section can be limited "to access in person without any vehicle. It must I think be "such access with such vehicle as the party seeking it bona fide "deems necessary, but it is an access always subject to be con-"trolled by valid and operative by-laws." Lord Macmillan expressed his opinion in this way[14]: "The harbour is to be open "to all for the purpose of unshipping goods. It is manifest that "this must include the consequential purpose of removing the "goods unshipped, and such removal necessitates the employ-"ment of the appropriate vehicles."

Those are not the narrow interpretations for which the defendants contend, and I think that they support and do not curtail the views expressed in the Court of Appeal in the same case.[15] Scrutton L.J. said[16]: "A great deal of discussion took "place as to the true meaning of this section. Counsel for the "railway company argued, without, I think, much conviction, "that 'unshipping' had a very limited meaning; it only covered "the operation of transferring goods from the ship to the quay, "and the dock company had full control over the subsequent "operation of taking the goods from the quay out of the dock "premises. This argument, besides being quite unbusinesslike, "gave no effect, in my opinion, to the words 'shall be open to the "'public.' The passenger has a right to 'embark' by entering "the dock premises, proceeding to the ship and embarking

[12] [1934] A.C. 279 (50 T.L.R. 275).
[13] [1934] A.C. 279, 298.
[14] Ibid. 301.
[15] [1933] 2 K.B. 14.
[16] Ibid. 29, 30.

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" thereon; he has a right to ' land ' by leaving the ship and pro-
" ceeding over the dock premises to their limits. The ' shipper '
" of goods has a right to bring them on to the dock premises, and
" through those premises to the ship on which they are shipped.
" He has a right to ' unship ' them by taking them from the ship
" and out of the dock premises." Further on, the same Lord Justice said [17]: " I am clearly of opinion that the unshipper has
" a right to the use of reasonable vehicles, motor or horse-drawn,
" subject to reasonable regulation by the dock company as to
" pace, place and time, having regard to the reasonable rights
" of other members of the public and of the dock company. I
" am also of opinion that the dock company has no right to
" impose limitations on what the vehicles properly used in
" shipping or unshipping shall do outside the dock premises."
Lawrence L.J. said [18]: " In my opinion, the provision in section
" 33 of the 1847 Act, that upon payment of rates, the harbour
" and dock shall be open to all persons for shipping and unship-
" ping goods, necessarily implies that all persons shall have the
" free right to remove the goods landed on the quays by the usual
" commercial means." Greer L.J. said [19]: " I think it is neces-
" sarily implied in section 33 of the Harbours, Docks, and Piers
" Clauses Act, 1847, that their docks and quays should be open
" to all such persons as were interested in the shipment or unship-
" ment of fish to remove the fish so unshipped by usual com-
" mercial methods, including the removal by means of motor or
" other vehicles, or by their agents or contractors in that behalf
" by such vehicles."

In *Dick* v. *Badart* [20] Cave J. held that section 33 must include not only shipowners and owners of goods, but also their respective servants. He held a by-law to exclude lumpers to be invalid, and said [21]: " A by-law that lumpers should only be employed subject
" to good character might be within the company's power to
" regulate the duties and conduct of persons employed in the
" dock, but a by-law by which lumpers are altogether excluded
" from the dock could not possibly be within it."

Another case on the section is *Great Central Ry. Co.* v. *North-Eastern Steam Fishing Co. Ld.*,[22] the report of which was supplemented by the defendants by a transcript of the judgment of Walton J.[23] The decision is an authority for the proposition that section 33 of the Act of 1847 does not give trawler owners a right to keep a tug inside the dock for the purpose of rendering towage services as and when required to their own trawlers which regularly go in and out. The plaintiffs do not challenge this case, and make no claim to keep a tug inside the Immingham Docks or to ply for hire within the dock or at the jetties, which plying for hire, other than by the defendants' tugs, can only be done in

[17] Ibid. 31.
[18] Ibid. 47.
[19] Ibid. 58.
[20] (1883) 10 Q.B.D. 387.
[21] Ibid. 393.
[22] (1906) 22 T.L.R. 520.
[23] Reprinted in full, post, p. 104.

pursuance of a licence issued by the dock-master. That is by-law 18. Walton J. did not seek to interpret the section except to say that it did not give the defendants, the trawler owners, the right to keep a tug inside the dock without the consent of the dock authority.

If the facts had been found as they were stated to be in the argument of Mr. J. A. Hamilton K.C.[22]—" The tug was required " to move the trawlers sometimes to the wharf or to a place " awaiting their turn to unload, or to a place where coal could " be loaded, or to bring coal lighters alongside, or to move the " trawlers to a place in the dock where ice (required for the " purposes of the next fishing voyage) could be taken on board. " The tug was necessary to move the trawlers after the boilers " had been blown, in accordance with the by-laws. Such assist- " ance was absolutely necessary and was used in the ordinary " course of business "—I doubt respectfully if I would have taken the same view of them as Walton J. appears to have done. It would depend, I think, on the frequency with which those services were normally rendered by the tug kept in attendance, but the actual decision was as I have stated, and it does not bear on the present case.

On behalf of the defendants the railway cases are relied on, *Barker* v. *Midland Ry. Co.*[24] and *Perth General Station Committee* v. *Ross*,[25] but they are of no application. It was so held in the *British Trawlers* case.[26] Section 33 of the Act of 1847 did not, of course, arise for consideration at all in those cases.

I am therefore of opinion that authority does not refute the interpretation which I have given to section 33, but substantially supports it, and, as it stands, section 33 would entitle the plaintiffs to enter the dock with their tugs in the manner which has been their recent practice and which is their present demand.

The section is, however, made expressly subject to any special Act, and the defendants rely further on their powers as owners and undertakers, and on sections 66 and 70 of their Act of 1901. Before considering those two sections, I will refer briefly to an authority which defines the position of a statutory body in the position of the defendants. In the *British Trawlers* case in the Court of Appeal Scrutton L.J.[27] referred with approval to the observations of Lindley L.J. in *London Association of Shipowners and Brokers* v. *London and India Docks Joint Committee*,[28] as follows: " The Legislature has expressly conferred upon the com- " pany many powers which the company, as the owner of " property, could have exercised without any express statutory " authority. Whenever this is the case, the powers expressly " given must be treated either as superfluous or as purposely " inserted in order to define, that is, limit the right conferred, " and as implying a prohibition against the exercise of the more

[24] (1856) 18 C.B. 46.
[25] [1897] A.C. 479.
[26] [1934] A.C. 279.
[27] [1933] 2 K.B. 14, 35.
[28] [1892] 3 Ch. 242, 251.

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" extensive rights which the company might have by virtue of its " ownership of property. That the latter is the true mode of " regarding statutory powers conferred on bodies created for " public purposes and authorized to acquire land for such " purposes cannot, I think, admit of any doubt."

Greer L.J. in the *British Trawlers'* case,[29] pointed out the distinction between companies created by charter, which are deemed to have all the powers of a natural person, and companies created by statute. He quoted the then current edition of Buckley on Companies and the statement therein that a " statute " does not create a corporation at common law. It creates a " statutory creature, which cannot go beyond its statute for the " reason that to the statute it owes its whole existence."

Section 70 of the defendants' Act of 1901 empowers the defendants to build, purchase, hire or license steamers and tugs for the purpose of and in connexion with the dock, and to make charges in respect of the use of any such vessels provided and used; and at the end of the section there is this proviso: " Pro- " vided always that nothing in this Act contained shall be deemed " or construed to authorize the company to require any owner " agent master consignee or other person having charge of any " vessel lighter or river craft to employ hire or use any such " steamer tug lighter or other ship or boat." The defendants, therefore, cannot make it compulsory for ships to use their tugs, and since the use of tugs, lighters or boats will, or may, from time to time be necessary, and since the port has to be open to the public for the shipping and unshipping of goods, it follows, I think, that if tugs other than the defendants' tugs were excluded, the rights of the users of the port would be curtailed and infringed. If shipowners wished to use the port, and if tug assistance was essential to enable them to do so in safety, the use of the defendants' tugs (and this would include those chartered or hired by them) would in effect be compulsory and the defendants would so achieve that which they are so definitely prohibited by the proviso from doing. Far from giving the defendants the right to exclude tugs, as they now claim to do, in my opinion section 70 effectively prohibits them from so doing. The proviso does not refer only to the section, but also to " nothing in this Act." The proviso, therefore, refers equally to section 66 (1) on which the defendants place perhaps their greatest reliance.

Section 66 in terms gives the company powers " with regard " to the management use and regulation of the dock works of the " company and the regulation and control of vessels resorting " thereto." Nowhere is an express power given to exclude tugs. It is submitted on behalf of the defendants that section 66 (1) by implication gives that power. In the face of the proviso to section 70 to which I have just referred, I do not find it possible to make such an implication.

[29] [1933] 2 K.B. 14, 56.

Section 66 (3) empowers the company to employ persons "to "work or remove or to discharge or load or perform any service "in connexion with any vessel," when there is delay or default in the working or removing of any vessel in the dock. Section 66 (1) makes these rights of the company "subject to the right "of the owner or master of any vessel to employ his crew in the "performance of any of the services" mentioned in the other three subsections of section 66. The whole section gives defined powers to the company, but it does not give them exclusive powers or any power to exclude which they do not otherwise possess.

In contrast, section 82 of the Harbours, Docks, and Piers Clauses Act, 1847, which relates to meters and weighers, expressly provides that "the master of any vessel, or the owner "of any goods shipped, unshipped, or delivered within or upon "the harbour, or dock, or pier, shall not employ any person "other than a weigher or meter licensed by the undertakers." This was referred to by Cave J. in *Dick* v. *Badart* [30]; and see also *Port of London Authority* v. *Cairn Line of Steamships Ld.* [31] Similar clear clauses are to be found in many other Acts, where some exclusive right was intended to be given to undertakers. There is no such provision here relating to tugs. The words of Lord Davey in *Municipal Corporation of City of Toronto* v. *Virgo* [32] may be applied to the present case: "No doubt the "regulation and governance of a trade may involve the "imposition of restrictions on its exercise both as to time and "to a certain extent as to place where such restrictions are in "the opinion of the public authority necessary to prevent a "nuisance or for the maintenance of order. But their Lordships "think there is marked distinction to be drawn between the "prohibition or prevention of a trade and the regulation or "governance of it, and indeed a power to regulate and govern "seems to imply the continued existence of that which is to be "regulated or governed."

In my judgment, the plaintiffs have established the right for their tugs to enter the Immingham Docks at least to the extent for which they claim, and there is no power in any statute affecting the defendants' rights which entitles the defendants to exclude tugs operating in the way the plaintiffs' tugs have been doing. The interdepartmental correspondence of the defendants to which I was referred revealed less desire on the part of those responsible for the port's administration to have the tug services at Immingham highly efficient and adequate than to stultify competition to benefit their own tugs, which apparently could not hold their own in a busy port. So far as I understand the position, the decision at which I have arrived is more likely to

[30] (1883) 10 Q.B.D. 387.
[31] [1913] 1 K.B. 497 (29 T.L.R. 229).
[32] [1896] A.C. 88, 93.

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provide efficient and suitable towage services at this important port than if the defendants' claim for a monopoly had prevailed.

I grant the declaration: that on payment of the rates made payable under the Humber Commercial Railway and Dock Act, 1901, and any statutory amendment or modification thereof the plaintiffs are entitled in the ordinary course of their business to employ their tugs in providing towage services to vessels entering or leaving Immingham Docks for the shipping or unshipping of goods and/or embarking or landing of passengers.

*Judgment for the plaintiffs.*
*Declaration granted.*

Solicitors: *Theodore Goddard & Co., for Andrew M. Jackson & Co., Hull; M. H. B. Gilmour.*

M. M. H.

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## NOTE.

K.B.Div.

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*May* 7.

Walton J.

### GREAT CENTRAL RAILWAY CO. *v.* NORTH-EASTERN STEAM FISHING CO. LD.

WALTON J. The plaintiffs, the Great Central Railway Co., are the owners of a dock or docks at Great Grimsby, the fish docks, and the defendants, the North-Eastern Steam Fishing Co. Ld., and the other defendants are the owners of the steam-tug *Speedwell*. The claim is as follows: By letters dated February 29, 1904 (addressed to Mr. Simons, the then owner of the said steam-tug), September 12, 1904, and July 1, 1905, notice was given on behalf of the plaintiffs, terminating the permission previously given from time to time by them for the steam-tug to occupy their fish docks, and to perform towage services for hire therein, and requiring the defendants to remove their steam-tug from the fish docks; and it is said that the defendants have not removed their steam-tug from the fish docks but persist in unlawfully occupying the fish docks and performing towage services for hire therein with their steam-tug without any leave or licence from the plaintiffs, and in spite of the plaintiffs' notices. The plaintiffs claim a declaration that the *Speedwell* is not entitled to remain in their docks, and they claim an injunction and damages.

It is admitted that the fish docks at Great Grimsby belong to the plaintiffs—they are part of their undertaking, regulated by the Manchester, Sheffield and Lincolnshire Railway Company Act, 1849. With regard to the permission given by the plaintiffs before the controversy in this action began, the defendants say that if any such permission was given, it was ultra vires; they deny that they used the docks by permission of the plaintiffs, and they say that the notices given were ultra vires and were invalid as notices requiring the defendants to remove their tug. They say they have not used the docks otherwise than in a reasonable manner; and then they go on to say this: The defendants' fishing vessels are entitled to reasonable user of the docks, and, according to the usual course of trade and user of the docks, they require to be moved from time to time by tugs available at call for that purpose. The plaintiffs threaten and intend to exclude the defendants' tug and to compel them to use the plaintiffs' tugs only, which they have no right to do. The defendants further say that they have not

claimed, and do not claim, to keep their steam-tug in the plaintiffs' docks except for the purposes mentioned; and they admit that if they do use the docks they must do so under the regulations and by-laws which have been properly made from time to time under the Act of Parliament.

The use which the defendants say they have a right to make of the docks with their tug, as I understand it, is this. The defendants are owners of a number of steam trawlers, which bring their fish from time to time into the fish docks at Great Grimsby; they enter the docks and usually get alongside the quay under their own steam. They discharge their fish at the quay, and then, before they go out to sea again for fishing, they have to take on board a certain quantity of ice which they get in the docks, and a certain quantity of coal, and they have to be moved to another place where they get their ice, and to yet another place for their coal; or they have to be moored somewhere in the docks where they receive their coals from barges or lighters. That being so, of course these steam trawlers have to be moved about to a certain extent in the docks; and what the defendants claim is the right to keep this tug inside the docks, not for the purpose of bringing the steam trawlers into the docks, but for the purpose of moving them about, first one and then another, as required in the docks. They say that it is reasonable and convenient to have a tug always at hand in the docks for the use of these trawlers which have to be moved from time to time. The defendants are owners of a certain number of trawlers and there is no doubt that it is convenient for them to have this tug at hand inside the docks to move their trawlers as required. The question which I have to decide in this case is whether they have a right to keep their tug inside the docks for that purpose. They say that they have a right to have their tug there for such a purpose. The plaintiffs, the Great Central Railway Co., say: "No, these docks belong to us and you "have no right to keep a tug in our docks without our leave or unless "you have some agreement with us by which we consent that you "should do so under certain terms, and we do not consent and we will "not; you must take that tug away." I have to say which is right.

The special Act which relates to the user of these docks is the Act of 1849, which incorporates the Harbours, Docks, and Piers Clauses Act, 1847. Many of the sections of the Act of 1849 were referred to, but I do not think that it is necessary for me to refer to them for the purposes of this judgment. I merely call attention to this—that by section 247 of the Act of 1849 the plaintiffs are entitled to provide tugs for the purpose of "towing and assisting vessels entering into, using, or "going out of the said docks," on certain terms and making certain charges which are not to exceed certain sums that are mentioned in the section. Of course, that does not settle the present case. It gives powers to the plaintiffs to provide the facilities, which the defendants desire to provide for themselves.

That being so, what are the rights? The plaintiffs are the owners of the docks; but I think it is plain that they cannot close these docks absolutely to the world at large. The public have certain rights. Is the right claimed by the defendants one of them? What are the public rights? So far as I can ascertain, they are to be found, and I think only to be found—at any rate so far as affects the present case—in section 33 of the Harbours, Docks and Piers Clauses Act, 1847. [His Lordship read the section.] That is to say, all persons may take vessels into the docks for the purpose of shipping or unshipping goods, and they may send men to the docks, I think, to provide the labour necessary for the purpose of shipping and unshipping goods. (I leave out the embarking and disembarking of passengers, because that does not matter here.) I think they clearly may do that. It may be, but I have not to decide it, that persons are entitled to take their vessels into

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the docks, for the purpose of shipping or unshipping goods, in tow. It may be that the owner of a fishing smack is entitled to take his smack into these fish docks with the assistance of a tug. I have not to decide that. It may be, but perhaps it is more doubtful, that when a vessel goes into the docks, it may have a tug in attendance. I have not to decide that. What the defendants claim is this: the right to maintain what I may call the services of a tug inside the docks, and to occupy the docks for that purpose. Does section 33 give that right or not? I do not know that I ought to occupy time in discussing all the various arguments pro and con which were addressed to me in the course of the trial. I think it is enough for me to say that the conclusion I have arrived at is, that the defendants have no such right without the consent of the plaintiffs, and that they are not entitled to keep their tug inside the docks for the purpose of assisting such of the steam-trawlers as go into the docks, and as are the property of the defendants. I noticed in the points of claim that it is alleged that they claim or seek to keep the tug inside the docks to perform towage services for hire. I do not think in the course of the case I heard anything of the tug *Speedwell* being used for hire. I understand it was there to be used for the purposes of the trawlers which belong to its owners. Therefore I have not attached any importance to the claim that the tug is to be retained there for hire, because I do not think it is.

I think substantially the plaintiffs succeed.

*Judgment for the plaintiffs.*

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[COURT OF APPEAL.]

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*Dec.* 2, 3, 4, 5, 8, 9, 10.

Singleton and Morris L.JJ. and Upjohn J.

## * JAMES SHAFFER LD. *v.* FINDLAY DURHAM & BRODIE (SUED AS A FIRM).

*Contract—Repudiation—Written agreement—Construction—Reliance on bona fide but mistaken construction not repudiation—Whether acceptance must correspond with repudiation.*

Export distributors contracted in writing to pass on to manufacturers customers' orders for goods of not less than £80,000 in any one year for a number of years. Owing to import restrictions on the continental market, they were unable to obtain sufficient orders. In negotiations with the manufacturers, they said that their obligations under the contract did not go beyond passing on to the manufacturers whatever orders they received, and, though they would do their utmost to obtain orders, they were not responsible to do more. The manufacturers wrote referring to this statement and accepting it as a repudiation of the contract and holding the defendants responsible in damages resulting from repudiation.

On appeal from Streatfeild J., who held that the distributors repudiated:—

*Held*, that in the circumstances of the case, the conduct of the distributors did not evince a clear intention not to be bound by the contract. They had expressed an erroneous construction of the contract but it was apparently held by them in good faith and was not an unreasonable construction to put on the contract. They had and were doing their best to fulfil the contract and did not intend to repudiate it.

*Freeth* v. *Burr* (1874) L.R. 9 C.P. 208 followed.

Decision of Streatfeild J. varied.

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APPEAL from Streatfeild J.

The following statement of facts is taken from the judgment of Singleton L.J.:—

In 1945 the defendants began negotiations with the plaintiff company, who were manufacturers, with a view to supplying sanitary fittings, such as taps and bibcocks, manufactured by the plaintiffs, to the continental market, and particularly to Germany. The defendants, who were what is known as a "confirming "house," were to obtain the orders for the goods and to some extent to confirm them, and the plaintiffs would remunerate them on a percentage basis for the orders passed on to them. On July 11, 1945, the defendants wrote the following letter: "For "attention of Mr. G. J. Shaffer. Dear Sirs, We are very pleased "to have been able to conclude arrangements with you for the "manufacture of special sanitary fittings required for export to "overseas markets and which were previously only manufactured "in Germany. For the present we are confining our requirements "to a restricted range of patterns, but we hope that in the near "future, when your works are in full production, it will be found "possible to extend the range of fittings for which similar "components such as headwork can be utilized. From our con-"versations you will have gathered that we expect to be in a "position to place before you some very interesting continuous "business in these lines. We now enclose our opening order."

On September 8, 1945, the parties made an agreement to commence from August 1, 1945, and to continue for a term of three years. Paragraph 1 provided: "In consideration of your "giving us the benefit of all your orders for special sanitary "fittings for overseas markets we undertake to manufacture "exclusively for you, under your own trade mark, those special "export types of sanitary fittings as per samples and particulars "already furnished, and for which we have now accepted orders, "also for similar and further designs to be discussed from time "to time."

The business developed and both parties profited for a time. Shaffer was busy opening up a new factory at South Shields for his company where they would manufacture the goods, and one Sondheim of the defendants helped him in arranging the set-up. Sondheim was of German extraction but had been in the United Kingdom for some years. He was an expert on the manufacture of sanitary fittings and well acquainted with the German market for them. In the early days of the business orders were out-stripping production. The factory was not completed for some time and the machines were not all installed until 1947, some even a little later. By March, 1947, the plaintiffs were, however, producing bibcocks, bottle traps and pillar taps, though there was some difficulty in the production of the pillar taps which was not overcome until about February, 1948. The position was not, however, entirely satisfactory from the plaintiffs' point of view. They were expending large sums of money in establishing a factory

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for the manufacture of the goods, and there was no certainty as to whether orders would flow continuously or not. They discussed this with the defendants, and after some time it was decided that there should be a formal long-term agreement between the parties.

The draft of the agreement was prepared by the solicitors for the plaintiffs, and was entered into by the defendants on March 20, 1947 (acting, apparently, without the advice of solicitors). Clause 4 (*c*) of the agreement read: "That this agreement shall "commence on March 1, 1947, or upon such other date as may "be agreed upon by the parties and shall remain in force until "February 28, 1962, unless determined on February 28, 1957, "by either party giving to the other six months' previous notice "in writing." In other words, the agreement was for 15 years, with the option to either party to cancel it at the end of 10 years by giving six months' notice before the 10 years expired.

The parties to the agreement were five men trading as Findlay Durham & Brodie, referred to as the export distributors of the one part, and the limited company, James Shaffer Ld., of the other part, and it recited: "Whereas (1) The export distributors "and the manufacturers have for some time hitherto traded the "one with the other in goods set out in clauses 1 (*a*) and 1 (*b*) "hereto (hereinafter referred to as 'the goods') under the terms "of an agreement dated August 1, 1945. (2) The export distri- "butors and the manufacturers have agreed for the considerations "hereinafter contained to enter upon this present agreement."

By clause 1 (*a*) of the agreement: "The export distributors "undertake to buy exclusively from the manufacturers all their "requirements for all markets of all types of water fittings com- "prising bibcocks, pillar taps, bidet taps, undertile stopcocks, "mixing valves which the manufacturers manufacture and which "do not conform to the requirements of any British Waterworks "Association member or of any Dominion local authorities." That clause dealt with manufactures which were not for use in the United Kingdom, and the export distributors undertook by clause 1 (*b*) to buy exclusively from the manufacturers all their requirements for all markets of all the named types of fittings which the manufacturers produced.

Clause 1 (*b*) provided: "The export distributors undertake to "buy exclusively from the manufacturers bottle traps, pop-up "wastes, flexible tubes, mixing valve components and any similar "fittings which may be agreed upon from time to time by the "parties for export to those countries where neither the require- "ments of a member of the British Waterworks Association nor "of a Dominion local authority apply. Countries in which "water fittings are not required to conform to the specification "of the members of the British Waterworks Association or of "a Dominion local authority shall be hereinafter referred to as "'the countries.'"

By clause 2: "The export distributors will:—(*a*) ship the "goods which are supplied by the manufacturers and delivered

" f.o.b. United Kingdom port to the purchasers in the countries. " . . . (*c*) Do all in their power to further the trade in and " export of the goods in the countries. (*d*) Continue to advise " and assist the manufacturers in the design manufacture and " production of the goods. . . . (*j*) Will receive by way of " remuneration an allowance of fifteen per cent. discount off the " value of the manufacturers' invoices after deduction of the " cost at cost for packing and cases. (*k*) Pass on to the manu- " facturers customers' orders for the goods amounting to not less " in volume than the volume of goods which at present prices " would amount to the value of £80,000 in any one year spread " over intervals to conform with the manufacturers' capacity for " production. (*l*) Pass on to the manufacturers orders (for the " goods of such size as will be economic to manufacture and " enable the manufacturers to produce) in accordance with " present procedure."

That clause dealt with the obligations of the export distributors under the agreement.

By clause 3 of the agreement: " The manufacturers in con- " sideration of the undertakings hereinbefore given by the export " distributors undertake for themselves and their assigns that " they—(*a*) Will supply exclusively to the export distributors the " water fittings enumerated under clause 1 (*a*) " with a proviso. " . . . (*d*) Will pass on to the export distributors any orders " and inquiries they may receive directly or indirectly for export " to the countries. (*e*) Will pay to the export distributors fifteen " per cent. of the price charged for the goods after deduction at " cost to the manufacturers of packing wrapping and cases. . . . " (*h*) Will accept from the export distributors and give delivery " of orders for the goods amounting to not less in volume than " the volume of the goods which at present prices would amount " to £80,000 in any one year."

Clause 3 (*h*) corresponded with the obligation which the export distributors undertook by clause 2 (*k*) to " Pass on to the manu- " facturers customers' orders for the goods amounting to not less " in volume than the volume of goods which at present prices " would amount to the value of £80,000 in any one year," etc.

By proviso 4 (*d*): " If at any time there should be a marked " decline in the total of orders in hand to such extent that this " total amounts to less than three months' work in hand as " compared with deliveries made during the preceding six " months and based on the same value calculated on the average " prices at which the goods were delivered during that period, " then the manufacturers may ask for an explanation of the " export distributors for the reason of such decline. If the " explanation given by the export distributors is not deemed " satisfactory by the manufacturers then the manufacturers shall " have the right on notifying the other party in writing of their " intention so to do to approach the countries direct for additional " business always provided the manufacturers do not offer the

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"goods at lower prices or on more advantageous terms than "those agreed to be quoted by the export distributors and always "provided the export distributors are given the option of handling "the finance and shipping of such new business at a reduced "commission of seven and a half per cent. on the f.o.b. value "of the goods required."

At the date when the agreement was signed, March 20, 1947, the manufacturers were not manufacturing all goods of the types mentioned in clauses 1 (*a*) and (*b*), and they never did in fact manufacture all the types of articles mentioned in clause 1 (*a*). The business was conducted on the following "procedure": The export distributors gave an order from time to time, and if the order was for something which the manufacturers were not then manufacturing, they would start up new orders for the manufacture, and in the course of a few months the article would be manufactured.

The agreement continued in operation from March 20, 1947, for about 15 months, until May 27, 1948. During that period the defendants gave orders for goods to the plaintiffs, and it was admitted that all the orders which were given were supplied.

By the early months of 1948 the plaintiffs had overcome their manufacturing difficulties in regard to the making of pillar taps and sink mixers and the production of these articles was, accordingly, speeded up. About the same time, however, the British Government withdrew the requirement that half the output of the plaintiffs must be for the home market. Meanwhile the issue of import licences in Scandinavia and Holland was suspended. As a result the number of orders passed on to the plaintiffs by the defendants declined rapidly. Shaffer became very worried about the position, and, in February, 1948, he consulted the defendants. On April 23 they wrote reassuring him: "Dear Sirs, We enclose a list of orders we have "taken for clients in Holland, Denmark, and Norway, and con- "firmed to them in the form of pro forma invoices subject to "import licences being granted. We also enclose two letters "from our Dutch agent regarding the position of import licences. "Further communications received from him since are to the "effect that the matter is still in abeyance, but he is still hopeful "of receiving licences. The orders are mainly for chromium "plated bibcocks, pillar taps and flexible tubes, and to a certain "extent also for bath and sink mixer fittings. Should the two "latter articles be considered luxuries under the present circum- "stances and for that reason import licences not be given, it "would affect the total of orders only to a negligible extent. "As you know, the literature required for opening up further "markets is only now coming to hand and we have so far been "handicapped for want of catalogues and samples. We are, how- "ever, already in touch with markets in the Middle East and "South America, and also hopeful of being able to meet local "competition in Belgium."

At that time, therefore, the defendants were still hopeful of receiving licences; to some extent they had been held up by the plaintiffs through lack of literature, but that was now coming forward. The documents which were enclosed showed pro forma invoices for £57,800 (of which £34,700 came from Holland). These invoices were not orders, properly so called, but they, or some of them, probably would have become orders if import licences could have been obtained, and the defendants were hopeful that they would obtain them.

Very few orders, however, came through. By May, 1948, production of the fittings had outrun the orders and the plaintiffs had in their factory material and component parts of a value of over £36,000, including finished goods of a value of £16,000. The company was in great financial difficulties and Shaffer said in evidence that they were unable to pay wages. The stock which was piling up was specific to the continental market, and, in any case, the home market was in a depressed state owing to the restrictions on building. Shaffer consulted Sondheim and one Muriel, a defendants' representative. Both were sympathetic but said that they had had hundreds of cancellations from overseas, so that they too were in great difficulties. Sondheim said that the best thing they could do was to have a meeting with all the partners. He said that the defendants would assist the plaintiffs financially and take over some of the stock. Unfortunately, before that meeting could be held Sondheim was taken ill and, as a result of his illness, he lost his memory. A meeting was, however, held between Shaffer and one of the defendants, one Freeman. Freeman declined to give financial assistance to the plaintiffs and said that, as a confirming house, they could not possibly take over the stock or any part of it. He was sympathetic with the plaintiffs' difficulties but did not admit any liability under the agreement to pass on more orders to them than his company had actually obtained. He referred again to the large number of pro forma orders which had only failed to materialize because they were unable to overcome the currency restrictions and to obtain import licences for the continental market. After that interview Shaffer wrote on May 1:

" Dear Sirs, re Sanitary Fittings Agreement. Further to our " recent meeting when it was explained to me why there was a " marked decline in orders, and that you were uncertain as to " whether these fittings which we are manufacturing are good " saleable stock, you will appreciate that we find ourselves in a " very difficult position. We do not wish if possible to give up " manufacturing these fittings as it would be some time before we " could go back to them in the event of a revival of trade. We " have, therefore, decided after consultation with our auditors to " go on manufacturing these fittings and under clause 4 (*d*) of our " agreement endeavour to dispose of some of them to overseas " buyers whom we hope to meet at our stand at the British Indus- " tries Fair. In order to accomplish this we have given these

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" continental fittings a position on our stand instead of arranging " to show them in the office as previously. We have also arranged " to have available a representative to deal with inquiries of this " kind. As we understand that you will not be able to send a " representative to take Mr. Sondheim's place we are going to " carefully try and deal with any of the customers who will be " coming to meet Mr. Sondheim at the stand on your behalf as " best we can, although you will appreciate it will be impossible " to replace Mr. Sondheim with his years of experience and " intimate friendship with these buyers. We feel sure you will " appreciate the step we have taken as being one in our joint " interest and hope that it will not be long before we can go back " again to our normal procedure." The plaintiffs did not, however, get any orders from the continent, and so they were no better off.

On May 18, there was a further meeting, between Shaffer for the plaintiffs and Durham and Brodie for the defendants. They also brought their representative Muriel. Shaffer gave evidence as to this meeting. He said that the defendants again expressed great sympathy. Durham said: " Everybody wants your goods, " but cannot get import licences. We could sell hundreds of " thousands of pounds worth." Shaffer then said: " Well, we " have an agreement under which you undertook to take not less " than £80,000 worth a year." The defendants produced the agreement and said: " Look what it says—customers' orders. We " have given you all the customers' orders we have had. How " can we give you something we have not got? This is quite " clearly a case of force majeure," and Brodie added: " I " was not in this country when this was signed, because if I had " been here I would not have let it be signed." Shaffer asked for financial help again and was told it was impossible. The defendants said they had no liability to give £80,000 worth of orders. They would do all they could to get orders, and would pass on whatever orders they got but there was no liability to do anything further.

In cross-examination, he said that the defendants made it clear that they would do their best to get orders, but, that since their expert Sondheim had become ill, they had nobody with comparable knowledge of the market.

After the interview Shaffer consulted the solicitors to the company, and on May 27, they wrote: " We have been instructed " by our clients, Messrs James Shaffer Limited of Riverdrive, " South Shields, in relation to the contract between you and them " of February, 1947. We are informed by our clients that you " have failed to fulfil your obligation under the contract and have " in particular failed to satisfy clause 2 (*k*) thereof, by which you " undertook to pass on to our clients, customers' orders for goods " amounting to not less in volume than the volume of goods which " at prices existing at the date thereof would have amounted to " the value of £80,000 in the course of a year spread over as in

"that clause provided. The total of such orders last year does "not reach that figure and there has been no improvement in "the commencing months of this, the second year, so that our "clients are forced to the view that you have no intention of "fulfilling this obligation. Our clients take the view that your "conduct is such as to repudiate the contract which repudiation "we hereby on our clients' behalf accept. We further are "instructed and hereby give you notice that our clients intend "now to treat the contract as at an end. We give you notice "also that our clients reserve the right to hold you liable for such "damages as they have sustained as a result of your breaches "of the contract."

Between March 20 and May 27, 1947, the defendants had passed on to the plaintiffs orders for about £30,000 worth of goods. Afterwards they placed a further £16,000 "without "prejudice."

On June 15, 1948, the plaintiffs commenced proceedings, claiming damages, resulting from, first, the breach by the defendants of clause 2 (*k*) of the agreement of March 20, 1947, in failing to pass on to the plaintiffs as manufacturers "customers' orders for the goods amounting to not less in "value than . . . £80,000 in any year," and, second, damages resulting from the repudiation of the agreement by the defendants. Streatfeild J. held that the defendants were liable under both heads and ordered that the damages should be assessed by the official referee. The defendants appealed.

*K. Diplock Q.C.* and *J. P. Ashworth* for the defendant appellants.

*Gilbert Paull Q.C.* and *S. K. de Ferrars* for the plaintiff manufacturers.

The appeal under the first head [that the defendants were in breach of clause 2 (*k*) of the agreement of March, 1947] turns on the construction of the agreement, and clause 2 (*k*) in particular, and does not call for report. (The appeal under that head was dismissed.)

The following cases were cited in argument on the issue of repudiation: *Millars' Karri and Jarrah Co. (1902)* v. *Weddel, Turner & Co.* [1]; *Société Maritime et Commerciale* v. *Venus Steam Shipping Co. Ld.* [2]; *Freeth* v. *Burr* [3]; *British & Beningtons Ld.* v. *North Western Cachar Tea Co. Ld.* [4]; *Heyman* v. *Darwins Ld.* [5]; *Berners* v. *Fleming* [6]; *Johnstone* v. *Milling* [7]; *Baillie* v. *Kell* [8]; *Taylor* v. *Oakes, Roncoroni & Co.* [9]; *Ross T. Smyth &*

[1] (1908) 14 Com.Cas. 25.
[2] (1904) 9 Com.Cas. 289.
[3] (1874) L.R. 9 C.P. 208.
[4] [1923] A.C. 48.
[5] [1942] A.C. 356 (58 T.L.R. 169) ([1942] 1 All E.R. 337).
[6] [1925] Ch. 264.
[7] (1886) 16 Q.B.D. 460.
[8] (1838) 4 Bing.N.C. 638.
[9] (1922) 27 Com.Cas. 261.

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*Co. Ld.* v. *T. D. Bailey, Son & Co.*[10]; *Macaura* v. *Northern Assurance Co. Ld.*[11]; *Jureidini* v. *National British and Irish Millers Insurance Co. Ld.*[12]; *Mersey Steel and Iron Co. Ld.* v. *Naylor, Benzon & Co.*[13]; *Spettabile Consorzio Veneziano di Armamento e Navigazione* v. *Northumberland Shipbuilding Co. Ld.*[14] (the *Spettabile* case).

SINGLETON L.J. [having stated the facts and considered the construction of the agreement of March 20, 1947, said:] If one party to a contract before the time for performance has arrived declares his intention not to perform the contract, the other party to that contract may treat that as an immediate breach of contract if he thinks fit, and may bring an action for damages. That is the position which it is said was reached in this case in May, 1948.

In *Heyman* v. *Darwins Ld.* Lord Wright said[15]: "But "perhaps the commonest application of the word 'repudiation' "is to what is often called the anticipatory breach of a contract "where the party by words or conduct evinces an intention no "longer to be bound and the other party accepts the repudiation "and rescinds the contract. In such a case, if the repudiation "is wrongful and the rescission is rightful, the contract is ended "by the rescission but only as far as concerns future performance. "It remains alive for the awarding of damages either for previous "breaches or for the breach which constitutes the repudiation. "That is only a particular form of contract-breaking and would "generally under an ordinary arbitration clause involve a dispute "under the contract like any other breach of contract. There is "no difference, for instance, for this purpose between a refusal "to take further instalments under a contract for the sale of "goods by instalments and a refusal to take the entire contract "quantity where the tender is to be a single delivery. I need "scarcely add that one party to a contract cannot put an end "to it. To produce that effect there must be rescission. An "anticipatory breach does not necessarily involve an actual "intention to break the contract. Intention is to be judged by "the party's conduct. The difference between repudiating a "contract and repudiating liability under it must not be over-"looked. It is thus necessary in every case in which the word "repudiation is used to be clear in what sense it is being used."

In *Freeth* v. *Burr*[16] the headnote reads: "The defendant "contracted to sell to the plaintiffs 250 tons pig-iron at 56s. per "ton, half to be delivered in two, remainder in four weeks; "payment, net cash fourteen days after delivery of each parcel.

[10] (1940) 56 T.L.R. 825 (45 Com. Cas. 292) ([1940] 3 All E.R. 60).
[11] [1925] A.C. 619.
[12] [1915] A.C. 499.
[13] (1884) 9 App.Cas. 434.
[14] (1919) 121 L.T. 628 (88 L.J. K.B. 1194, sub. nom. *Consorzio Veneziano, etc.* v. *Northumberland Shipbuilding Co. Ld.*).
[15] [1942] A.C. 356, 379.
[16] L.R. 9 C.P. 208.

"The market was rising, and, notwithstanding urgent demands "by the plaintiffs, the delivery of the first 125 tons was not "completed for nearly six months. The plaintiffs refused to pay "for the first parcel, claiming a right to set off the loss they had "sustained from being obliged to procure other iron in conse- "quence of the defendant's default; but they still urged the "delivery of the second parcel. The defendant, treating the refusal "to pay as a breach and an abandonment of the contract by the "plaintiffs, declined to deliver any more. There was no sugges- "tion of inability on the part of the plaintiffs to pay, and the "price of the first parcel was ultimately paid:—*Held*, that the "mere refusal to pay for the first parcel did not, under the cir- "cumstances, warrant the defendant in treating the contract as "abandoned and refusing to deliver the remainder, and that the "plaintiffs were entitled to damages for the breach."

Lord Coleridge C.J. used these words[17]: "I mention that "because it is important to express my view that, in cases of "this sort, where the question is whether the one party is set "free by the action of the other, the real matter for considera- "tion is whether the acts or conduct of the one do or do not "amount to an intimation of an intention to abandon and "altogether to refuse performance of the contract. I say this in "order to explain the ground upon which I think the decisions in "these cases must rest. There has been some conflict amongst "them. But I think it may be taken that the fair result of them "is as I have stated, viz., that the true question is whether the "acts and conduct of the party evince an intention no longer to "be bound by the contract. Now, non-payment on the one hand, "or non-delivery on the other, may amount to such an act, or "may be evidence for a jury of an intention wholly to abandon "the contract and set the other party free. That is the true "principle on which *Hoare* v. *Rennie*[18] was decided, whether "rightly or not upon the facts, I will not presume to say."

I do not read further the judgment of Lord Coleridge, nor do I read any passages from the short but valuable judgments of Keating and Denman JJ. in that case. The submission made on behalf of the defendants in this case is based upon the words of Lord Coleridge that, before there can be repudiation in a case of this kind, there must be acts or conduct which amount to an intimation of an intention to abandon and altogether to refuse performance of the contract. The question indeed is whether the acts and conduct of the party evince an intention no longer to be bound by the contract.

In *Mersey Steel and Iron Co. Ld.* v. *Naylor, Benzon & Co.* Lord Selborne L.C. said[19]: "Upon the other point, I do not "think it desirable to lay down larger rules than the case may "require, or than former authorities may have laid down for my

[17] L.R. 9 C.P. 208, 213.
[18] (1859) 5 H. & N. 19.
[19] 9 App.Cas. 434, 438.

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" guidance, or to go into possible cases differing from the one " with which we have to deal. I am content to take the rule as " stated by Lord Coleridge in *Freeth* v. *Burr*,[20] which is in sub- " stance, as I understand it, that you must look at the actual " circumstances of the case in order to see whether the one party " to the contract is relieved from its future performance by the " conduct of the other; you must examine what that conduct is, " so as to see whether it amounts to a renunciation, to an absolute " refusal to perform the contract, such as would amount to a " rescission if he had the power to rescind, and whether the other " party may accept it as a reason for not performing his part; and " I think that nothing more is necessary in the present case than " to look at the conduct of the parties, and see whether anything " of that kind has taken place here."

Lord Selborne expressly approved the passage which I read from the judgment of Lord Coleridge in *Freeth* v. *Burr*,[20] and that passage is recognized as a true statement of the law.

The difficulty is to apply it to any particular case, and one difficulty which arises comes from the words " You must look at " the actual circumstances." The learned counsel who have argued this case before this court took quite a different view of what are the actual circumstances to which we can have regard. Perhaps that is not unusual. None the less, it is our duty to look at the circumstances and to see what was done, to see what it is which is relied upon as repudiation by the defendants.

In *Johnstone* v. *Milling*,[21] Cotton L.J. said [21]: " Whether such " a statement amounted to a renunciation of the contract must " depend on the circumstances of the case and the nature of the " contract."

We know the nature of this contract, or we ought to do so now. We must look at the nature of the contract and at the circumstances of the case. I must refer to two lines from the speech of Lord Wright [22] in *Ross T. Smyth & Co. Ld.* v. *T. D. Bailey, Son & Co.*: " It must not be forgotten that repudiation " of a contract is a serious matter, not to be lightly found or " inferred." That applies, it seems to me, even more strongly if the contract is a long-term contract, a contract which was to run for 15 years, with the option of a break when 10 years had gone.

I draw attention to the value of the judgments of both Denman J. and Walton J. in *Millars' Karri and Jarrah Co.* (*1902*) v. *Weddel, Turner & Co.*[23] It is true, as Mr. Diplock says, that the learned judges there were dealing with a breach rather than an anticipatory breach, but I find every word in those two judgments to be most helpful.

Another case which was cited is the *Spettabile* case.[24] That case was heard before Bailhache J., who came to the conclusion

[20] L.R. 9 C.P. 208.
[21] 16 Q.B.D. 460, 471.
[22] [1940] 3 All E.R. 60, 71.
[23] 14 Com.Cas. 25.
[24] 121 L.T. 628.

that the terms of a letter written by one party to another amounted to a repudiation of the contract. Bailhache J. thought that that repudiation had not been accepted by the other side. The case went to the Court of Appeal, and the Lords Justices thought that the terms of the letter did not amount to a repudiation, but agreed with the view of Bailhache J. that there was in fact no acceptance. (It would not help if I said that I feel a certain amount of sympathy with the view of Bailhache J. on the first head.)

The following passage in the judgment of Atkin L.J. is of great value [25]: "A repudiation has been defined in different "terms—by Lord Selborne as an absolute refusal to perform "a contract; by Lord Esher as a total refusal to perform it; "by Bowen L.J. in *Johnstone* v. *Milling* [26] as a declaration of "an intention not to carry out a contract when the time arrives, "and by Lord Haldane in *Bradley* v. *H. Newsom, Sons & Co. Ld.* [27] as an intention to treat the obligation as altogether at an "end. They all come to the same thing, and they all amount at "any rate to this, that it must be shown that the party to the "contract made quite plain his own intention not to perform the "contract." That is how Atkin L.J. put it. It is not very different, really, from the way in which Lord Coleridge put it in *Freeth* v. *Burr*, [28] so that I think I may say the law is fairly clear upon the matter, but the application of it to particular facts may not be equally easy to ascertain.

The other reason for mentioning the *Spettabile* case [29] is that the action which was before the court in that case was commenced on May 26, 1919, and the judgment of Bailhache J. was given on June 6, 1919. At the commencement of his judgment Bailhache J. said: "In this case I am asked to exercise, I think, one of the "most useful functions of the commercial court—namely, to say "between parties to contracts whether those contracts are still "binding upon them. That is a function of the court which "saves parties in commercial transactions from a great deal of "uncertainty and a great deal of money. It is a function which "this court is always pleased to exercise when asked, and I desire "to say that in cases of this kind the court is always ready to "hear it at the shortest possible notice. In this particular instance "the case came on for hearing before me yesterday, within some "10 or 12 days after the issue of the writ. The system would be "perfect but for one thing that cannot be avoided—namely, the "frailty of human judgment."

Atkin L.J. said [30]: "No doubt questions of great difficulty "arise between commercial men. And there are great uncertainties whether a contract between them will be performed or "whether it will put them in the very gravest difficulty unless "the dispute can be determined by the courts. The procedure

[25] 121 L.T. 628, 634.
[26] 16 Q.B.D. 460.
[27] [1919] A.C. 16.
[28] L.R. 9 C.P. 208.
[29] 121 L.T. 628.
[30] 121 L.T. 628, 635.

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" before the court is now open to them, which is unchallenged, " by which they can come to a court and in a very short time " have those disputes resolved. That they can do without ex- " posing themselves to the risk of having to take a definite course " in repudiating a contract which, if it is wrong, may involve " them in a very large sum of money." That was in 1919.

For more than 40 years the commercial court has been in existence, and very largely through Mathew J. and Bray J. it achieved a position under which the commercial world knew that it could resort to that court and get a point decided in a very short space of time, and if there was need for a journey to the Court of Appeal, that journey could be made speedily too. I think it is a matter for regret that the commercial world has ceased to make use of the commercial court to the extent to which it did. There was a dispute, or a disagreement, between the parties, as to the construction of a clause in this contract. Either party could have gone to the commercial court and have had that point determined at short notice. At that time there was only the disputed construction of the contract; the question whether there was a repudiation arose later. The commercial world was grateful in years gone by to those who arranged the working of the commercial court. I think myself the legal profession ought to pay more attention to it than it does now. If the point of construction had been decided in 1948, it might have been decided in half a day, and a great deal of what has taken place four years later would have been avoided, the costs of both sides would have been immeasurably less, and both parties would have been the richer.

His Lordship then considered the circumstances which were said to have amounted to repudiation and went on: At the interview on May 18, 1948, the parties took a different view of the obligation of the defendants under the contract. Mr. Paull submits that they merely expressed a different view, and that there was nothing to show that the defendants really held the view they expressed. I have heard, however, nothing in this case which causes me to doubt their good faith. They were in difficulties, so were the plaintiffs, and they raised a question as to the meaning of the clause in the contract which compelled them to pass on orders to the extent of £80,000 in a year. The construction they adopted was not, I think, correct, but I have no reason to doubt that the defendants thought that it was a tenable view, and I have no reason to doubt their good faith. There was no evidence from the defendants' side on this part of the case.

What is the result of it all? The contract of which 15 months had run had another $8\frac{3}{4}$ or $13\frac{3}{4}$ years to run; there had been preparations on both sides to carry it out; the defendants were anxious to do their best to implement the contract. That is understandable, because if they could pass forward £80,000 worth of orders at the rate of 15 per cent. commission to them, they would

be entitled to £12,000, which is a considerable sum of money. They were anxious for the contract to go on, but the necessity for obtaining import licences was an obstacle, an obstacle which might be removed in time, but no one knew whether it would be removed. The parties had entered into a kind of trade which, in the events that happened, involved the obtaining of import licences from certain countries on the continent, and, for reasons best known to them, the countries in some cases had shut down that business for the time being, and were not granting import licences. If that difficulty had been removed there was no reason why good trade and business should not have followed to the advantage of both parties to the contract.

Mr. Diplock submitted that there was no repudiation; and, alternatively, that if there was repudiation, it was not the repudiation which the plaintiffs accepted in the letter of May 27. He said that in order for there to be an effective acceptance of a repudiation, it must be in the terms of the repudiation itself. Mr. Paull, on the other hand, submitted that, in the circumstances, and in view of the nature of the contract, there had been a repudiation by the defendants, and that there was a proper acceptance of that repudiation.

The plaintiffs pleaded in paragraph 5 of the statement of claim in the action: "The defendants did not pass to the plaintiff "company customers' or any orders for goods to the amount of "£80,000 in the year March 1, 1947 to February 28, 1948, nor "did they in each or any of the months of March or April or "May, 1948, pass to the plaintiff company orders to an amount "equal to one-twelfth part of £80,000, and the defendants expressly and/or impliedly by their conduct evinced an intention "not to be bound by or to carry out the said contract according "to its terms and the defendants thereby broke and repudiated "the said contract."

Upon that the defendants applied for particulars of the conduct relied on, and particulars under five heads were given, one of which (the fourth) is in these terms: "They on or about May 18, "1948, at an interview whereat were present Mr. Durham and "Mr. Brodie and the said Muriel acting for and on behalf of "the defendants orally informed the said Shaffer acting for and "on behalf of the plaintiff company that the defendants had not "by the said contract undertaken to pass on orders to the extent "of £80,000 a year but had undertaken to pass on customers' "orders to that value; that they had passed on all the customers' "orders they had and could not pass on what they had not got "and that they were absolved from any further obligation under "the said contract and did not intend to do otherwise for the "future and that the defendants ought not to have signed the "said contract."

So that it became clear that the plaintiffs were relying on that which was said at the interview of May 18. Those particulars were not delivered until December 10, 1948, and Mr. Diplock

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submitted that is not within the acceptance of repudiation in the letter of May 27 of that year. Moreover, he said, if the reason given in December, 1948, was the real reason, that was not a prompt acceptance of the repudiation for it was said many months afterwards. Thus a question might arise as to the meaning of the word " conduct " in the letter. I am inclined to the view that the repudiation which was accepted, or said to be accepted, by the plaintiffs in the letter of May 27, was the failure of the defendants to send forward sufficient orders, either in the first year or in the next three months. It does not appear from that letter that anything that had been said at the interview was relied on.

The real question is whether there was anything which can be said to amount to repudiation.

I have considered the authorities anxiously, and, in so far as I am able to do so, I seek to apply the law as laid down to the facts of this particular case. Streatfeild J. said that this was a very difficult case and near the line. I think that that is a true description. Sometimes when a case is put in one particular way it has great appeal, and, when it is put in the other way, it has an almost equal appeal. I do not think that it is right to look at the interview of May 18 alone; as I understand the law, it is our duty to have regard to the circumstances. I have referred to them. It is most important to bear in mind that this was a long-term contract, and I think it is important, too, to bear in mind that, when the interview of May 18, 1948, took place, the defendants were, on the construction of the contract which I adopt, a long way behind in orders. I am not sure how far one is entitled to have regard to the financial difficulties of the plaintiffs, who were unable to pay wages, but that may be an element, in view of the fact that it was made known to the defendants.

I go back to the words of Lord Coleridge in *Freeth* v. *Burr* [31]: " . . . the real matter for consideration is whether the acts or " conduct of the one do, or do not, amount to an intimation of " an intention to abandon and altogether to refuse performance " of the contract." I say this in order to explain the ground " upon which I think the decisions in these cases must rest. " There has been some conflict amongst them. But I think it " may be taken that the fair result of them is as I have stated, " viz., that the true question is whether the acts and conduct of " the party evince an intention no longer to be bound by the " contract "; or to the words of Atkin L.J. in the *Spettabile* case.[32] After he had cited definitions of repudiation he added: " They all come to the same thing, and they all amount at any " rate to this, that it must be shown that the party to the " contract made quite plain his own intention not to perform the " contract."

[31] L.R. 9 C.P. 208, 213. [32] 121 L.T. 628.

Mr. Paull submitted that when the defendants Brodie and Durham said "We are only under an obligation to pass forward "such orders as we get," they were saying "There is no "obligation on us to perform the contract, though we are ready "to perform another contract." I am not sure that that is right. The view of the defendants was: "We take the view "that under this contract we are only responsible to pass forward "the orders which we get, but we are going to do the best we "can," and they might have added: "We will do everything "possible, because on every order we get, we make something." In those circumstances, is it possible to say that the defendants, either by not sending forward orders, or by anything said at the interview, showed an intention to abandon and altogether to refuse the performance of the contract, or is it possible to say that, because they raised a question as to the construction of the contract, they evinced an intention no longer to be bound by the contract? I think not.

I felt the force of Mr. Paull's argument on the facts as to the small number of orders, and that in the first five months of 1948 only a few thousand pounds' worth of orders were passed to the plaintiffs, and on the evidence as to the interview. On the other hand, repudiation is, as Lord Wright said,[33] a serious matter. It is more serious than usual when it is exercised in regard to a contract which would run for 10 or 15 years. The parties to such a contract know, or if they do not know they have solicitors who can tell them, that there is quite an easy way to determine what the true construction of that contract is, as Bailhache J. and Atkin L.J. said in the *Spettabile* case.[34] The rights of the parties could have been ascertained at little cost and within a very short time. In those circumstances, the plaintiffs took upon themselves a risk in saying "You have repudiated this contract; we "accept your repudiation," a risk which, in my view, was unjustified. I think for these reasons their claim for damages on the basis of repudiation fails, and to that extent the judgment of Streatfeild J. is wrong. I would add that I can appreciate his difficulty; he expressed it himself.

As I have formed that view, it is unnecessary for me to consider a further point raised by Mr. Diplock that, as the reason for the acceptance of the repudiation given by the letter of May 27 is not the reason which is now relied on, or is not the real reason, the plaintiffs cannot have the benefit of that acceptance. It is a very interesting point; I am not sure that there is any decision of the courts upon it. There are some words in a speech of Lord Sumner which may be thought, at least by one side, to help. I do not think those words do help when they are examined. Nor do I think I should help the parties by expressing my view on this question. In my judgment, the submission of Mr. Diplock on the repudiation issue

[33] [1940] 3 All E.R. 60, 71.

[34] 121 L.T. 628.

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succeeds. The appeal ought to be allowed in part, but the judgment will stand for the assessment of damages, or such damages as may be found due to the plaintiffs, in respect of the breaches of contract which they committed by late deliveries during the 15 months for which the contract ran.

MORRIS L.J. [after stating the facts and considering the question of construction, said:] I come to the second part of the case, whether the defendants repudiated this contract—whether they evinced an intention no longer to be bound by it. Speaking for myself, I get the greatest assistance, considering all the cases which have been put before us, from the words used by Lord Coleridge C.J. in *Freeth* v. *Burr*.[35] I cite these two or three sentences: "I mention that because it is important to express "my view that, in cases of this sort, where the question is "whether the one party is set free by the action of the other, "the real matter for consideration is whether the acts or conduct "of the one do or do not amount to an intimation of an intention "to abandon and altogether to refuse performance of the "contract. I say this in order to explain the ground upon which "I think the decisions in these cases must rest. There has been "some conflict amongst them. But I think it may be taken that "the fair result of them is as I have stated, viz., that the true "position is whether the acts and conduct of the party evince "an intention no longer to be bound by the contract. Now, "non-payment on the one hand, or non-delivery on the other, "may amount to such an act, or may be evidence for a jury of "an intention wholly to abandon the contract and set the other "party free." I have read those words again, although they were read by my Lord, because I consider that one must begin one's inquiry as to the facts by having in mind the principle so clearly enunciated in those words.

Keating J., in his judgment in that case, refers to the "circumstances." He says: "But, looking at all the circum-"stances of this case," and then he went on to enumerate what they were in that case.

Lord Selborne, in *Mersey Steel and Iron Co. Ld.* v. *Naylor, Benzon & Co.*,[36] speaks of the actual circumstances. There was a similar reference in *Johnstone* v. *Milling*. Bowen L.J. said[37]: "We have, therefore, to consider upon what prin-"ciples and under what circumstances it must be held that a "promisee, who finds himself confronted with a declaration of "intention by the promisor not to carry out the contract when "the time for performance arrives, may treat the contract as "broken, and sue for the breach thereof. It would seem on "principle that the declaration of such intention by the promisor "is not in itself and unless acted on by the promisee a breach "of the contract; and that it only becomes a breach when it is

[35] L.R. 9 C.P. 208, 213.
[36] 9 App.Cas. 434.
[37] 16 Q.B.D. 460, 472, 474.

"converted by force of what follows it into a wrongful renunciation of the contract. Its real operation appears to be to give the promisee the right of electing either to treat the declaration as brutum fulmen, and holding fast to the contract to wait till the time of its performance has arrived, or to act upon it, and treat it as a final assertion by the promisor that he is no longer bound by the contract, and a wrongful renunciation of the contractual relation into which he has entered. . . . We must construe the language used by the light of the contract and the circumstances of the case in order to see whether there was in this case any such renunciation of the contract."

The first of those two passages in the judgment of Bowen L.J. contains a reference which would be very material if it were necessary to consider the point raised by Mr. Diplock as to whether an acceptance of a repudiation must refer to and specify the repudiation which is alleged. In view of the conclusion I have reached in regard to the question whether there was repudiation, I do not find it necessary to say anything in regard to that topic.

I can summarize quite shortly the reasons why I have come to the conclusion, endeavouring to approach the matter on the lines indicated by Lord Coleridge, that there was no repudiation by the defendants in this case. It is very material, I think, that the contract was to extend over many years. Difficulties arose in 1948 which might have been of a temporary nature. It would be quite impossible to foresee what would happen in future years; it might easily be that orders would at a later time become numerous, and that they would be very much in excess of £80,000. Although I have come to the conclusions that I have expressed as to the wording of the agreement, I do not think that it can be said that the construction of clause 2 (*k*) suggested in the course of the interview of May 18 by the defendants was an absurd construction. In this connexion I think it is not unimportant to see the reaction on the mind of Streatfeild J., where he said: "There is something in it, is there not? How do you "pass on unless there is something to pass on?" [Mr. Gilbert Paull:] "I shall argue that anon, my Lord." [The witness:] "That is why I took it that at that time there was nothing I "had." [Streatfeild J.:] "I shall hear argument, of course, "about it."

I think that the construction put on the contract by the defendants was erroneous, but I do not think that it was impossible or a stupid point of view to suggest. In one sense it must be true to say that the defendants cannot pass on customers' orders unless they have them. They were under obligation under the agreement, as clause 1 (*c*) shows, to supply the manufacturers with full particulars of all purchases, including names and addresses of the customers to whom the goods were sold in the countries. If the defendants just had not got orders, they could not pass on customers' orders. As I have held, they had entered into a contract which was absolute in its terms, and if they failed to get

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customers' orders, and therefore failed to pass on customers' orders, they were in breach of the contract and were liable to pay damages. But they could not, actually, in fact, pass on customers' orders if they did not have customers' orders. There is no finding that the defendants were not doing their best to get orders; there are abundant references in the transcript showing that the defendants said that they were doing their best, and I see no reason to doubt that. It was very much in their interests to do their best: they wanted to do their best.

Mr. Paull has pointed to the fact that the partners did not give evidence in this case, but it does not seem to me that that matter can avail Mr. Paull. The evidence that is before the court is the evidence of Mr. Shaffer, and his evidence as to what took place at the interviews is accepted. There is no doubt that the position in May, 1948, was disastrous for the plaintiffs and one must indeed appreciate their difficulties from the practical point of view. They had constructed the new foundry; they had hoped for large orders; they had all the obligations of the foundry; they had to find wages each week; they had to deal with their bank, and they were undoubtedly in a position of very great difficulty. They asked that the defendants should relieve those difficulties. It does not seem to me that the defendants were unsympathetic, but they were not under obligation to assist in that respect; they were not under obligation to purchase certain material that was in the hands of the plaintiffs. Further, the plaintiffs were in difficulties because of what had happened to their own trade. [His Lordship considered the evidence of Shaffer and went on:] They were undoubtedly in very great difficulty, and it must have been a matter of supreme disappointment for Mr. Shaffer, having understood that orders would come, to find no improvement, but, on the other hand, a deterioration in the position.

I have all those facts in mind, but, nevertheless, it does not seem to me that the defendants evinced an intention to throw over this contract or to repudiate it. They had, I think, done their best; there is certainly no finding that they had not done their best. I have no doubt that they wanted to go on with the contract. The letter of May 27, to which my Lord has referred, certainly does not suggest that anything said at the interview had made a very big impression so far as repudiation was concerned. The interview of May 18 was the last of three interviews. Streatfeild J. does not find that there was any repudiation during the first two interviews, and Mr. Paull has said that he never so contended. If the defendants had been wanting to repudiate this contract, it seems to me that there would have been some effective hint of it in the first two interviews. The interviews also were sought not by them, but by the plaintiffs. I am not overlooking that one must judge not only by words and by motives, but by all the circumstances, and in the light of everything that was done. Endeavouring to do that, I have come to

the conclusion that the defendants did not repudiate this contract, and did not evince an intention no longer to be bound by it. They took an erroneous view, but not one which was impossible or stupid, in regard to one clause of the contract; they had done their best; they had met difficulties which were unexpected both by them and by the plaintiffs; it was a sorry position for both sides, but I do not consider that the defendants had repudiated their contract.

UPJOHN J. I agree with what has been stated by my Lords, and I only desire to add a few words on two points. The first is one of the points of construction, and the second is the point upon which we are differing from Streatfeild J.

[His Lordship then considered the construction of the document and went on:]

On the other point, that of repudiation, as my Lord, Singleton L.J., has said, the difficulty in this case is not in stating what is the law, but in its application to the particular circumstances of this case. I do not desire to add anything to what has fallen from my Lords as to the law; I only desire, out of deference to Streatfield J., to state very shortly the circumstances which appear to me to be relevant in ascertaining whether the defendants were evincing an intention no longer to be bound by the contract, to explain why I am differing from him.

There are, I think, two cardinal matters to remember. The first is that this was a long-term contract; I need say no more about that; but, secondly, this was a joint adventure which was intended to break into entirely new ground. It was hoped that the market abroad in the sanitary fittings which had before the war largely been supplied from German sources would fall into the lap of the plaintiffs and the defendants, but, of course, when you are starting to enter hopefully into new markets altogether it frequently happens that, in the initial stages, performance sadly falls behind the promise, and, in my judgment, the admitted breaches of the defendants in the first year must be considered in that light. They were, no doubt, in breach; their deliveries for the first year had fallen sadly behind, and they were in breach of their obligations under clause 2 (*k*) of the contract. On the other hand, one must bear this in mind: the plaintiffs themselves would have been quite unable, admittedly unable, to fulfil orders for £80,000, or anything like it, had they been forthcoming from the defendants. They were having their teething troubles as well as the defendants. The factory had to be equipped; the staff had to be organized and operatives trained; and on top of all that for a number of months they had trouble in their foundry. They were not, however, in breach, for they were able to deliver all the orders which they in fact received from the defendants in a reasonable time. By April, 1948, Mr. Shaffer found the situation had seriously deteriorated, even compared with the modest performance of the first year's operation of the contract.

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He found that, due to restrictions in foreign countries as regards imports, the foreign markets, while not closed, had seriously deteriorated. The plaintiff company was in serious financial difficulties, and was unable, indeed, to pay wages; but that, although partly due to the failure of the defendants to give orders under the contract, was due also, in part, to the fact that the home market, with which the defendants had no concern, had completely disappeared.

I think that it is important to appreciate the financial difficulties of the plaintiffs for this reason, and this reason only: It supplies the clue to the interviews that took place in April and May, 1948. I need not trouble with the first interview with Mr. Sondheim. At the second interview, which was sought by Mr. Shaffer, who saw one of the partners, Mr. Freeman, Mr. Shaffer asked for financial assistance, but his request fell on peculiarly stony ground. He then asked for another interview. I doubt not that he wanted to see other partners in order to try to persuade them to give him further financial assistance to tide over his difficulties. That, I think, is an important matter to have in mind. The interview was fixed for May 18. At it there is no doubt that both parties were anxious to continue trading, the one with the other; both parties were at their wit's end as to what to do; the defendants were at their wit's end as to how they were to get an adequate number of orders; the plaintiff company, through Mr. Shaffer, was at its wit's end as to how to get money to carry on its factory. It is not surprising, in those circumstances, that a question should arise as to the respective rights and difficulties of the plaintiff company and the defendants, and so it did. Mr. Shaffer stated that he had an unqualified agreement for the supply of £80,000 worth of orders a year. That was immediately challenged by the defendants, who said that they were only bound to pass on such orders from customers as they had been able to obtain, although they fully recognized their duty to do their utmost to obtain such orders. There was no lengthy discussion upon the matter. I respectfully agree with Morris L.J. when he says that the construction put upon clause 2 (*k*) by the defendants was not absurd or untenable, and I am wholly satisfied that the construction contended for was put forward in complete good faith; indeed, if clause 2 (*k*) is examined, as it might be, by a layman, ignoring the other clauses in the agreement, and ignoring the fact that the whole essence of the agreement was that there was to be the relationship of vendor and purchaser as between the plaintiffs and the defendants in relation to each order, it is possible that the construction contended for by Mr. Diplock was right.

Mr. Paull submitted that the defendants by their behaviour at this meeting, coupled with their earlier conduct, evinced an intention no longer to be bound by the contract. He said that their refusal to recognize that they were bound by an unqualified warranty under the contract to produce £80,000 worth of orders

a year evinced such an intention. The argument so put is attractive, but, after all, it merely comes to this, that the defendants were putting forward honestly, as I have said, their view that, on the true construction of the contract, they were only bound to pass on such orders as they were able to obtain.

In all the circumstances of this case, I am quite unable to come to the conclusion that the defendants by their acts and conduct evinced an intention no longer to be bound by their contract.

*Appeal allowed in part (on the issue as to repudiation).*

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Solicitors: *Freshfields; Benson Mazure & Co.*

E. D.

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[COURT OF APPEAL.]

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Singleton and Morris L.JJ.

*Legal Aid—Divorce—Security for wife's costs—Both husband and wife "assisted persons"—Matrimonial Causes Rules,* 1950 (*S.I.* 1950, *No.* 1940) (*L.* 27), *r.* 65 (3).

In the absence of regulations under section 12 (2) (*b*) (ii) of the Legal Aid and Advice Act, 1949, the power of the Divorce Court under rule 65 (3) of the Matrimonial Causes Rules, 1950, to order security for a wife's costs remains, and it may do so even though both parties are legally assisted persons, but in that case it is very seldom that an application for security should be made.

An application was made under rule 65 (3) for security for the wife's costs in a divorce suit in which both parties were legally assisted persons, the National Assistance Board having assessed the petitioning husband's maximum contribution to the legal aid fund at £70 and the respondent wife's contribution as nil. The registrar, who had before him no other evidence as to the circumstances and means of the parties than the husband's legal aid certificate, ordered him to provide security to the extent of £20 :—

*Held,* that it was undesirable that there should be an order for security made against the petitioner on no information other than that which was before the National Assistance Board, and the order would be set aside.

*Conway* v. *Wimpey (George) & Co. Ld.* [1951] 1 T.L.R. 215; [1951] 1 All E.R. 56 distinguished.

*Vincent* v. *Vincent* [1952] W.N. 532 ([1952] 2 T.L.R. 907) ([1952] 2 All E.R. 978) applied.

Order of Collingwood J. reversed.

APPEAL by the husband petitioner from an order of Collingwood J. (sitting in chambers).

On January 3, 1952, William Harold Evans filed a petition for a decree of dissolution of his marriage with Clara Ethel

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Evans on the ground of cruelty. The wife made application for legal aid, and, on February 9, 1952, she was granted a civil aid certificate to defend the suit. Her disposable income was stated to be £156, her disposable capital £8, and her maximum contribution to the legal aid fund was assessed as nil. On July 21, 1952, she filed an answer to the petition.

The husband also applied for legal aid, and, on September 18, 1952, he was granted a legal aid certificate, the National Assistance Board determining his disposable income at £296, his disposable capital as nil, and his maximum contribution as £70. The local committee assessed his contribution at the same sum, £70, payable by an initial instalment of £4 and then 11 monthly payments of £6 each.

On November 3, 1952, an application was made to the District Registrar of Brighton that he should order the husband petitioner to give security for the wife's costs of the hearing. The registrar had before him the civil aid certificate of the husband. He ordered that the husband should provide security to the extent of £20. The husband appealed to Collingwood J., who upheld the registrar, and from that decision the husband appealed again, both parties being assisted persons for the purpose of the appeal.

*R. D. Ranking* for the petitioner husband.
*Kenneth Jones* for the respondent wife.

The following cases were cited in argument:—*Conway* v. *Wimpey (George) & Co. Ld.*[1]; *Burton* v. *Holdsworth*[2]; *Maclean* v. *Maclean*[3]; *Wigley* v. *Wigley*[4]; *Williams* v. *Williams*[5]; *Jackson* v. *John Dickinson & Co. (Bolton) Ld.*[6]; and *Vincent* v. *Vincent.*[7]

SINGLETON L.J. stated the facts, substantially as set out above, and continued:—The benefit of the legal aid scheme to the parties is apparent. The wife secures legal aid without contributing anything, and the husband, the petitioner, who has considerable earning power, has to provide £70 by instalments (which some years ago would have been enough to cover the costs of a petition of this kind). The benefit to him of the scheme is that he knows the extent of his liability, apart from the possibility of an order for costs being made against him later, and he is able to pay the money by instalments.

The Legal Aid and Advice Act, 1949, provides by section 2 the financial conditions of legal aid; section 3 is concerned with the

[1] [1951] 1 T.L.R. 215 ([1951] 1 All E.R. 56).
[2] [1951] 2 K.B. 703 ([1951] 2 T.L.R. 435) ([1951] 2 All E.R. 381).
[3] [1951] 1 All E.R. 967.
[4] [1951] P. 156 ([1950] 2 All E.R. 1218).
[5] [1929] P. 114.
[6] [1952] W.N. 9 ([1952] 1 All E.R. 104).
[7] [1952] W.N. 532 ([1952] 2 T.L.R. 907) ([1952] 2 All E.R. 978).

contributions which assisted persons are to make; and section 4 (6) provides: "Subject to the provisions of this section, a "person's disposable income and disposable capital, and the "maximum amount of his contribution to the legal aid fund "in respect of any proceedings, shall be determined by the "National Assistance Board, and the board may call attention "to any special circumstances affecting the maximum amount "of the lump sum and periodical payments which he could "reasonably make on account of any contribution." It was under that subsection that the National Assistance Board determined the maximum contribution, which the petitioner could make towards his own costs, at the sum of £70.

Section 12 provides: "(1) The Lord Chancellor may make "such regulations as appear to him necessary or desirable for "giving effect to this Part of this Act or for preventing abuses "thereof. (2) Without prejudice to the foregoing subsection or "any other provision of this Act authorizing the making of "regulations, regulations may . . . (*b*) regulate the procedure "of any court or tribunal in relation to legal aid, and in "particular make provision . . . (ii) as to the cases in which and "extent to which a person receiving legal aid may be required "to give security for costs, and the manner in which it may be "given." No such regulations have been made as yet.

Rule 65 (3) of the Matrimonial Causes Rules, 1950, provides: "Where an application for security has been made under this "rule, a registrar shall ascertain what is a sufficient sum of "money to cover the costs of the wife, and if, after taking all "the circumstances into account, including the means of the "husband and the wife, he considers that the husband should "provide security for all or some of the wife's costs, he may "order the husband to pay the sum so ascertained, or some "portion of it, into court or to give security therefor within "such time as he may fix, and may direct a stay of the "proceedings until the order is complied with." That states the power of the court when an application is made by a wife, who is in this case the respondent, for security for her costs. The present form of rule 65 (3) dates from 1947. It provides expressly that one of the matters to be taken into account on an application for security for costs is the means of the husband.

[His Lordship referred to the order made by the registrar and continued:] The husband appealed to Collingwood J. against that order, but the judge said that he was bound by *Vincent* v. *Vincent*,[7] and upheld the registrar.

Mr. Ranking, on behalf of the husband, put forward two submissions to this court. The first was that where both parties were legally aided, there was no power to make an order for security for costs. His second point was that, even if there was power, the making of the order for £20 security in this case was a wrong exercise of the discretion conferred on a registrar and that the order in question ought to be set aside.

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In December, 1950, there was before this court *Conway* v. *Wimpey (George) & Co. Ltd.*,[8] in which the plaintiff had been ordered to provide security for the costs of an appeal. Immediately thereafter, the plaintiff became an assisted person and an application was made that the order for security should be discharged. The judgment of the court was that, until the regulations envisaged by section 12 (2) (*b*) (ii) of the Act of 1949 were made, in the absence of special circumstances, an order for security for costs should not be made against an assisted person and, therefore, the order which had been made would be discharged. Cohen L.J., who gave the judgment of the court, said[9]: "Nonetheless, until we get the guidance of the regulations . . . "I think we must proceed on the basis that, generally speaking, "and in the absence of special circumstances, it would be "inappropriate to make an order for security for costs at a time "when an emergency certificate is in force." He was considering an order for security for costs made under order 58, r. 15 (2).

It was submitted by Mr. Kenneth Jones that quite a different position arose in this case, for this was an application for security for the wife's costs under rule 65 of the Matrimonial Causes Rules, 1950. These rules, it should be noticed, were made after the Legal Aid and Advice Act of 1949, and, indeed, after the decision of the court in *Conway* v. *Wimpey (George) & Co. Ltd.*[9] In the absence of regulations under section 12 (2) (*b*) (ii), it cannot be said that the power of the Divorce Court to order security for a wife's costs has ceased. I think it remains, and a party, whether assisted or not, may make an application under the provisions of rule 65 even though the other party be an assisted party. The matter then has to be considered. At the same time, I think that it is very seldom that such an application should be made.

It seems to have been thought that the principle laid down in *Conway* v. *Wimpey (George) & Co. Ltd.*[9] should be taken to cover divorce practice as well. I am inclined to think it would have been a good thing if it had been so treated by the court, though the court was not then concerned with a matrimonial suit.

A practice direction was issued by the Senior Registrar of the Divorce Court, which I should describe as extremely useful from the point of view of practice, though Barnard J. seems to have thought that it was not worded quite rightly. This court was given to understand that the registrar at Brighton did not have it before him when considering this application. The direction is: "*Legal Aid. Costs, security for.* In the absence of any regula- "tions under section 12 of the Legal Aid and Advice Act, 1949, "the decision in *Conway* v. *Wimpey (George) & Co. Ltd.*[9] must "be taken to prevent the making of any order for security for "costs against an assisted person unless there are special

[8] [1951] 1 T.L.R. 215 ([1951] 1 All E.R. 56).
[9] Ibid.

" circumstances. The fact that a legally aided husband has been " directed by the local committee to pay a contribution less than " the maximum contribution may be regarded as a special " circumstance, and an order to secure for the wife's costs a sum " not greater than the difference between the actual and " maximum contributions may be made in a proper case."

In November, 1952, Barnard J. decided *Vincent* v. *Vincent*.[10] In that case the husband filed a petition for divorce on April 25, 1951, on the ground of his wife's desertion. On January 14, 1952, he obtained a civil aid certificate to enable him to carry on the proceedings. On July 22, 1952, the wife obtained a civil aid certificate limited to obtaining an order for security against the husband. On August 28, 1952, the wife's application to the registrar for such an order was dismissed on the ground that no order for security could be made against an assisted person. On appeal to Barnard J. it was held that it was a well-established practice in the Divorce Division that a wife had a right to apply for her security for costs, and that that was not affected by the husband being an assisted person, and, therefore, the registrar was bound to comply with rule 65 (3) of the Matrimonial Causes Rules, 1950, and the case would be referred to him for that purpose.

Barnard J., in giving his decision, pointed out that Cohen L.J. in *Conway* v. *Wimpey (George) & Co. Ld.*[11] was careful to make it clear that he was not seeking to lay down a general rule covering all classes of case and all circumstances, and continued: " The registry, by their direction, have interpreted the decision in " *Conway's* case as applying to a wife's application for security " for costs in the Divorce Division. I have come to the con- " clusion that this direction is a misinterpretation of the decision " in *Conway's* case. It is a well-established practice of this " division that a wife has a right to apply for security for her " costs, and Lord Merrivale P. once said, in *In re A. B.'s* " *Petition*[12] '. . . there is something in the nature of a prescrip- " ' tive right upon cause shown to secure to the wife the means " ' for defence.' "

Barnard J. then referred to *Williams* v. *Williams*,[13] where Hill J. said: " ' The main object of security, in recent years at " ' any rate, is that justice may be done by the wife being enabled " ' to procure the assistance of solicitor and counsel and come to " ' court. That is the main object in modern times. The old " ' basis for the rule, namely, that all the wife's property on " ' marriage passes to the husband, and therefore the husband " ' alone can foot the bill, has gone altogether, and now you " ' must consider whether in the circumstances the wife can foot " ' the bill, and it is a very important matter to consider whether " ' the solicitor can conduct the business without something in " ' court to pay him up to setting down and without security.' "

[10] [1952] 2 All E.R. 978.
[11] [1951] 1 T.L.R. 215.
[12] [1928] P. 25, 27.
[13] [1929] P. 114, 118.

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Barnard J. continued: "I think that the present case is a "different class of case from *Conway* v. *Wimpey (George) & Co. "Ld.*[14] by reason of the peculiar nature of a wife's security for "costs in the Divorce Division, which I have already indicated "and is not covered by *Conway's* case. I, therefore, allow this "appeal and refer the matter back to the Leeds registrar to "comply with rule 65 (3) of the Matrimonial Causes Rules, 1950. "The registrar will, of course, take into account the fact that the "husband is an assisted person and will also have regard to the "facts stated in the civil aid certificate and it may well be that "he will come to the conclusion that this is a case in which no "security should be ordered." Barnard J. upheld the power of the Divorce Court to make an order for security, even though the person against whom it is made was an assisted person. I have said that I think that that power remains. The judge pointed out that if the case went back to the registrar, he might well order nothing by way of security.

In this case now under appeal the wife was an assisted person. There was no difficulty about her coming to court with solicitor and counsel for she had legal aid. Application was made to the registrar for security for costs, but in my view it would have been better not to have made it. If the registrar had properly found himself able to make an order for security, it could only have been for a trifling amount, and the cost on both sides of getting the order is at the expense of the legal aid fund. Moreover, the customary practice, when an application of this sort is made, is to produce a supporting affidavit as to means and the like, and that costs a good deal of money. There was nothing like that before the court in this case. The registrar had the legal aid certificate before him and he indorsed the summons: "I have "referred to the petitioner's legal aid certificate for particulars "of the petitioner's means and consider he is able to give security "for £20." The legal aid certificate states, at least, that the petitioner had no disposable capital. Mr. Kenneth Jones pointed out to us that, notwithstanding that, the petitioner might have had some capital which was not "disposable capital." The Legal Aid and Advice Act, 1949, referred to the National Assistance Board the duties of determining a person's disposable income and disposable capital and the maximum amount of his contribution to the legal aid fund. The reason for that course is because officers of the National Assistance Board are accustomed to dealing with such matters. The Legal Aid Committee followed the advice of the National Assistance Board and, between them, they decided how much the petitioner who desired to bring his petition before the court should provide by way of contribution.

Within a very short time of that having been decided, and the petitioner having determined to pay that contribution, an application was made to the registrar by the wife (who also is an

[14] [1951] 1 T.L.R. 215.

assisted person and who does not really need security for costs at all, because she is an assisted person) under rule 65. It is the duty of the registrar under that rule, after taking all the circumstances into account, including the means of the husband and the wife, to consider whether or not the husband should provide security and how much he should provide, if anything. The registrar has to consider all the circumstances including the means of both spouses. The registrar said: "I have referred to "the petitioner's legal aid certificate for particulars of the "petitioner's means and consider he is able to give security for "£20." It looks to me very much as though he considered that the petitioner was in a position to do something which the National Assistance Board thought they ought not to ask him to do. I recognize that the test which the registrar had to apply is not precisely the same as that which the National Assistance Board has to use; but it is the duty of the National Assistance Board, in a case such as this, to find out, having regard to the terms of the Act and the rules thereunder, how much is reasonable for the petitioner to pay when he is granted legal aid; and they do that. The registrar, who considered the matter very soon after the Board had made their assessment, said: "I have the "certificate before me and I consider that the husband is able "to give security for £20." That is akin to a registrar sitting on appeal from the National Assistance Board, and it is undesirable that such a position should arise.

Over and above that, the object of the Legal Aid and Advice Act, 1949, is to enable a party who has a case to put before the court, a case which is considered proper and worthy of assistance, but who has not the means to do so, to put his case forward with the help of the legal aid fund. In this case both sides have been granted legal aid. The application on behalf of the wife is: "Grant me security." It may be that the result of her application would be that one side which has legal aid would prevent the other side which also has legal aid from bringing his petition forward. It is not clear where the petitioner is to find the sum which the registrar ordered him to pay. Has he to borrow it, or has the petition to be held up for months, when it has been decided by the Legal Aid Committee that he has a proper case to bring forward? What good purpose does the order for security serve? I do not think that it serves any good purpose whatever. In the case of an application, such as this, made by a wife who is an assisted person, and when there is no reason to think that the husband has any means other than those which the National Assistance Board has found, I do not see what good an application for security can do to anyone when it follows immediately on the assessment of the husband's financial position by the National Assistance Board. It is a waste of time, and it is a waste of money. If there is any reason to think that there has been a change of circumstances since the Board made their assessment, or that something has

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been overlooked, the position is quite different; but that there should be an application of this kind without any materials put before the registrar except the civil aid certificate is difficult to understand.

Further, if it had been right to make an order which would have preserved, I suppose, the right of the wife under rule 65, it clearly ought to have been a very small order and the cost of obtaining it would be more than it was worth. The Legal Aid and Advice Act, 1949, may be, and, I think, is, of great benefit, but it is important that it should be worked reasonably. This application has led to the incurring of considerable costs. It was an application which could be made without the leave of the committee. At a later stage the leave of the committee was necessary for the petitioner to appeal to this court. It was right that that leave should be given and, as the order had been made, it was right that it should be discussed in this court.

I do not question the power to make an order under rule 65, but as Barnard J. said in *Vincent* v. *Vincent*,[15] in referring the matter back to the registrar, "it may well be that he will "come to the conclusion that this is a case in which no security "should be ordered." That is the conclusion to which I think the registrar ought to have come in this case. It is for that reason that I think the application was a mistake. If all that is put before a registrar, in a case of this kind, is the civil aid certificate, I do not think that it is right for him to say: "I have "referred to the petitioner's legal aid certificate for particulars "of the petitioner's means and consider he is able to give "security for £20." If that is the true position, one would think that a further £20 might have been ordered by way of contribution from the husband towards his own costs. I do not think that it is desirable, in view of the circumstances which are before this court, that there should be an order of this kind made against the petitioner on no information other than that which was before the National Assistance Board.

For these reasons I have reached the conclusion that this appeal should be allowed and that the order for security made by the registrar should be set aside.

MORRIS L.J. I am entirely of the same opinion. It is of interest, when considering the circumstances in this case, to note some remarks made by my Lord in *Wigley* v. *Wigley*.[16] That was a case in which the wife was an assisted person, but the husband was not. My Lord said[17]: "But, if that assisted "person is a husband, and the suit is a matrimonial suit, it "may be that thereafter an application comes for security for "the wife's costs. It is with that sort of case in mind that I "think it might be as well if regulations under section 12 (2) "(*b*) (ii) were made. Otherwise, someone will be faced with

[15] [1952] 2 All E.R. 978, 980.
[16] [1951] P. 156.
[17] [1951] P. 156, 160.

" the task of deciding what is to be done in regard to the wife's " application for security for costs when, with the help of the " National Assistance Board, the local committee have already " decided that the husband shall make the maximum payment " which he can make to the legal aid fund. There may be an " overlapping and it will be extraordinarily difficult for anyone " to say what shall be done unless further guidance be given on " that matter."

It is to be observed that by section 1 (7) (*b*) of the Legal Aid and Advice Act, 1949, it is provided: " Save as expressly pro- " vided by this Part of this Act or by regulations made " thereunder— . . . (*b*) the rights conferred by this Part of this " Act on a person receiving legal aid shall not affect the rights or " liabilities of other parties to the proceedings or the principles " on which the discretion of any court or tribunal is normally " exercised."

The Matrimonial Causes Rules of 1950 were dated December 4, 1950, and were amended by the Matrimonial Causes Amendment Rules, 1951, dated May 9, 1951. The provisions of rule 65 are, therefore, provisions which are in force during the period subsequent to the passing of the Legal Aid and Advice Act, 1949. I can find nothing which supersedes, or which in any way nullifies, the present effect and validity of rule 65 of the Matrimonial Causes Rules, 1950. Therefore, I find myself in agreement with the judgment which Barnard J. delivered in *Vincent* v. *Vincent*,[18] to which my Lord has referred. Barnard J. there pointed out that in *Conway* v. *Wimpey (George) & Co. Ld.*[19] this court was considering a situation to which order 58, r. 15 (2), applied, and it was from that rule that the expression " special " circumstances " came. It follows, therefore, that rule 65 is operative, and that the power to make an order for security under that rule remains and survives, even though the parties are assisted persons. But it is of great consequence to have in mind the concluding words used by Barnard J., to which my Lord has drawn special attention. They form a guide and are a pointer to the view which I think must have been held by the judge as to what is likely to happen in cases of this kind.

We were also referred to the decision of the Court of Appeal in *Jackson* v. *John Dickinson & Co. (Bolton) Ld.*[20] in which the plaintiff, who was ordinarily resident abroad, claimed, as an assisted person, damages for personal injuries. The defendants applied for an order for security for costs. It was held that the fact that the plaintiff was an assisted person did not disentitle the defendants from obtaining an order for security.

Mr. Kenneth Jones referred, in the course of his submissions, to the provisions of section 2 (2) (*e*) of the Legal Aid and Advice Act: " Where a person receives legal aid in connexion with any

[18] [1952] 2 All E.R. 978.
[19] [1951] 1 T.L.R. 215.
[20] [1952] W.N. 9 ([1952] 1 All E.R. 104).

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" proceedings . . . (*e*) his liability by virtue of an order for costs " made against him with respect to the proceedings shall not " exceed the amount (if any) which is a reasonable one for him " to pay having regard to all the circumstances, including the " means of all the parties and their conduct in connexion with " the dispute." Mr. Kenneth Jones quite correctly pointed out that that shows that though a party is an assisted person, if due regard is had to that fact and to all the circumstances, there may be an order for costs made against him. In the present case, the only material, we have been definitely told, which was before the registrar was the civil aid certificate. Mr. Kenneth Jones submitted that, in spite of the terms of that certificate, it might have been that the assisted person had some resources. He pointed, for example, to para. 6 of the second schedule of the Legal Aid (Assessment of Resources) Regulations, 1950 (No. 1358), which reads: " No account shall be taken of any loose cash in the posses- " sion of the person concerned reasonably necessary to meet his " current requirements so far as it does not exceed £20." So, Mr. Kenneth Jones argued: " The husband may have had up " to £20," and he pointed to other contingencies or possibilities. It seems to me, however, that all that is pure speculation and that, in a case in which the only material before the registrar was what is contained in the civil aid certificate in this case, there was no material on which the registrar could make his order.

It might well be that the effect of that order would be to prevent the assisted person from proceeding with his petition. There is the usual stay pending the provision of security, but unless the petitioner could find the £20, he might never be able to proceed.

I agree fully with all that my Lord has said, and, on the facts of this case, it seems to me there was not sufficient material on which the registrar could make the order which he made. I concur with the order proposed by my Lord.

*Appeal allowed.*

Solicitors: *Haslewood, Hare, Shirley Woolmer & Co., for Bosley & Co., Brighton; Gates & Co., Brighton.*

E. D.

[QUEEN'S BENCH DIVISION.]

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*Dec.* 1, 2, 3, 4, 5, 8.

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[1951 A. No. 1390.]

*Factory—Steel foundry—Injurious dust—Elimination—Combination of grid and extractor plant—Provision of masks—Pneumoconiosis contracted by workman—Whether "practicable measures" taken for protection of employees—Factories Act*, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 67), *s.* 47 (1)—*Grinding of Metals (Miscellaneous Industries) Regulations*, 1925 (*S.R. & O.* 1925, *No.* 904), *reg.* 13.

By section 47 (1) of the Factories Act, 1937: "In every factory "in which . . . there is given off any dust . . . injurious . . . "to the persons employed . . . all practicable measures shall be "taken to protect the persons employed against inhalation of the "dust . . . and in particular, where the nature of the process "makes it practicable, exhaust appliances shall be provided. . . . "

From 1940 to 1948, except for two periods of time, the plaintiff was employed by the defendants in their steel foundry. Although it was not realized at the time, he had by 1943 contracted pneumoconiosis as a result of inhaling dust in the foundry, and by 1948 he was partially disabled. Before 1940 the defendants had installed grids and gratings in their foundry in an effort to eliminate dust, and in 1942 they installed an extractor plant underneath the gratings to draw off the dust, which resulted in a great improvement in the atmosphere of the foundry. At the time of its installation the combination of an extractor plant and gratings for the purpose of eliminating the danger from dust was new in the steel industry. The defendants also provided masks for their employees and endeavoured to induce them to wear them, but the plaintiff, although well aware of the danger, chose not to wear his while at work. In an action by the plaintiff claiming damages on the ground that his condition was caused and aggravated by negligence and/or breach of statutory duty by the defendants in that (among other things) they took no steps to safeguard him from the dust or to provide exhaust fans or appliances and were, in the circumstances, in breach of section 47 (1) of the Factories Act, 1937:—

*Held*, that the obligations imposed by section 47 (1) depended upon the meaning of the word "practicable"; that, although that word imposed a stricter standard than "reasonably practicable" it meant that the measures to be taken must be possible in the light of current knowledge and invention; that the method now perfected for eliminating the dust hazard in steel foundries was not known at the time when the plaintiff contracted pneumoconiosis and was, therefore, not practicable within the meaning of section 47 (1), and that, therefore, as the defendants had taken reasonable steps to induce their employees to wear masks, they could not be said to have been in breach of section 47 (1) or of their common law duty. The plaintiff, accordingly, was not entitled to succeed.

ACTION.

The plaintiff was employed by the defendants at their steel foundry for about eight years. From July, 1940, until October,

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1944, except for a period of six months, he worked in and about a sandmill, preparing a sand mixture in a hopper and also shovelling sand through two-inch gratings on to a conveyor belt a few feet below. That was a dusty operation, for a considerable amount of dust rose up through the grating. From October, 1944, until September, 1945, the plaintiff was a foundry slinger, engaged in taking castings and moulds to gratings and grids where the castings were knocked out, a process which also caused a considerable amount of dust. In September, 1945, the plaintiff left the defendants' employment, but he returned in December, 1946, when, until April, 1948, he worked as a labourer in the shot blasting department, wheeling castings on a trolley into the sand or shot blasting cabinets. While blasting was in process the doors were closed and the shot-blaster alone remained in the cabinet, but occasionally dust would come as if from the cabinets although any dust which actually escaped from the cabinets was infinitesimal. When blasting was over the plaintiff went into the cabinets and removed the castings. From April, 1948, to October, 1948, he was a slinger for the shot-blaster, and it was part of his work to rough off surplus sand from the castings, and that, again, was very dusty work.

In November, 1943, when a general X-ray of all the defendants' workers was taken, nothing abnormal was noticed in the X-ray of the plaintiff. In October, 1948, the plaintiff left the defendants' employment. Further X-rays were taken, and he was found to be suffering from pneumoconiosis, which, in fact, he had contracted in 1943. Finally, in August, 1949, the plaintiff was certified by a pneumoconiosis board as suffering from that condition and awarded a 40 per cent. disability pension.

Pneumoconiosis is a progressive disease caused by inhalation of dust, in particular of dust caused by very fine particles of sand with a high silica content such as is used in steel foundries. The defendants were among the foremost in the steel industry to carry out research into methods of eliminating the dust hazard in steel foundries, and were the first to introduce grids or gratings to reduce the dust, and at the time when the plaintiff began working for them the current method was for castings to be knocked out on the sandy floor and not over a grid, which was a less dusty method. In 1942 the defendants installed an extractor plant underneath the grating which drew away the dust and effected a great improvement in the atmosphere of the foundry. At the time when it was installed the extractor plant was an innovation. Masks provided by the defendants were issued to all the men working in the foundry, and it was the custom of the foreman to tell all new employees that they must wear their masks. The plaintiff was supplied with a mask when he entered the defendants' employment, but although he was aware of the danger and throughout his employment possessed a mask, he was not in the habit of wearing it at his work.

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The plaintiff brought this action for damages for personal injuries and physical harm against the defendants. He alleged that the pneumoconiosis from which he was suffering was caused and aggravated by negligence and/or breach of statutory duty by the defendants during the period when he was employed by them in that (among other things) they took no adequate steps to safeguard him against the danger of contracting pneumoconiosis and took no steps to provide fans or exhaust appliances, and were, in the circumstances, in breach of sections 4 and 47 (1)[1] of the Factories Act, 1937. He also alleged breach by the defendants of regulation 13 of the Grinding of Metals (Miscellaneous Industries) Regulations, 1925.[2]

The defendants denied liability.

*D. P. Croom-Johnson* for the plaintiff.
*P. M. O'Connor* for the defendants.

The cases referred to in argument included the following:— *McCarthy* v. *Coldair Ld.*[3]; *Lee* v. *Nursery Furnishings Ld.*[4]; *Clifford* v. *Challen (Charles H.) & Son*[5]; and *McCorkindale* v. *Lion Foundry Co. Ld.*[6]

PARKER J. The plaintiff claims damages against his late employers for negligence or breach of statutory duty. Shortly, his case is that he was employed by the defendants in their steel foundry at Letchworth from 1940 to 1945, and again from the beginning of 1946 until October of 1948, and that throughout those periods he was working under very dusty conditions, and as a result contracted a condition of the lungs known by the generic name of pneumoconiosis. He claims that that condition resulted from a breach of the common law duty as between master and servant, or a breach of statutory duty under the Factories Act and regulations made thereunder, to take steps to prevent him being injured by dust.

[1] Factories Act, 1937, s. 47 (1): "In every factory in which, in connexion with any process carried on, there is given off any dust or fume or other impurity of such a character and to such extent as to be likely to be injurious or offensive to the persons employed, or any substantial quantity of dust of any kind, all practicable measures shall be taken to protect the persons employed against inhalation of the dust or fume or other impurity and to prevent its accumulating in any workroom, and in particular, where the nature of the process makes it practicable, exhaust appliances shall be provided and maintained, as near as possible to the point of origin of the dust or fume or other impurity, so as to prevent it entering the air of any workroom."

[2] Grinding of Metals (Miscellaneous Industries) Regulations, 1925, reg. 13: "Sand blasting shall not be done in any room except in an enclosed chamber or cabinet in which no other work is ordinarily performed and at which efficient means are provided, arranged and maintained to prevent the escape of dust to the outside of such chamber or cabinet."

[3] [1951] W.N. 590; [1951] 2 T.L.R. 1226.

[4] (1945) 61 T.L.R. 263; [1945] 1 All E.R. 387.

[5] [1951] 1 K.B. 495; [1951] 1 T.L.R. 234; [1951] 1 All E.R. 72.

[6] Unreported, April 5, 1952.

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[His Lordship stated the facts as set out above, considered the medical evidence, and continued:] I have come to the conclusion that the balance of probabilities, despite the difficulties of the short exposure, are that the plaintiff had, by November, 1943, contracted pneumoconiosis of the lung. The question then is: was it contracted in the course of this employment? In my view it was. Indeed, if it is once held that he is suffering from the disease it is difficult to see how else he could have got it.

Then comes the question: if, as I have held, he suffers from this condition of pneumoconiosis, did he contract it as a result of any fault on the part of his employers? Before dealing with the specific allegations under that head, I think that it is right to make one or two general observations. First, it is inevitable that a steel foundry will produce considerable hazards from the point of view of pneumoconiosis. I am told that steel foundries in the country consume—if that is the right word—something like two million tons of sand in a year. That is sand with a very high silica content, and it is the inevitable result of the very operation of the foundry work that dusty conditions will prevail whatever care is taken. But, of course, it follows that, because of those hazards and because of those dusty conditions, employers must do all that they can to limit the hazard.

Recent research has shown that the dust which is dangerous from the point of view of pneumoconiosis is so fine that it cannot be seen—dust of the order of what is referred to as five to ten microns, a micron being a ten-thousandth part of a millimetre—and of that dangerous dust the most dangerous is that produced in the fettling shop of the foundry by the use of pneumatic chisels which cut the sand particles, and freshly broken particles of sand of that minute size are the most dangerous. It becomes clear at once that it is inevitable that throughout the atmosphere of a foundry there will be this very dangerous dust, and by its very layout it is impossible to divide a foundry off into small, as it were, watertight compartments where any dangerous dust can be isolated. A certain amount is bound to go into the atmosphere. The most dangerous place is the shot blasting cabinet, because there the sand is blasted off the castings by an operator using a hosepipe from which is shot out shot metal under a pressure of some 95 lbs. to the square inch, which itself breaks the sand particles and causes these dangerous freshly fractured particles. In regard to that regulations, to which I will refer, have been made, dealing with the construction and use of the cabinets in which shot blasting takes place because, unlike a lot of the other processes in the foundry, it is possible to isolate the dangerous dust produced.

I draw attention to those observations because this is one of the cases where it is not enough for a workman to say "I got "the disease during my period of employment." He must go further and satisfy the court that it was caused as a result of some breach by his employers of their common law or statutory

duty, and that is all the more imperative when the very nature of the work is one which is subject to hazards which cannot be eliminated altogether.

One final observation; it is conceded by everybody in this case that the defendants have conducted considerable research into this matter. They have invented, and are continuing to invent, new methods of overcoming the hazards, and they are in the very front of the fight by the steel foundry industry in this country to eliminate these hazards.

The first ground which was relied on by the plaintiff was an alleged breach by the defendants of section 47 of the Factories Act, 1937. [His Lordship read section 47 (1) and continued:] It was said here that it was practicable at all material times to insert an exhaust appliance under the grid, as was in fact done in January, 1942. It was said that the installation of that plant did remove all dust; that extractor plants were not a modern invention; that they had been well known in use for certain purposes for a number of years; and that there was nothing physically impossible, by reason of the layout of the factory or the like, in its being installed. That brings me at once to what "practicable" means.

Mr. Croom-Johnson, who argued this case very well for the plaintiff, pointed out, what is undoubtedly true, that there are at least three different standards under the Factories Act, probably more. There is the standard which amounts to an absolute duty, which is imposed by a number of sections by means of various words, including, in one section, the words "effective measures." There are also at the other end of the scale obligations which are to be carried out where "reasonably "practicable"; that invokes at once a number of considerations apart from possibility, such as questions of cost, questions, probably, of practice and, indeed, as was said in the Court of Appeal in *McCarthy* v. *Coldair Ld.*,[7] probably comes close to, or is equivalent to, the ordinary common law obligation of master and servant. That, as I have said, is at the other end of the scale.

In the middle there is an obligation which, as here, is to do something if it is practicable, and presumably "practicable" is something stricter than "reasonably practicable." The real question is: "What does 'practicable' mean?" Mr. Croom-Johnson referred me to Webster's Dictionary, where "practic-"able" is defined as "possible to be accomplished with no "means or resources," and, although dealing with a different point, Lord Goddard C.J., in *Lee* v. *Nursery Furnishings Ld.*,[8] adopted a definition in the Oxford Dictionary of "capable of "being carried out in action" or "feasible."

It seems to me that "practicable" must impose a stricter standard than "reasonably practicable." Under "practicable"

[7] [1951] W.N. 590.

[8] [1945] 1 All E.R. 387.

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questions of cost may be eliminated, but what is to be done must still be possible, and it must, as I see it, be possible in the light of current knowledge and invention at the time. The defendants' old method, and, I understand, the current method, of knocking out moulds was to knock them out on the sandy floor of the foundry, an operation which is extremely dusty, and the defendants introduced—and, so far as we know, were the first in the industry to introduce—grids or gratings with a view to eliminating the dust hazard, and, although the dust remains, that is an improvement on the knocking out on the sandy floor.

Then, in January, 1942—and but for the difficulties of obtaining machinery during the war I have no doubt they would have introduced it earlier—the defendants went still further by way of eliminating this hazard by introducing the extractor plant under the grid. It is true that there is nothing new in the nature of an invention in the form of a grid; nor is there anything new in the nature of an invention in the form of an extractor plant; but what was new, and what was not part of current knowledge and invention at the time, was the combination of a grid and an extractor plant for the purposes of eliminating the dust hazard produced by knocking out moulds.

I think myself that at that time, between 1940 and 1942, the method now perfected for eliminating the sand hazard was not known, and was not in my view practicable within the meaning of that word in section 47 of the Factories Act. One complaint was that before the installation of that plant steps ought to have been taken to protect the men, whether under section 47 or at common law matters not, by providing them with masks and taking all possible steps to see that they wore them.

[His Lordship considered the evidence relating to the provision of masks and continued:] There is no doubt that masks were available, and that the men knew that they were available. But, of course, the duty under the Act and, indeed, at common law, is so strict that it is not enough to say to a man "Oh, you can have a mask"; there is a duty to provide a mask, and if need be, to put it into his hand and to take such steps as you can to get him to wear it.

I am satisfied, without going through all the evidence on behalf of the defendants, first, that the plaintiff well knew the hazard, and secondly that he was supplied originally with a mask or masks. I am also satisfied that in 1942 he turned in his old mask and was reissued with two new masks. I am further satisfied that he chose, as, indeed, so many other people chose because it was uncomfortable, not to wear his mask.

As regards what steps were taken to see that the men wore the masks, I agree that the position is not quite so satisfactory. The position, as I see it, was that, although masks were the only

practicable measure that could be taken to prevent people from inhaling this dust, they were, as all the witnesses have said, almost impossible to wear, at any rate for heavy work like shovelling, and although the ideal thing was to wear them there were comparatively few men who would do so. There is some evidence that steps were taken to induce the men to wear masks, but I think that the foremen soon gave up the hopeless task of trying to induce the men to do what was almost impossible for them to do, namely, to wear a mask for heavy shovelling. Indeed, one of the difficulties in the steel foundry is that the only measure that really can be taken to eliminate the hazard is to make the men wear masks, and until Parliament says so, or until—as I understand is being done now—a mask is invented which will enable men to work, talk and smoke with it on in comfort, men will not wear masks.

I have been referred to *Clifford* v. *Challen* (*Charles H.*) *& Son*,[9] which was concerned with the provision of barrier cream as a protection against dermatitis. I fully recognize all that was said there, but I think that somewhat different considerations apply to a mask in a case like this, in which all the evidence is that it is impossible to get people to wear it. I am satisfied that in this case the defendants did take reasonable steps to induce the men to wear masks. The foreman of the fettling shop said that his instructions were that labourers could obtain masks if they needed them. He would say to his foreman, "Look, you have a new man starting; do what you can to get "him to wear a respirator when there is any concentration of "dust." Then he said what I think is, and I accept as, a true attitude of those in authority at this foundry, "One of our "ambitions was to make men wear masks." Of course, you cannot do it until, as I have said, Parliament says that they are to be worn.

Although, therefore, I am satisfied that the plaintiff contracted pneumoconiosis by November, 1943, and that he contracted it as a result of exposure to dust during his work with the defendants, I am not satisfied that it was contracted as a result of any breach of statutory duty or common law duty by the defendants.

The matter does not quite end there, because it was said that there were subsequent breaches of duty during the remaining period of his employment as a result of which the fair inference was that the condition which existed in November, 1943, had been aggravated or had increased by November, 1948. As regards most of the complaints during that period, the only complaint can be the one already made with regard to the non-provision of masks: and everything I have said in regard to masks applies also to this period.

[9] [1951] 1 K.B. 495.

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That leaves one complaint only. By regulation 13 of the Grinding of Metals (Miscellaneous Industries) Regulations, 1925, it is provided that "Sand blasting shall not be done in any room "except in an enclosed chamber or cabinet in which no other "work is ordinarily performed and at which efficient means are "provided, arranged and maintained to prevent the escape of "dust to the outside of such chamber or cabinet." I think that as a matter of construction that clearly imposes an absolute duty on employers with regard to preventing an escape of dust from these cabinets.

I observe that the same view has been held in the recent case in the Court of Session of *McCorkindale* v. *Lion Foundry Co. Ld.*[10] That case is not binding on me, but I have read the observations and the conclusion arrived at, and I would have reached the conclusion at which I have arrived quite apart from that decision.

It was said here that dust did escape from these cabinets, and it was agreed that any dust which did escape was of the very highest dangerous category. It was said that that occurred in one or two ways. First, it was said that the doors were not kept properly sealed at the foot by a rubber hose, for it would wear out and was not renewed quickly enough, and when it got damaged or worn dust escaped from inside the cabinet. It was also said that on occasions the doors were not shut completely and the dust escaped. [His Lordship considered the evidence in regard to the cabinets and continued:] The amount of dust carried outside from inside would be really infinitesimal. I am satisfied that there were dusty conditions outside these doors, and although technically I suppose one grain of dust coming out would be said to be a breach of regulation 13, in this case these cabinets were so well sealed and maintained that any escape of that sort was really negligible. [His Lordship considered further complaints made by the plaintiff concerning the cabinets and continued:] I am not satisfied that the plaintiff was subjected to any hazard beyond the ordinary hazard of working in a foundry.

The difficulty I have in acceding to his argument on aggravation is that whatever development in his condition there was between November, 1943, and October, 1948, was very, very small. Pneumoconiosis is a progressive disease, and is one which will develop under the most careful foundry conditions. If in November, 1943, anybody had realized that the plaintiff was suffering from this condition they would have said "The one "place in which you must not work is a steel foundry," and therefore the working in the steel foundry—however properly conducted—would be bound to cause some increase of the condition.

[10] Unreported, April 5, 1952.

In my opinion, therefore, the plaintiff has fallen far short of proving that he has suffered any aggravation, any development in the condition, as a result of any breach of duty on the part of these defendants.

In these circumstances this claim fails, and there must be judgment for the defendants.

*Judgment for the defendants.*

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ADSETT v. K. AND L. STEELFOUNDERS AND ENGINEERS LD.

Solicitors: *W. H. Thompson; Clifford-Turner & Co.*

J. F. L.

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[CHANCERY DIVISION.]

* MORGAN (INSPECTOR OF TAXES) *v.* TATE & LYLE LD.

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*Nov.* 18, 19, 20; *Dec.* 18.

Harman J.

*Revenue—Income tax—Deduction—Expenses wholly and exclusively for purposes of trade — Advertising — To prevent nationalization of industry—Income Tax Act,* 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. D, Cases I and II, r.* 3 (*a*).

Advertising expenses incurred by a company to prevent the nationalization of their industry are expenses wholly and exclusively laid out for the purposes of the trade within the meaning of rule 3 (*a*) of Cases I and II of Sch. D to the Income Tax Act, 1918, and admissible therefore as a deduction from the company's profits for the purposes of income tax.

*Ward & Co. Ld.* v. *New Zealand Commissioners of Taxes* [1923] A.C. 145; 39 T.L.R. 90 distinguished.

APPEAL by case stated from the Commissioners for the General Purposes of the Income Tax Acts for the City of London.

The Commissioners held that a debt incurred by the respondents, Tate & Lyle Ld., for services rendered during a period of six months from March to September, 1949, was money wholly and exclusively laid out for the purposes of the company's trade under rule 3 (*a*) of Cases I and II of Sch. D to the Income Tax Act, 1918,[1] and therefore admissible as a deduction from their profits for the purpose of income tax.

The debt in question was for expenses incurred by the respondents in a propaganda campaign against the Labour Party's proposals to nationalize the sugar refining industry.

The campaign originated in the intentions expressed by the government of the day in and before the year 1949, and in

[1] Income Tax Act, 1918, Sch. D, Cases I and II, r. 3 (*a*): "In computing the amount of the profits or gains to be charged, no sum shall be deducted in respect of (*a*) any disbursements or expenses, not being money wholly and exclusively laid out or expended for the purposes of the trade. . . ."

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particular in a policy statement issued in April, 1949, which showed that it was part of the Labour Party's policy to transfer to public ownership all the sugar manufacturing and refining concerns in the country.

The respondents were the proprietors of an extensive business which among other activities refined more than half of all the sugar refined in this country. The board of directors regarded the Labour Party's policy as a threat to the company's existence, and decided to take such steps as might be open to them to resist it. At an extraordinary meeting of the shareholders held on September 15, 1949, the situation was reviewed and a resolution was passed expressing the belief that "nothing but harm "to workers, consumers and stockholders alike" could spring from nationalization of the industry, and empowering the board to "do everything in their power to meet the threat of the "nationalizers who . . . wish to seize the assets of this company."

In anticipation of this the respondents entered into an agreement with a firm known as Aims of Industry Ld., an independent company limited by guarantee. This agreement was dated March 31, 1949, and recited that the respondents were desirous of fostering and promoting the interests of the industry of sugar refining with the ultimate view to the preservation and extension of the goodwill of their business.

By clause 1 of the agreement the respondents appointed Aims of Industry Ld. their "public relations officer and advertising "agent" for a period of five years, determinable by three months' notice by the respondents. By clause 2, Aims of Industry Ld. agreed to "use its best endeavours to foster and "promote the interests of the said industry" by various advertising means. By clause 4 the agent's fee was fixed at £5,000 a year payable in advance, and by clause 5 the respondents agreed to lodge in a joint account a sum of £75,000 "for the purpose "of meeting all expenditure recommended by the company "[Aims of Industry Ld.] and approved by the principal for "furthering the aims and objects of this agreement."

During the first six months of the currency of this agreement the sum of £29,398 5s. 0d. was withdrawn from the joint account. Of this, according to figures in the case, £2,500 represented one half year's fee under the agreement, £11,500 odd represented "general advertising," and the balance of £15,339 15s. 2d. was stated to be due to "anti-nationalization expenditure (specific)." It was that last sum alone (or a sum to be substituted for it on any agreed redistribution of the £29,000 odd among the three heads mentioned) which was in dispute in the case. The Crown did not deny that sums expended in paying the fee of Aims of Industry Ld. under the agreement and the expense due to its general advertising activities were proper deductions; they contended, however, that expenditure on the so-called anti-nationalization campaign could not properly be deducted.

The commissioners decided as stated above, and the Crown now appealed from that decision.

*Sir Reginald Manningham-Buller S.-G.* and *Sir Reginald Hills* for the Crown.

*J. Millard Tucker Q.C.*, *Roy Borneman Q.C.* and *Desmond Miller* for Tate & Lyle Ld.

Cases referred to in argument:—

*Associated Portland Cement Manufacturers Ld.* v. *Kerr* [2]; *British Insulated and Helsby Cables Ld.* v. *Atherton* [3]; *City of London Contract Corporation* v. *Styles* [4]; *Cooke* v. *The Quick Shoe Repair Service* [5]; *Hancock* v. *General Reversionary and Investment Co. Ld.* [6]; *Inland Revenue Commissioners* v. *Dowdall O'Mahoney & Co. Ld.* [7]; *Mann, Crossman & Paulin Ld.* v. *Compton* [8]; *McGarry* v. *Limerick Gas Committee* [9]; *Mersey Docks and Harbour Board* v. *Lucas* [10]; *Moore (A. G.) & Co.* v. *Hare* [11]; *Mitchell* v. *Noble (B. W.) Ld.* [12]; *Rhymney Iron Co.* v. *Fowler* [13]; *Smith* v. *Incorporated Council of Law Reporting* [14]; *Smith's Potato Estates Ld.* v. *Bolland* [15]; *Southern* v. *Borax Consolidated Ld.* [16]; *Strong & Co. of Romsey Ld.* v. *Woodifield* [17]; *Union Cold Storage Co. Ld.* v. *Jones* [18]; *Usher's Wiltshire Brewery Ld.* v. *Bruce* [19]; *Vallambrosa Rubber Co. Ld.* v. *Farmer* [20]; *Watson* v. *Royal Insurance Co. Ld.* [21]; *Ward & Co. Ld.* v. *New Zealand Commissioner of Taxes.* [22]

*Cur. adv. vult.*

1952. December 18. HARMAN J., reading his judgment:— The question on this appeal has a certain spurious interest derived from the fact that a political colour attended the activities on which the money in question was expended. These consisted of an advertising campaign whose object was to set the public mind against the then Government's proposal to nationalize the sugar refining industry. The standard bearer in the campaign was, it appears, an invented figure styled "Mr. Cube," whose antics and comments achieved notoriety because they appeared on the containers of sugar purchased weekly by consumers up and down

[2] (1946) 62 T.L.R. 115; [1946] 1 All E.R. 68; 27 T.C. 103.
[3] [1926] A.C. 205; 42 T.L.R. 187.
[4] (1887) 4 T.L.R. 51.
[5] (1949) 30 T.C. 460.
[6] [1919] 1 K.B. 25; 35 T.L.R. 11.
[7] [1952] 1 T.L.R. 560; [1952] 1 All E.R. 531.
[8] [1947] 1 All E.R. 742.
[9] [1932] Ir.R. 125.
[10] (1883) 8 App.Cas. 891.
[11] (1914) 6 T.C. 572.
[12] [1927] 1 K.B. 719; 43 T.L.R. 245.
[13] [1896] 2 Q.B. 79; 12 T.L.R. 404.
[14] [1914] 3 K.B. 674; 30 T.L.R. 588.
[15] [1948] A.C. 508; 64 T.L.R. 430; [1948] 2 All E.R. 367.
[16] [1941] 1 K.B. 111; [1940] 4 All E.R. 412.
[17] [1906] A.C. 448; 22 T.L.R. 754.
[18] (1923) 8 T.C. 725.
[19] [1915] A.C. 433; 31 T.L.R. 104.
[20] 1910 S.C. 519; 5 T.C. 529.
[21] [1896] 1 Q.B. 41.
[22] [1923] A.C. 145; 39 T.L.R. 90.

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the country and were, I suppose, applauded or execrated according to the political sentiments of the beholder. He became, according to the Solicitor-General, a well-known figure in political circles. This type of political flavour is bound to creep in where the state takes as large a part as it now does in the commercial activities of the country; but I desire to say at the outset that this case has nothing to do with politics or with the political feelings of those who were responsible for the activities in question; nor is it concerned with the views on nationalization of this or any other industry from time to time prevailing at Westminster. It is simply another instance of a familiar type of case where a taxpayer claims and the Crown denies the propriety of a deduction from profits under rule 3a of Cases I and II of Schedule D.

[His Lordship stated the facts and continued:] The first point taken for the Crown before the Commissioners was that this expenditure was concerned with the sugar refining industry as a whole and was not confined to the respondents' own concern. There is in my judgment nothing in this point. It was clear that a campaign of this sort could not be conducted in favour of one concern in the industry and that the only way to protect the respondents was to protect their competitors along with them. Therefore the fact that the whole industry was included did not make the money the less laid out exclusively for the purposes of the respondents' trade.

The second and third points taken for the Crown were based on the suggestion that there have been employed as a means to the so-called nationalization of industry two main methods, the first of which consists in the purchase of the assets of all the concerns in the trade, leaving them with nothing but Government stock to distribute among their shareholders: the second by acquiring the shares of all the shareholders in concerns interested in the trade, leaving the companies intact but entirely controlled by the Government or its nominee. It was apparently argued that if the first of these devices were employed the expenditure incurred in combating it was the cost of conducting a campaign to decide who should earn the profits, while if it was the second the expenditure was for the protection of the stockholders and not of the company's trade. This, in my judgment, is a false point. I cannot see that it makes any difference to a shareholder in a company which is to be nationalized whether he acquires the Government stock which is his compensation direct from a body which purchases his shares or indirectly on a liquidation of the company. In either event he ceases to have any interest in the industry. I cannot believe that this case turns on the question what form nationalization might have taken in the case of this industry.

Before me the point taken on the Crown's behalf was that this expenditure was expenditure connected with the ownership and

not the conduct of the business, or alternatively, that the expenditure, even though laid out wholly for the purposes of the trade, was of a capital nature. This last point was not raised before the Commissioners, and it was urged upon me that the Crown ought not to be allowed to raise it now. For reasons which I shall give, I think that the point is a bad one, and I need not decide whether the Crown was at liberty to raise it here.

There are no disputed facts in the case. It must be taken as admitted or agreed that the expenditure in question was undertaken to prevent the confiscation of the business by means of nationalization. It is, I think, clear, and must have been clear to the Commissioners, that the general body of the shareholders who passed the resolution to which I have referred did not consider what form nationalization might take, and did not care. All that they wanted was to prevent the business from being taken from the hands of those then conducting it. The so-called campaign conducted by Aims of Industry Ld. in conjunction with the respondents had the same object; and I see no reason to suppose that the respondents through their board did not consider that it was, in the words of the resolution, intended to combat " the harm to workers, consumers and stockholders alike " believed to be likely to ensue from nationalization. Nor do I doubt that the objects of the campaign were considered to be within the recital in the agreement of March 31, 1949, as being " with the ultimate view to the preservation and extension of " the goodwill of the business."

Whether right or wrong, with these facts before them, the Commissioners found that the money was wholly laid out for the purposes of the respondents' trade, and the first question to be determined is whether that is a finding of fact; for, if it is, it seems to me that there was ample evidence before the Commissioners on which they could so find.

Before I consider this I will refer to the statute. The profits of the respondents are taxable under Sch. D (1) (ii) of the Income Tax Act, 1918, and the rule in question is rule 3, which is in a negative form: " No sum shall be deducted in respect of " (*a*) any disbursements or expenses, not being money wholly " and exclusively laid out or expended for the purposes of the " trade." Scrutton J., in *Smith* v. *The Incorporated Council of Law Reporting*,[23] was of opinion that the question whether money was so laid out is a question of fact. Rowlatt J., however, in *Union Cold Storage Co.* v. *Jones*,[24] was of opinion that whether expenses were " too remote from the business of " the appellant company " was not a question of fact. Croom-Johnson J. in *Cooke* v. *The Quick Shoe Repair Service*,[25] was of opinion that if the expense was of a kind which could be included in the phrase then it was a question of fact whether it

[23] [1914] 3 K.B. 674; 30 T.L.R. 588; 6 T.C. 477.

[24] (1923) 8 T.C. 725, 736.

[25] (1949) 30 T.C. 460.

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was so included. In this sense no one will doubt that the question is one of fact. It seems to me, however, that the question whether an expenditure whose object is known is capable upon the true construction of the Act of coming within its words must be a question of law, and for this I have the recent authority of Lord Reid and Lord Radcliffe in *Inland Revenue Commissioners* v. *Dowdall O'Mahoney & Co. Ld.*[26]; see the speech of Lord Reid[27] and that of Lord Radcliffe[28] where he expresses the opinion that the Commissioners made an error of law in expressing an opinion analogous to that expressed here. It is therefore, in my opinion, for the court to consider whether, the facts being admitted, the expenditure upon a true construction of the rule is within it.

This rule has many times been before the courts and has been much glossed on by the judges who have had the difficult task of applying it to the multifarious circumstances occurring from time to time. In one of the earliest cases, *Rhymney Iron Company* v. *Fowler*,[29] Pollock B. deprecated the addition of a gloss, saying that the words themselves were sufficient. In that case he held that payments made to an indemnity fund were not within the rule. Notwithstanding this warning, attempts have been made ever since to illustrate the rule by way of gloss. The most celebrated is that of Lord Davey in *Strong & Co. of Romsey Ld.* v. *Woodifield*,[30] a case where the House of Lords declined to allow under this rule the deduction of a sum paid by a brewery company as damages for negligence of one of its servants. He said[31]: "These words . . . appear to me to mean for the purpose of enabling a person to carry on and earn profits in the trade." Rowlatt J., in his judgment in *The Union Cold Storage Company Ld.* v. *Jones*,[32] said that the expenditure must be intended to "bring grist to the mill." Lord Porter in *Smith's Potato Estates Ld.* v. *Bolland*,[33] paraphrasing Lord Selborne in *Mersey Docks and Harbour Board* v. *Lucas*,[34] said that the expense must be "incurred in order to earn gain." There are no doubt a number of other attempts to illustrate the rule. Perhaps the last word on the subject was contained in Lord Porter's speech in *Smith's Potato Estates Ld.* v. *Bolland*[35] where after a reference to Lord Davey's definition he said[36]: "These expressions of opinion given some forty years ago and accepted ever since are, in my view, inconsistent with the appellants' contention, but it is said they are at best dicta and are inconsistent with the principles" on which certain other cases are based. Then he said: "My Lords, this statement was obiter

[26] [1952] 1 T.L.R. 560; [1952] 1 All E.R. 531.
[27] [1952] 1 T.L.R. 565.
[28] [1952] 1 T.L.R. 573.
[29] [1896] 2 Q.B. 79; 12 T.L.R. 404; 3 T.C. 476.
[30] [1906] A.C. 448; 22 T.L.R. 754; 5 T.C. 215.
[31] [1906] A.C. 453.
[32] 8 T.C. 725.
[33] [1948] A.C. 508; 64 T.L.R. 430; [1948] 2 All E.R. 367; 30 T.C. 267.
[34] (1883) 8 App.Cas. 891, 905.
[35] [1948] A.C. 508.
[36] Ibid. 522.

" only, as the actual decision was merely that the expenditure " was capital expenditure and therefore not deductible, but the " language does require careful consideration." Then after dealing with that he went on to express the view that the words used in connexion with other trades and other circumstances, though they might be a good interpretation of the words for the purposes there in hand, had no necessary weight when applied to other and different circumstances. These are the words to which I am referring. After citing *Strong & Co. of Romsey Ld.* v. *Woodifield* [37] Lord Porter said [38]: " My Lords, that expression has often " been referred to and approved, but it was used in reference to " the circumstances of the case then under consideration and I " doubt if it carries the matter to a final conclusion. It still " leaves open the question what expense is incurred for the pur- " pose of enabling a trader to earn profits and the adoption of a " phrase helpful in analysing the meaning of words in an Act of " Parliament with reference to a particular set of circumstances " is not necessarily either useful or conclusive in all cases. It " is probably safer to retain the wording of the Act itself and, " by applying it to the facts established, to discover whether the " deduction falls within its terms or not."

This seems to me to be admirable counsel, and enjoins me to stick to the words " for the purposes of the trade." I have had a great number of cases cited to me which are no more than illustrations of various sets of circumstances under which the court held, or did not hold, that the expenditure came within the words, and I shall be excused if I do not refer to them, for I cannot think that what was decided in other circumstances can be of much help to me in these, which have not occurred before, and which for aught I know may never occur again.

Before grappling with this difficulty, I had better express my views about the point whether this was a capital expenditure. In my judgment, it clearly was not. Instances were cited to me where expenditure was held to be of a capital nature, for instance, *Moore & Company* v. *Hare*,[39] where a company promoted a bill to empower the building of a private railway. This seems a clear enough case: the new railway and the bill to promote it would produce a new asset of the company of a permanent nature. Similarly, in *The City of London Corporation Ld.* v. *Styles* [40] the performance of incompleted contracts as part of the price for taking over a business was clearly an expense designed to increase the permanent assets. So, too, in *Associated Portland Cement Manufacturers Ld.* v. *Kerr*,[41] the payment of £30,000 to obtain certain restrictive covenants from directors was held to be an attempt to add to the permanent value of the company's goodwill. The present seems to me to have been on ordinary

[37] [1906] A.C. 448.
[38] [1948] A.C. 520.
[39] (1914) 6 T.C. 572.
[40] (1887) 4 T.L.R. 51; 2 T.C. 239.
[41] (1945) 62 T.L.R. 115; [1946] 1 All E.R. 68; 27 T.C. 103.

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accounting principles an income expense which would rank with other advertising expenses but for the singularity of its object. This point was considered by Lord Cave L.C. in his speech in *British Insulated and Helsby Cables Ld.* v. *Atherton*[42] in these terms[43]: "But there remains the question, which I have found "more difficult, whether, apart from the express prohibitions, "the sum in question is (in the words used by Lord Sumner in "*Usher's Wiltshire Brewery Ld.* v. *Bruce*[44]) a proper debit item "to be charged against incomings of the trade when computing "the profits of it; or, in other words, whether it is in substance "a revenue or a capital expenditure. This appears to me to be "a question of fact which is proper to be decided by the Com-"missioners upon the evidence brought before them in each case; "but where, as in the present case, there is no express finding "by the Commissioners upon the point, it must be determined "by the courts upon the materials which are available and with "due regard to the principles which have been laid down in the "authorities. Now, in *Vallambrosa Rubber Company* v. "*Farmer*,[45] Lord Dunedin, as Lord President of the Court of "Session, expressed the opinion that 'in a rough way' it was "'not a bad criterion of what is capital expenditure—as against "'what is income expenditure—to say that capital expenditure "'is a thing that is going to be spent once and for all, and "'income expenditure is a thing which is going to recur every "'year'; and no doubt this is often a material consideration. "But the criterion suggested is not, and was obviously not "intended by Lord Dunedin to be, a decisive one in every case; "for it is easy to imagine many cases in which a payment, "though made 'once and for all,' would be properly chargeable "against the receipts for the year. Instances of such payments "may be found in the gratuity of £1,500 paid to a reporter on "his retirement, which was the subject of the decision in "*Smith* v. *Incorporated Council of Law Reporting*,[46] and in the "expenditure of £4,994 in the purchase of an annuity for the "benefit of an actuary who had retired, which, in *Hancock* v. "*General Reversionary and Investment Company*,[47] was allowed, "and I think rightly allowed, to be deducted from profits. But "when an expenditure is made, not only once and for all, but "with a view to bringing into existence an asset or an advantage "for the enduring benefit of a trade, I think that there is very "good reason (in the absence of special circumstances leading to "an opposite conclusion) for treating such an expenditure as "properly attributable not to revenue but to capital." This expense has none of the characteristics of capital payments there adverted to and was, in my judgment, an income expense.

[42] [1926] A.C. 205; 42 T.L.R. 187; 10 T.C. 155.
[43] [1926] A.C. 212.
[44] [1915] A.C. 433; 31 T.L.R. 104.
[45] 1910 S.C. 519; 5 T.C. 529.
[46] [1914] 3 K.B. 674; 30 T.L.R. 588.
[47] [1919] 1 K.B. 25; 35 T.L.R. 11.

Turning now to the main difficulty, I may cite again from *British Insulated and Helsby Cables Ld.* v. *Atherton*,[48] where the Lord Chancellor said this in connexion with the deduction there in question[49]: "My Lords, I think it clear that the deduction from the profits of the above-mentioned sum of £31,784 "is not prohibited by the first rule applicable to Cases I and II, "which prohibits the deduction of a disbursement not being "money wholly and exclusively laid out or expended for the "purposes of the trade. It was made clear in the above cited "cases of *Usher's Wiltshire Brewery Ld.* v. *Bruce*[50] and "*Smith* v. *Incorporated Council of Law Reporting*[51] that a sum "of money expended, not of necessity and with a view to a direct "and immediate benefit to the trade, but voluntarily and on the "grounds of commercial expediency, and in order indirectly to "facilitate the carrying on of the business, may yet be expended "wholly and exclusively for the purposes of the trade; and it "appears to me that the findings of the Commissioners in the "present case bring the payment in question within that description. They found (in words which I have already quoted) that "the payment was made for the sound commercial purpose of "enabling the company to retain the services of existing and "future members of their staff and of increasing the efficiency "of the staff; and after referring to the contention of the Crown "that the sum of £31,784 was not money wholly and exclusively "laid out for the purposes of the trade under the rule above "referred to, they found that the deduction was admissible—"thus in effect, although not in terms, negativing the Crown's "contention."

It is urged by the respondents that those words of Lord Cave exactly cover what was done in this case. The respondents further relied on the decision of *Mitchell* v. *Noble (B. W.) Ld.*,[52] where the court allowed deduction of a sum paid to a retiring director in very peculiar circumstances described by Sargant L.J. in these terms[53]: "Now, first, as to the question whether this was "a disbursement wholly and exclusively laid out or expended for "the purposes of the trade, it seems to me that there is nothing "at all to show that it was not so exclusively laid out. The "object, as disclosed by paragraph 9 of the case, was that of "preserving the status and reputation of the company, which the "directors felt would be somewhat imperilled by the other "director remaining in the business or by a dismissal of him "against his will, involving proceedings by way of action in which "the good name of the company might suffer. To avoid that "and to preserve the status and dividend earning power of the "company seems to me a purpose which is well within the

[48] [1926] A.C. 205.
[49] Ibid. 211.
[50] [1915] A.C. 433.
[51] [1914] 3 K.B. 674.
[52] [1927] 1 K.B. 719; 43 T.L.R. 245; 11 T.C. 372.
[53] [1927] 1 K.B. 738.

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"ordinary purposes of the trade, profession or vocation of the "company."

It was the respondents' case that this sum of money was an income expense as in the last cited case, and not a capital expense as in *British Insulated and Helsby Cables Ld.* v. *Atherton*,[54] but was within the words used by Lord Cave and Sargant L.J. in describing an expense laid out wholly and exclusively for the purposes of the trade of the company.

The Crown relied particularly on a decision of the Privy Council, *Ward & Co.* v. *The Commissioner of Taxes*.[55] This case is the only one in which the circumstances bear any resemblance to the instant case. The expense there in question was incurred by a brewery company in financing a campaign to persuade the public to vote against "prohibition" in a forthcoming plebiscite. It is true that the result of prohibition would have been not to transfer the industry to the state but to destroy it altogether, but nevertheless there is a likeness between the two sets of circumstances, and the Court of Appeal in New Zealand and the Judicial Committee used phrases which at first sight at any rate are pertinent to the present case. I find this passage[56]: "The conclusion of the Court of Appeal upon this "point is contained in the following passage in the judgment of "that court: 'The question, therefore, is: Was the expenditure "'under consideration exclusively incurred in the production of "'the assessable income, for unless it was so, the Act expressly "'prohibits its deduction from such income. This question must, "'we think, be answered in the negative. We find it quite "'impossible to hold that the expenditure was incurred "'exclusively, or at all, in the production of the assessable "'income. It was incurred not for the production of income, but "'for the purpose of preventing the extinction of the business "'from which the income was derived, which is quite a different "'thing. It was contended by the company that it was illogical "'that while legitimate expenses incurred in the production of "'the income are deductible, similar expenses incurred for the "'much more important purpose of keeping the profit-making "'business alive are not deductible, and, further, that it was "'inequitable that the legislature should, on the one hand, force "'a certain class of traders into a struggle for their very "'existence, and, on the other hand, treat the reasonable "'expenses incurred in connexion with such struggle as part of "'the profits assessable to income tax. These aspects of the "'matter are clearly and forcibly set out in the contentions of "'the company as embodied in the correspondence with the "'Commissioner contained in the case, but they raise questions "'which can only be dealt with appropriately by the legislature.

[54] [1926] A.C. 205.
[55] [1923] A.C. 145; 39 T.L.R. 90.
[56] [1923] A.C. 149.

" ' This court, however, cannot be influenced by such considera-
" ' tions, being concerned only with the interpretation and
" ' application of the law as it stands.'

" Their Lordships agree with this reasoning. The expenditure " in question was not necessary for the production of profit, nor " was it in fact incurred for that purpose. It was a voluntary " expense incurred with a view to influencing public opinion " against taking a step which would have depreciated and partly " destroyed the profit-bearing thing. The expense may have " been wisely undertaken, and may properly find a place, either " in the balance sheet or in the profit-and-loss account of the " appellants; but this is not enough to take it out of the " prohibition in section 86 (1) (*a*), of the Act. For that purpose " it must have been incurred for the direct purpose of producing " profits. The conclusion may appear to bear hardly upon the " appellants; but, if so, a remedy must be found in an amend- " ment of the law, the terms of which are reasonably clear.

" It is only necessary to add that the decisions on the English " Income Tax Acts, the language of which is different from that " of the New Zealand Act, have no real bearing upon the question " now under decision."

It is to be observed that the board, which included Lord Cave, Lord Atkinson and Lord Sumner among its members, having had a number of English cases cited to it, was careful to say that the English decisions had no bearing on the question owing to the difference in language, the words of the New Zealand Act being " exclusively incurred in the production of the assessable " income," assessable meaning income to which the subject could be assessed to tax. The Board, moreover, stated that there the expenditure must have been incurred " for the direct purpose " of producing profits " and with this may be contrasted Lord Cave's statement in *British Insulated and Helsby Cables* v. *Atherton*[57] " in order indirectly to facilitate the carrying on of " the business." In my judgment, therefore, this case has no real bearing on the present one.

There remains the Crown's main contention, which was that the object of this campaign was not to maintain or increase the goodwill or profits, but to decide who should earn them. This, as it seems to me, covers too much ground. When analysed, it will be seen that all advertising is concerned with this struggle. If my goods do not appeal to the public and my competitor's do, he and not I will earn the profits which are to be made by selling the class of article which I have to offer. I therefore institute an advertising campaign with the object of belauding my goods and dispraising his: my design is that customers shall resort to my shop and not to his when they require the article in question. So here, the consumer is to be persuaded that he (or she) will get more or better or cheaper sugar by allowing the trade to be

[57] [1926] A.C. 205.

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controlled by the respondents and their rivals than by entrusting it to the hands of the pundits in Whitehall. It is conceded that the expense of a campaign of the former sort would be allowable; and rightly, for the money is laid out for the purposes of the trade. Equally so, in my judgment, is money spent on the latter object. There was nothing to show that this campaign did not in fact increase the goodwill and reputation of the respondents in the eyes of the public, as it was intended to do.

Accordingly, I am of opinion that the Commissioners came to a right conclusion and I dismiss the appeal.

*Appeal dismissed.*

Solicitors: *Solicitor of Inland Revenue; Pennefather & Co.*

I. G. R. M.

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[CHANCERY DIVISION.]

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*Dec.* 17, 18, 19.

Upjohn J.

## *OTTER *v.* CHURCH, ADAMS, TATHAM & CO.

[1949 O. 166.]

*Contract—Solicitor and client—Breach of duty—Negligence—Failure to advise client before death that his interest in certain property was entailed—Measure of damages—Time at which damages to be ascertained.*

In 1941, the plaintiff, as guardian of her son M. then aged 18, engaged the defendants as solicitors to advise her on the extent and nature of his interest in certain settled property which had recently fallen into his possession. The defendants informed her that M. upon attaining 21 would become entitled absolutely to the property in question. In fact, M's interest in it was an equitable interest in tail male with remainder over in favour of his uncle.

In December, 1944, the plaintiff as agent for M. informed the defendants that he had attained 21 and that he was serving with the Royal Air Force in India. She requested the defendants to advise him whether any and what steps should be taken to transfer the settled property to him. At an interview and by a subsequent letter she was advised by the defendants that the transfer of the settled property could await the return of M. to England, and that this was the most convenient course to adopt. Subsequently she informed M. of the advice which had been tendered by the defendants.

On May 14, 1945, M. was killed in a flying accident in India. He died intestate and a bachelor and had not before his death executed a disentailing assurance, or will relating to the settled property, which accordingly passed to his uncle and did not fall into his estate.

After M.'s death it was discovered that the defendants had mistaken the nature of M.'s interest in the settled property.

The plaintiff as sole administratrix of M.'s estate brought an action for damages against the defendants, and claimed that they

in breach of their duty to exercise care and skill as solicitors had (a) stated or implied that no steps need be taken by M. to make the settled property his own until his return to England, and (b) failed to advise M. that having attained 21, he ought to execute a disentailing assurance relating to the settled property or a will in accordance with section 176 of the Law of Property Act, 1925, if he wished to ensure that the settled property would form part of his estate on his death.

The plaintiff further claimed that in consequence of such negligence M.'s estate had suffered damage and had been decreased in value.

*Held*, that the defendants were guilty of a breach of contract, and that the damages which might fairly and reasonably be expected to flow from such breach were not limited to the nominal damages which the deceased could have recovered in his own lifetime; but were to be ascertained at the time when the damage accrued, that is, after the death of M.; and that as M. had been deprived of the opportunity of increasing his estate by making the settled property his own absolutely, the measure of damages was the loss to M.'s estate occasioned by the passing of the settled property to the next tenant in tail.

ACTION.

The plaintiff, as sole administratrix of the estate of her son Robert Colin Michael Otter ("Michael") who was killed on active service on May 14, 1945, intestate and a bachelor, brought an action for negligence against the defendants, who were solicitors. The plaintiff claimed that the defendants and in particular the partner Ralph Perceval Tatham, were negligent in that, in breach of their duty to exercise care and skill as solicitors, they failed to advise the plaintiff, acting as the agent of her son Michael, that his interest in certain settled property was an entailed interest and that Michael, having recently attained the age of 21, was in a position to disentail and make the property his own absolutely.

The plaintiff was the widow of Robert Edward Otter, barrister-at-law, sometime judge of the High Court in Burma, who died on October 14, 1932, leaving two children of the marriage surviving him, viz. Michael, who was born on September 18, 1923, and a daughter Jennifer.

Under the limitations of clause 13 of the will of one Catherine Elizabeth Younge, dated February 6, 1899, upon the death of one William Henry Otter in 1941, Michael, his father Robert E. Otter having died in 1932, became entitled in possession to certain freehold property ["the settled property"] for an equitable interest in tail male with remainders over.

Shortly after the death of William Henry Otter in 1941, the plaintiff retained and employed the defendants to advise her both on her own behalf and in her capacity as guardian of Michael in connexion with the settled property and with reference to the nature of his interest in it, and the defendants undertook to advise the plaintiff accordingly.

The defendants thereupon entered into correspondence with the solicitors to the estate of the testatrix, who, on August 21,

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1941, wrote the following letter to the defendants and enclosed a copy of clause 13 of the will: " . . . In our view [Michael] " is entitled absolutely to the settled estates unless his father " who was tenant in tail barred the entail in his lifetime. If " Mr. Justice Otter did bar the entail then it seems to us the " settled estates would fall into the estate of Mr. Justice Otter " and the destination of the settled estates would be governed " by his will if he made a will.

" Please let us know:—

" (1) Whether you agree with our construction of the clause.

" (2) Whether Mr. Justice Otter did bar the entail. . . ."

On September 1, 1941, the defendants replied: " With " reference to your letter of the 21st ultimo, we have considered " same and we agree with your conclusions but, of course, we " have only seen an extract from the will and assume that there " is nothing else in the will affecting the question. If there is " any doubt about it then a short case might be put to counsel. " . . . The boy [Michael] will be 18 this month."

After further correspondence, in the course of which the defendants were supplied with a complete copy of the will of the testatrix, the defendants, on September 9, 1941, wrote the following letter to the plaintiff: " . . . I have had further letters " from [the solicitors to the estate of the testatrix] and I think " it is clear from the documents that they have sent me that " your son, on attaining 21, will be entitled to certain settled " property . . . " which was then set out.

In 1942, on leaving school, Michael joined the Royal Air Force. In 1943 he trained as a flying officer in South Africa, and later that year he was transferred to India where he performed navigational duties.

About the middle of December, 1944, the plaintiff informed the defendants (as the fact was) that Michael had attained 21 and that he was serving with the Royal Air Force in India. As agent for Michael she asked the defendants to advise Michael whether any and what steps should be taken to transfer the settled property to him, and by taking such action she impliedly retained and employed the defendants to advise generally concerning Michael's interest in the settled property. One Ralph P. Tatham, a partner, orally advised her that the transfer of the settled property could await the arrival of Michael in this country and that this course would be the most convenient one to adopt.

On December 27, 1944, the defendants wrote the following letter to the plaintiff: " I have heard from [the solicitors to " the estate of the testatrix] with reference to your son's legacy " and they agree that it will be better to wait until his return " to this country before the trust assets are transferred to " him . . . " Shortly after receipt of this letter the plaintiff wrote to Michael and informed him of its contents and effects.

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On May 14, 1945, Michael was killed in a flying accident in India. He had not executed a disentailing assurance before his death; and accordingly, as he died intestate and a bachelor, the settled property passed to his uncle, Francis Lewis Otter, who survived him, and to his children under the terms of the will.

After the death of Michael the plaintiff, believing that the settled property formed part of his estate and devolved on her as his sole next of kin, was minded to make over the property to her daughter Jennifer. It was thought advisable to take the opinion of counsel, who pointed out that under the limitations of clause 13 of the will and in the events which had happened the property had passed to Francis Lewis Otter, and that accordingly the plaintiff's wishes could not be fulfilled.

By the amended statement of claim, the plaintiff claimed that in giving the oral advice at the interview in December, 1944, and in writing the letter dated December 27, 1944, the defendants acted negligently in the discharge of their duties to the plaintiff and Michael as their solicitors; that such negligence consisted in (a) stating or implying (as the letter in question did) that no steps need be taken by Michael to make the settled property his own until his return to England, and (b) the failure of the defendants to advise the plaintiff and Michael that, now that Michael had attained the age of 21, he ought to execute a disentailing assurance relating to the settled property or a will devising it in accordance with section 176 of the Law of Property Act, 1925, if he wished to ensure that the settled property would form part of his estate on his death.

The plaintiff further claimed that in consequence of such negligence on the part of the defendants (a) Michael refrained from executing a disentailing assurance relating to the settled property or devising it by will in accordance with section 176 of the Act of 1925, whereby it was lost to Michael and his estate, or, alternatively, that Michael was deprived of the opportunity of considering whether or not he should execute such a disentailing assurance or will . . . (d) the estate of Michael had suffered damage and been decreased in value.

The defendants by their defence denied the allegations contained in the statement of claim.

The value of the settled property was agreed for the purposes of the action to be £7,132.

*C. Montgomery White Q.C.* and *Hugh MacMaster* for the plaintiff.

*P. Ingress Bell Q.C.* and *I. J. Lindner* for the defendants.

UPJOHN J. [having stated the facts:] The law upon this matter may be summed up in one sentence which I take from the well-known passage in the speech of Lord Haldane L.C. in

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*Nocton* v. *Ashburton* (*Lord*) [1]: "My Lords, the solicitor contracts "with his client to be skilful and careful. For failure to perform "his obligation he may be made liable at law in contract or even "in tort, for negligence in breach of a duty imposed on him."

Mr. Tatham was neither skilful nor careful. He completely misread clause 13 of the will of Miss Younge. That was in a perfectly ordinary form, the effect of which should be known and understood by every solicitor and, indeed, by every student of law who has received instruction in the elementary law of real property.

The evidence may be summarized thus: in December, 1944, Michael having attained 21, acting through and by his mother as his agent—he, of course, being away on service for his country—consulted Mr. Tatham and asked for advice on what steps, if any, he should take to transfer to himself the settled estates. He was told that the matter was not urgent and that it could wait until his return. That was, I suppose, in the circumstances, as bad a piece of advice as any solicitor could give to his client. Mr. Tatham knew that Michael was engaged upon the dangerous occupation of flying during the war in the Royal Air Force. Mr. Tatham should have informed him that the property was entailed and that if he died on active service the estates would pass to his uncle and his uncle's children. He did no such thing. Michael was allowed to assume that the property belonged to him absolutely. He should have been told, of course, that it was possible to reduce the property into his own ownership, to make it his own, in one of two ways, either by making a will or by executing a disentailing assurance, in which case if he did either of these two things then, should he unhappily be killed on active service, the property would not pass to his uncle but would remain as part of his own estate.

It was argued that Mr. Tatham, having come to an admittedly erroneous conclusion on the true construction of the will in 1941, was under no liability to reconsider the matter in 1944. It was said that he owed no duty to Michael because, when he formed the erroneous conclusion in 1941, he was not acting for Michael; he was acting for Michael's mother in her capacity as guardian; and that, therefore, he was apparently entitled to assume that what he had considered in 1941 was correct and that he was entitled to give Michael advice on the basis that the opinion he had formed in 1941 was the true view. I reject that argument entirely.

When a solicitor undertakes to advise his client, in this case a young man who had just attained 21, and is specifically asked what steps, if any, his young client should take with regard to a specific piece of property, it is his duty fully to inform himself of the nature of the property with which the client is concerned. If, as in the present case, the solicitor prefers to rely

[1] [1914] A.C. 932, 956; 30 T.L.R. 602.

on some information that he received in 1941, and if he chooses to rely on the erroneous views he then formed on the nature of his client's interest after he has perused the relevant documents, he cannot conceivably escape liability by saying that when he was originally considering the matter, he owed no duty to his client. His failure to advise his client properly was due to the fact that he advised him without properly informing himself of the nature of his client's interest.

In truth, as I did not see Mr. Tatham in the witness box, I do not know what he had in mind when he advised his client. His advice may have been given recklessly without pausing to consider what was the true nature of his client's interest. He may have refreshed his mind by looking at the earlier correspondence in 1941 before the interview with the plaintiff. He may, for all I know, have taken and kept a copy of clause 13 of the will, and he may have perused it again and again misconstrued it. All that is a matter of speculation, and it matters not what Mr. Tatham did. What is clear is that in advising his client, in the circumstances he acted neither skilfully nor carefully. He never told his client of the peculiar nature of an estate tail and its incidence.

In the result, I am satisfied and I find as a fact that Mr. Tatham was grossly negligent in the advice he tendered to his client through his mother, the plaintiff, in 1944, and that he was negligent both at the interview and in the letter he wrote to the plaintiff following upon that interview on December 27, 1944.

In principle, therefore, the plaintiff has established a breach of contract by the defendants, and the question arises what is the measure of damages. Mr. Ingress Bell submitted an attractive argument, which proceeded on these lines: he submitted that a personal representative can have no higher or better rights than the person he represents, and that, therefore, she can claim no greater damages than the deceased could have claimed in his own lifetime. It was then truly pointed out that damages in the deceased's lifetime must necessarily have been nominal, because the mistake having been discovered, it could be rectified at a stroke of the pen. Mr. Bell submitted forcibly that the plaintiff was, in effect, attempting to recover damages which resulted not from the solicitor's breach of duty, but which arose by virtue of the death of the deceased.

The matter is admittedly free from authority. Mr. Bell cited three cases: the first, *Lockier* v. *Paterson*,[2] was a decision dealing with the rights of a personal representative in an action of tort and does not really touch upon this point; the next, *Valpy* v. *Oakeley*,[3] again does not really touch upon the point I have to consider; and, finally, *Beckham* v. *Drake*,[4] contains a useful discussion of the general principles affecting this question.

[2] (1844) 1 C. & K. 271.
[3] (1851) 16 Q.B. 941.
[4] (1849) 2 H.L.Cas. 579.

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Mr. Montgomery White, on the other hand, submitted that what vests in the personal representative is the right of action which was previously vested in the deceased; and he referred to *Raymond* v. *Fitch*,[5] where the judgment of Lord Abinger shows that, as a matter of common law, all choses in action which are not of a purely personal nature, such as an action for slander, survive and pass to the personal representative; and, indeed, that is not disputed.

"Accordingly," submitted Mr. Montgomery White, "the "right of action being vested in the personal representative, "what is the measure of damages?"; and he pointed out that the measure of damages must be such as might be expected naturally to flow from the breach. He submitted that that was the true test; and that it was not the right test to say that damages can be no greater than those which the deceased could have recovered in his own lifetime. He put his case, in a sentence, thus: there is the right of action in the personal representative. One has to ascertain the damages in accordance with principles affecting damages for breach of contract at the time that the damage accrues. I accept that submission.

What, then, is the proper measure of damages in the present case? I was referred by Mr. Bell to the well-known rule in *Hadley* v. *Baxendale* [6] as expounded in the more recent decision of *Victoria Laundry (Windsor) Ld.* v. *Newman Industries Ld., Coulson & Co. Ld. (Third Parties)*,[7] which established that damages for breach of contract should be such as would naturally be expected to flow from the breach, or such as may reasonably be supposed to have been in the contemplation of the parties, at the time they made the contract, as the probable result of the breach of it. It seems to me impossible in this case to apply that latter test having regard to the nature of the breach of contract. Therefore, I have to consider what are the damages which may naturally be expected to flow from the breach.

It is perfectly true that if Michael had continued to live damages would have been nominal. Are they, however, to be limited to the damages which he could have recovered in his own lifetime, as Mr. Bell submitted? Not in my judgment. It is contrary to common sense to suppose that damages in a case such as this must only be nominal merely because, had the mistake been discovered in the lifetime of the deceased, it could have been rectified. The true method of approaching the problem, in my judgment, is this: if the mistake was discovered in Michael's lifetime it was his duty, of course, to mitigate damages, and, indeed, reduce them to a nominal sum by executing a disentailing deed; but it may well be that the mistake is not discovered until after his death. If the mistake is not discovered till after his death, Michael has been deprived

[5] (1835) 2 Cromp., M. & R. 588.
[6] (1854) 9 Exch. 341.
[7] [1949] 2 K.B. 528; 65 T.L.R. 274; [1949] 1 All E.R. 997.

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of the opportunity of increasing his estate by executing a disentailing assurance relating to the settled property, and, therefore, upon his death, his estate is diminished by that amount.

To take one example only, suppose that the mistake had been discovered in the lifetime of Michael. He is informed of the mistake, and he is informed that he can do one of three things: he can let matters rest as they are, in which case upon his death without male issue the settled property will pass from him to another branch of the family; alternatively, he can execute a disentailing assurance and the property will become his; and in the further alternative he can execute a will making the property his own upon his death. Let it be assumed that, on being informed of that, he instantly sends an urgent message home: "Please send out for me a disentailing assurance. I "desire to reduce this property into my own ownership." A disentailing assurance is produced, but, unfortunately, before he can sign it, before it reaches him, he is killed instantly. Can it in those circumstances be seriously suggested for one moment that his personal representative is not entitled to sue for the diminution of his estate by reason of the solicitor's breach of duty? In my judgment, it cannot seriously be suggested that that is the law. In my judgment, therefore, I am not bound to hold that damages in this case are only nominal merely because the deceased could only have recovered nominal damages in his lifetime.

What, then, is the true measure of damages? The relevant facts upon that question seem to be these: it was certainly more than a remote possibility that Michael would be killed while on active service. The parties must, therefore, be taken to have considered that the result of this failure to give him proper advice might easily result in the loss of the estate. Mr. Bell submitted that, even upon the footing that he was wrong upon his first point, viz., that the personal representative could not claim greater damages than the deceased could have claimed in his own lifetime, even so damages are nominal. I reject that argument. In the circumstances of this case, there was a serious possibility that the failure to give him correct advice would lead to his estate losing the whole of the settled property.

Apart from that consideration, what are the other relevant circumstances? They seem to me to be these: this was not what I may call the Otter mansion. Had it been, one can imagine that Michael might well have wished it to descend to his uncle and male relations on his father's side rather than that he should bring it into possession for the benefit even of his mother and his sister; but, of course, this was no more

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than a piece of property which, so far as he was concerned, was worth about £7,000 and which was bringing to him an appropriate income. Therefore, that consideration makes it perhaps rather unlikely that he would have thought it right to allow the property to devolve on his uncle and cousins. On the other hand, I must bear in mind that he might have taken that view.

On the other hand, had the plaintiff been informed that a disentailing assurance or a will was necessary to preserve the property for her family—that is to say, herself and her daughter—she would undoubtedly, according to her evidence, which I believe, have advised her son to make a will leaving everything to his sister Jennifer; that is to say, that in law she would have advised her son to make the property his own; and I see no reason to doubt that the son would have probably acted upon his mother's advice; but, there again, he might not and I must bear that possibility always in mind.

There is also this further consideration: the settled property was worth at his death some £7,132. That is an income-bearing property and that would have borne income over the last seven years since his death, income not on quite £7,132, because of the incidence of estate duty, but, nevertheless, the value of the property which his estate has lost is substantially in excess of £7,000.

Bearing all those factors in mind, what is my duty? It is difficult, of course, to estimate damages when one has to speculate upon the action which Michael would have taken had he known the truth, but that difficulty is not a bar to this court assessing damages. That has been so ever since the well-known decision in *Chaplin* v. *Hicks*.[8]

I have to make up my mind as best I can, and I do so by awarding the plaintiff in her capacity as the administratrix of Michael £6,500.

*Judgment for the plaintiff.*

Solicitors: *Steadman, Van Praagh & Gaylor; Hair & Co.*

J. A. G.

[8] [1911] 2 K.B. 786; 27 T.L.R. 458.

[COURT OF APPEAL.]

* M. & F. FRAWLEY LD. *v.* THE VE-RI-BEST CO. LD.

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[1952 H. 823.]

Somervell, Jenkins and Hodson L.JJ.

*Landlord and Tenant—Leasehold property—Expiring tenancy—New lease—Business of builder and decorator—Shop—"Retail trade or "business"—Shops Act*, 1950 (14 *Geo.* 6, *c.* 28), *s.* 74 (1)—*Leasehold Property (Temporary Provisions) Act*, 1951 (14 & 15 *Geo.* 6, *c.* 38), *s.* 10 (1) *and* (2); *s.* 20.

The plaintiffs, a firm of builders and decorators, whose lease of premises was due to expire on December 25, 1952, applied to the county court judge for, and were granted, a new lease, under section 10 of the Leasehold Property (Temporary Provisions) Act, 1951, on the ground that the premises were a shop, occupied wholly or mainly for the purpose of a retail trade or business, within the meaning of the Act. On appeal by the defendant landlords:—

*Held*, that the word "shop" as defined by section 20 of the Act of 1951 and section 74 of the Shops Act, 1950, did not cover the business of builders and decorators as carried on by the plaintiffs, and that the appeal must be allowed.

*Per* Somervell L.J. The history of the statutes dealing with shops, which are now consolidated in the Act of 1950, supports the view that the words "retail trade or business" are not capable of the wide construction sought to be put on them by the plaintiffs. I am clear that the words ought not to be construed as bringing in a business such as is carried on by the plaintiffs.

*Per* Jenkins L.J. Subsection (2) of section 10 of the Act of 1951 shows that the statute contemplates that the retail trade or business, by virtue of which the shop qualifies under the definition, will be carried on in the shop. If the expression "retail trade or "business" covered services rendered by a builder on the customer's own premises or on a building site, it would have been unnecessary to treat as doubtful cases requiring inclusion by definition, the business of a barber or hairdresser, the sale of refreshments, etc., for all would be covered by the phrase itself. A business might be a retail business although it was concerned with matters other than the sale of goods, but the designation "retail" seems to me to be wholly alien to the business of a builder and decorator.

*Per* Hodson L.J. The word "retail" primarily suggests the sale of goods rather than of services, and when it is sought to apply the word to the sale of services one is, I think, bound to consider whether the services are carried out on the premises, as, for example, in the case of a barber, or away from the premises as in the present case. That, I think, is a valid distinction in considering the word "retail," and it is supported by Lord Thankerton in *Toogood & Sons* v. *Green* [1932] A.C. 663, at p. 674; 48 T.L.R. 463.

APPEAL from Judge Blagden, Westminster County Court.

The plaintiffs, M. & F. Frawley Ld., builders and decorators, were the tenants of No. 21, Lawrence Place, New Oxford Street, W.C.1, and their lease was due to expire on December 25, 1952. They therefore, on October 8, 1952, applied to Judge Blagden for a renewal of the lease under section 10 of the Leasehold Property

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(Temporary Provisions) Act, 1951.[1] The judge granted the application, holding that the premises were a "shop" and that the plaintiffs were carrying on a "retail trade or business" within the meaning of section 20 of the Act of 1951 and section 74 of the Shops Act, 1950.[1]

At all material times the plaintiffs had exhibited on the premises the notice "Builders' materials supplied by retail," and over the entrance door there was placed a large key and the notice "Keys cut," but it was not suggested that the sale of building materials to the public was a substantial or appreciable part of the plaintiffs' business.

The defendants now appealed, contending that the premises were not a shop and were not occupied wholly or mainly for the purposes of a retail trade or business.

*I. S. Warren* for the defendants.
*J. Asher* for the plaintiffs.

SOMERVELL L.J. This is an appeal from a decision of Judge Blagden. The application was made by Messrs. Frawley under the Leasehold Property (Temporary Provisions) Act, 1951, section 10 of which provides that the occupier of a shop may "apply to "the court for, and subject to the provisions of this Act . . . "obtain, the grant of a new tenancy," subject to certain conditions. The plaintiffs maintain that they were within that provision. The only answer with which we are concerned is that the premises

[1] Leasehold Property (Temporary Provisions) Act, 1951, s. 10: "(1) The provisions of this Part of "this Act shall have effect for "enabling the occupier of a shop "under a tenancy to which this section applies (hereinafter referred to "as 'the expiring tenancy') to apply "to the court for, and subject to the "provisions of this Act to obtain, the "grant of a new tenancy where "apart from the next following "section the expiring tenancy would "come to an end immediately before "the date of the commencement of "this Act or within the period of two "years beginning with that date, "and would so come to an end by "effluxion of time or by the expira-"tion of a notice to quit given by the "landlord, whether before or after "the commencement of this Act. (2) "This section applies to a tenancy "the subject of which—(*a*) consists "of a shop, or (*b*) consists of a "shop and of living accommodation "occupied wholly or mainly by the "tenant or by a person who is "employed by the tenant for the "purposes of the retail trade or "business carried on in the shop."

Section 20: "(1) In this Act the "following expressions have the "meanings hereby assigned to them "respectively, that is to say:—. . . "'retail trade or business' has the "same meaning as in the Shops Act, "1950, except that it does not include "the sale of intoxicating liquor for "consumption on the premises, . . ."

"'Shop' means premises occupied "wholly for business purposes, and "so occupied wholly or mainly for "the purposes of a retail trade or "business."

Shops Act, 1950, s. 74: "(1) In "this Act, save where the context "otherwise requires—. . . 'retail trade "or business' includes the business "of a barber or hairdresser, the "sale of refreshments or intoxicating "liquors, the business of lending "books or periodicals when carried "on for purposes of gain, and retail "sales by auction, but does not "include the sale of programmes and "catalogues and other similar sales "at theatres and places of amuse-"ment."

were not a shop. Before going into the facts I will read the relevant definitions. [His Lordship read the definitions of "shop" and "retail trade or business" in section 20 of the Act of 1951 and continued:] The judge had a "view," which we have not had the advantage of having, but he set out very clearly the nature of the premises and the business of the plaintiffs. They have at all material times had a notice up "Builders' materials supplied by retail." Over the door there is a key and the words "Keys cut." Entering the premises, there is a small room where there are pots of paint and packets of cement, and paint brushes. They were available for sale to the general public. There is no counter, but the goods are displayed on a table and in a cupboard under the table. Then there are doors marked "office," and the rest of the premises is not open to the public and is very much greater in area. Those non-public rooms could fairly be described as offices, though a certain amount of material is kept there and work is done in one of them in cutting keys. In the basement, bulkier materials are stored. The plaintiffs are, and are described on their notepaper, as the judge found, as builders and decorators. Apart from cutting keys, they also do plumbing and electricians' work and some sign writing. They have been there for about 17 years.

It is not suggested on the part of the plaintiffs that this business of selling building materials to the public is a substantial or appreciable part of the business done by them. That is to say, if the issue whether this was a shop or not depended on this activity, it could not be said that these premises were used wholly or mainly for that particular trading activity. The judge has decided that the plaintiffs were entitled to be granted a new lease on the ground that the business carried on by them as builders and decorators was within the words of the definition of shop. The case, therefore, turns on the construction of those words.

The definition in the Shops Act, 1950, of "retail trade or business" takes the form of saying that the words to be defined "include" certain matters which follow. It was suggested, in the course of the argument, that "include" is normally used when something is to be included which manifestly would be outside the words to be defined but for the definition. I do not myself accept that view, nor do I wish to lay down any general observation as to what the word "include" may mean in every context. But in this context I think that it is plain that what follows "includes" are activities about which, at any rate, there might have been disputes whether they came within the words "retail trade or business." Undoubtedly, the word "retail," which governs the two words which follow, does primarily suggest the selling of goods rather than the selling of services.

In the course of the argument in the court below, and before us, a very wide construction of this phrase was put forward on these lines. It was said, rightly, that the word "business" in

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a certain context is a word of very wide import, possibly covering almost every activity for profit or gain. Then it was said, though I do not agree with this, that the word "retail" means any business activity in which the person carrying it on comes in contact with, and supplies services or other facilities to, members of the public as distinct from persons in trade. Then it was said that those two things ought to be, as it were, read into this tripartite expression "retail trade or business." The judge considered that argument, and he himself pointed out that that appeared to cover things which would, at any rate, seem to be a very long way away from the word with which one starts, which is "shop." The general character of the word to be defined must colour the definition. So far as I can see, this wide construction would include bankers. I need not, however, pause to consider how far it would go, because it is plain to me that if in their context the words "retail trade or business" were to be given a construction of that kind, then the definition in the Shops Act of 1950 was wholly unnecessary and would be an absurd provision.

We were referred to the history of the matter, and it has been explained how the barber came to be included as a "shop" and how the expression "retail trade or business" came to appear in the statutes which have dealt with shops and which are now consolidated in the Act of 1950. I do not find it necessary to refer in detail to those matters, but I think that the history supports the argument that these words are not capable of the wide construction which has been suggested. It seems to me that if the word "business" is to be regarded as extending the meaning beyond the buying and selling of goods, the extension (and we have examples in the definition) is of this kind. There are cases, and the barber is a very good example, where although no chattel may be sold services are sought and received at premises which are normally and naturally described as a shop. The same would apply, probably, to the business of lending books. But a builder and decorator seems to me to be in a different category altogether. His services are rendered normally outside his own premises.

The judge, at the conclusion of his judgment, gave as an example waterpipes bursting in somebody's house and someone being sent to the builder's premises in order that workmen may come to the house and repair the waterpipes. In my view, one is there in a different area to the shop, either according to the narrow definition, or according to the somewhat extended purview which is brought out by the definition in the Shops Act, 1950. It is unnecessary in this case to decide whether the word "business" in the Act of 1951 would bring in other activities than those which are brought in by the express words after "includes" in the Act of 1950. I am myself clear that they ought not to be construed as bringing in a business such as that

carried on by the plaintiffs. I think that the judge felt the difficulties of the argument but, with respect, for the reasons which I have given, I have come to a different conclusion and I would allow the appeal.

Jenkins L.J. I agree. The plaintiffs, M. & F. Frawley, Ld., applied under section 10 of the Act of 1951 for, and were granted by the county court judge, a new tenancy of the premises here in question. The contest in the case is whether, as the judge held, the premises were a "shop" within the meaning of the Act. The definition of "shop" is to be found in section 20 of the Act, "'shop' means premises occupied wholly for business "purposes, and so occupied wholly or mainly for the purposes "of a retail trade or business." It is provided by the same section that "'retail trade or business' has the same meaning "as in the Shops Act, 1950," which, by section 74, defines "retail trade or business" in these terms: "'retail trade or "'business' includes the business of a barber or hairdresser, the "sale of refreshments or intoxicating liquors, the business of "lending books or periodicals when carried on for purposes of "gain, and retail sales by auction, but does not include the sale "of programmes and catalogues and other similar sales at "theatres and places of amusement."

It is, perhaps, worth noting that in subsection (2) of section 10 of the Act of 1951 there is this provision: "This section applies "to a tenancy the subject of which—(*a*) consists of a shop, or "(*b*) consists of a shop and of living accommodation occupied "wholly or mainly by the tenant or by a person who is employed "by the tenant for the purposes of the retail trade or business "carried on in the shop." That provision, I think, is perhaps indirectly relevant as showing that the Act contemplates that the retail trade or business, by virtue of which the shop qualifies as such under the definition, will be carried on in the shop. My Lord has already referred to the facts found by the judge, which come very shortly to this: the plaintiff's business is that of builders and decorators. In the premises in question there is an outer room where pots of paint or size, or packets of cement, paint brushes, and the like, are available for sale to the general public. They also advertise themselves as key cutters and locksmiths. So far as the sale to the public of pots of paint, and so forth, is concerned, the judge found—and this was clearly in accordance with the evidence—that that part of the plaintiffs' activities formed an insignificant proportion of the business carried on on the premises, and that the main part of the business consisted in conducting from those premises the business of builders and decorators, receiving orders for building work, and giving estimates for building work, or tendering to undertake building work, to be carried on on the site, wherever it might be, where such work was required.

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Accordingly, in view of the insignificant character of the trade done in the way of the sale of paint, and so forth, the issue in this appeal resolves itself into the very short question whether, on the true construction of the Act of 1951, the carrying on in the way I have indicated of a builders' and decorators' business, which consists of doing building and decorating work on sites or in houses wherever the services of the plaintiffs are required, is the carrying on of a "retail trade or business" within the meaning of the definition. The expression "retail trade," I think, clearly connotes in its primary sense a business consisting of selling goods to members of the public (as distinct from members of the trade) who resort to the shop or premises where the business is carried on, for the purpose of making purchases. The expression "business" may, I think, have a wider connotation than the expression "trade," the latter expression being more closely linked with transactions of purchase and sale than the expression "business." The point is a very short one, and in my view the judge erred in holding that the builders and decorators' business here in question was a retail business because it involved doing work for the actual customer on the actual customer's property as distinct, I suppose, from doing work for some middle man other than the individual who actually required the services for himself. So to hold, in my view, involves placing a wider meaning on the expression "retail trade "or business" than it will reasonably bear.

I think that conclusion is borne out by the definition in section 74 of the Shops Act, 1950, for if the expression "retail "trade or business" had the wide significance sought to be placed upon it by the plaintiffs in this case, it would not have been necessary to treat as doubtful cases, requiring inclusion by definition, the business of a barber or hairdresser, the sale of refreshments, the business of lending books, and the business of retail sales by auction; for all these would be included in the phrase itself without any express extension of the definition. The terms of the definition do no doubt suggest, and for my part I would not deny, that a business may be a retail business although it is concerned with matters other than the sale of goods; but while I have no intention of attempting to lay down any general or exhaustive definition, it does seem to me that the adjective "retail," which is primarily applicable to the sale of goods in the way I have mentioned, demands in its application, as it were by analogy, to businesses which consist in the sale of services rather than goods, that the services rendered should be performed in circumstances comparable to those in which the ordinary retail trade, in the sale of goods, is normally carried on in a retail shop. For example, the business carried on in a shop where services, such as repairing shoes, or cleaning clothes or mending watches, are rendered for customers resorting to the premises in circumstances comparable to those in which the business of selling goods by retail to similar customers might be carried on,

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could, I think, reasonably be held to answer the description of a "retail business."

But the designation "retail" seems to me to be wholly alien to the builders and decorators' business here in question. We have been referred to a number of authorities on other Acts, but I do not find it necessary to take up time by reading them. There is nothing in any of them, so far as I am aware, in any way inconsistent with the conclusion at which I have arrived on the construction of the language of this particular Act and its application to the judge's findings of fact. Accordingly, I agree that the appeal should be allowed.

Hodson L.J. I agree. The word "retail" does primarily suggest the sale of goods rather than services, and when one seeks to apply the word "retail" to the sale of services one is, I think, bound to consider whether the services are carried out on the premises as, for example, in the case of a barber, or away from the premises as is the present case. The judge seems to have thought that that was a distinction without a difference. At the conclusion of his judgment, when discussing a case cited to him, *Ritz Cleaners Ld.* v. *West Middlesex Assessment Committee*,[2] a case on another Act, he noted that counsel had sought to distinguish that case on the ground that there business was carried on wholly at the dealer's premises and in this case it was carried on mainly at the customer's premises. That, I think, is a valid distinction in considering the word "retail," and it is supported by Lord Thankerton in *Toogood & Sons Ld.* v. *Green*,[3] where he himself quoted a speech by Lord Dunedin in a previous case, *Turpin* v. *Middlesbrough Assessment Committee*.[4] That was a case under the particular derating Act which was there in question with regard to a retail shop. Speaking of the garage premises, he said: "Now, if we compare the hereditament here "in question with a retail shop, do we find any common charac- "teristics? My Lords, I think we do; for they are both buildings "to which the public can resort for the purpose of having "particular wants supplied and services rendered therein." I think that supports the distinction which counsel has sought to draw and which is, I think, a valid distinction. For these reasons, and the reasons which my Lords have given, I agree that the appeal should be allowed.

*Appeal allowed.*

Solicitors: *Warren & Warren; Crawley & de Reya.*

A. W. G.

[2] [1937] 2 K.B. 642; 53 T.L.R. 588; [1937] 2 All E.R. 368.

[3] [1932] A.C. 663, 674.

[4] [1931] A.C. 446, 474; 47 T.L.R. 308.

[CHANCERY DIVISION.]

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*Dec.* 18.

Vaisey J.

# * *In re* BANQUE DES MARCHANDS DE MOSCOU (KOUPETSCHESKY). WILENKIN *v.* THE LIQUIDATOR (No. 2).

[No. 0097 of 1932.]

*Company—Winding-up—Dissolved foreign corporation—Assistance by foreign lawyer in litigation in connexion with winding-up—Proof in winding-up by foreign lawyer rejected by court—Sanction of ex gratia payment to foreign lawyer on his undertaking to continue on committee of inspection.*

In 1917 a Russian bank, which had no address in England but was indebted to an English company, was dissolved by Soviet confiscatory degrees and ceased to exist. In May, 1932, after litigation, the court made a winding-up order and appointed a liquidator who rejected the company's proof for its amount and also the proof of a Russian barrister, who had lived for many years in England and had helped very greatly in the litigation, for £850 for his work: the liquidator, however, considered that sum fair and reasonable should the claim be sustained. Appeals against the rejections were dismissed by Vaisey J. in *In re Banque des Marchands de Moscou* (*Koupetschesky*) [1952] W.N. 151; [1952] 1 T.L.R. 739; [1952] 1 All E.R. 1269. On an application to the registrar to sanction an ex gratia payment of £420, the registrar decided that the application was premature and that the proper course was to ascertain the views of the creditors. The application to sanction the payment thereupon came before Vaisey J.

*Held*, granting the application, (1) that the court, while it would in normal circumstances have upheld the registrar's decision, was dealing with a personal problem; (2) that the Russian barrister had been of great assistance in the winding-up and that, but for him, the matter might never have progressed; (3) that it was beyond question that his help might be of value in the future, as it had been to the liquidator in the past; (4) that the court was justified, in this particular case, in allowing the payment, provided that it was not going to be made the basis of future claims for ex gratia or other payments; (5) that, accordingly, on the Russian barrister's undertaking in writing to continue on the committee of inspection, unless prevented by ill-health or other unavoidable cause or until released from further service by the court, the court would authorize the liquidator to pay to him £420 as an ex gratia payment, in full satisfaction of all his claims for remuneration or compensation or expenses to the date of the court's order.

APPLICATION BY LIQUIDATOR.

On or about December 14, 1917, a Russian bank which was situate in Russia and had no address in England was dissolved by Soviet confiscatory decrees and ceased to exist. It was at the time indebted to an English company and, after litigation in England, a winding-up order was made in England, and a liquidator appointed, on May 30, 1932. In the winding-up the

company proved for the amounts owing to it, and a Russian barrister of many years' standing and long resident in England, who had been of great assistance in the litigation, proved for £850 for his services, to which amount he claimed to be entitled as of right. The liquidator rejected the proofs of both the company and the Russian barrister, but regarded the amount of £850 claimed by the latter as fair and reasonable if the claim could be sustained. On February 28, 1952, Vaisey J., in *In re Banque des Marchands de Moscou (Koupetschesky)*,[1] dismissed both appeals against rejection. The grounds on which that of the Russian barrister was dismissed were that his services had not been rendered to the bank, or to the liquidator, or to those interested in any equity in the bank, or to the Crown (in whom any assets in England of the bank would have vested as bona vacantia); and that to extend the principle of "agency of "necessity" to include agency on behalf of a non-existent person such as the bank would have been against the trend of decided cases. His Lordship suggested that the matter of a gratuitous payment be dealt with by the registrar who, accordingly, was asked to sanction the payment to the Russian barrister of £420 as an ex gratia payment in respect of his claim. The registrar considered that that application to him was premature, and that the proper course was to await the attitude of the creditors. The application for leave to pay the £420 thereupon came before Vaisey J.

*Raymond Walton* for the liquidator

VAISEY J. This is an application by the liquidator in the winding-up of the Banque des Marchands de Moscou (Koupetschesky) for leave to pay to Mr. Marc Wilenkin the sum of £420, or such other sum as this court should direct as and by way of an ex gratia payment in respect of his claim, as set out in his proof of debt sworn more than 20 years ago, on September 23, 1932.

The facts on which this application is based are sufficiently set out in the judgment which I delivered with regard to Mr. Wilenkin's legal claims and other matters, on February 28, 1952, and I need not repeat or enlarge on what I there said, observing only that Mr. Wilenkin's claim to have his proof admitted was rejected by me and that the liquidator was satisfied that if it came to a matter of gratuitous payment the sum of £850 would not be incommensurate with the services rendered for which the claim was put forward.

Of course, had I admitted Mr. Wilenkin's proof he would have had to come in with the other creditors and would have had to wait until the time had arrived for a distribution among them. It is anticipated that the amount which the creditors

[1] [1952] W.N. 151; [1952] 1 T.L.R. 739; [1952] 1 All E.R. 1269.

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are likely to receive is something in the nature of ten shillings in the pound.

At the hearing before me last February I suggested that, if it was a case of gratuitous payment, it should be dealt with by the registrar, and Mr. Registrar Wilson very ably discharged his duty in dealing with this matter. When asked to sanction the payment which I am now asked to sanction, he expressed the view, which I think was well founded, as a matter of propriety, that the application was premature, being in substance an application to pay approximately 50 per cent. of the £850, not as of right but by way of gratuitous payment. The registrar expressed the view that the proper course would be to wait and see what the creditors thought because, after all, the proof had been rejected and it was their money which was to be depleted for the purpose of making this proposed ex gratia payment.

I agree with, and I think that, in normal circumstances, I should have upheld, the registrar's decision, but it does seem to me that here we are dealing in a sense with a personal problem. Mr. Wilenkin, who was called to the Russian Bar, or who became qualified as an advocate in Russia, many, many years ago, has undoubtedly been of great assistance in this winding-up and, indeed, but for his activities it is suggested that this matter would never have progressed at all; he laid the foundation for it. However, I am looking not only at the past. It must be remembered that the liquidator has told me that he thinks that £850 was a fair rate, and I have also to look to the future. I have to realize, and I think it is beyond question, that Mr. Wilenkin's help may be of value in the future as it has been of value to the liquidator in the past. I think that if this is not going to be made (and I do not intend it to be made) the basis for future claims—for ex gratia or other payments—that I am justified, in this case, in allowing this payment to be made. But I think that I shall allow it only on Mr. Wilenkin's undertaking to continue to serve as a member of the committee of inspection, unless prevented by ill-health or other unavoidable cause, or until he is excused further service by the court. I think that an undertaking of that kind will secure to the liquidator, so far as it is possible to secure anything in the nature of a contract of personal service, the continuance of Mr. Wilenkin's valuable assistance.

On that undertaking being given to the court, and it is an undertaking which I am quite sure that Mr. Wilenkin will observe not only in the letter but in the spirit, I will authorize the liquidator to pay to Mr. Wilenkin the sum of £420, which he claims by way of an ex gratia payment, such payment to be made on Mr. Wilenkin's receipt in writing acknowledging the payment to have been made in full satisfaction of all his claims for remuneration or compensation or expenses in connexion with the liquidation down to the present date. If a receipt is signed

by him in that form, and if he gives an undertaking in the way in which I have suggested, I will authorize the payment to be made and the liquidator's costs will be his costs in the winding-up.

[Mr. Walton stated that he had been informed that Mr. Wilenkin would give the written undertaking and that he (counsel) had been asked to give verbally forthwith on Mr. Wilenkin's behalf the undertaking in the terms required by the court.]

*Order accordingly.*

Solicitors: *Slaughter & May.*

K. R. A. H.

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[COURT OF APPEAL.]

* HINDE *v.* HINDE AND ANOTHER.

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*Nov.* 7; *Dec.* 17.

Birkett and Morris L.JJ.

*Husband and Wife—Maintenance order—Construction—Consent order—Jurisdiction of court—Validity of order—Supreme Court of Judicature (Consolidation) Act*, 1925 (15 & 16 *Geo.* 5, *c.* 49), *s.* 190 (1) (2).

A maintenance order drawn up by consent provided that the respondent husband should pay to the wife "until remarriage as "from . . . March 23, 1936, maintenance . . . of £300 0s. 0d. per "annum gross . . . monthly." The husband died, and his executors refused to pay further maintenance to the wife, who thereupon issued a summons applying for leave to issue execution against the husband's estate or, alternatively, against his executors. On appeal from Barnard J. (who upheld the registrar in dismissing the summons):—

*Held*, that the parties could not by consent confer on the court a jurisdiction which it did not possess, and inasmuch as the jurisdiction of the court in respect of a wife's maintenance was by section 190 (1) and (2) of the Supreme Court of Judicature (Consolidation) Act, 1925, limited to a period of the joint lives, if the order was to be enforceable as an order of the Divorce Court it could only be for their joint lives. There was nothing in the order which, on construction, indicated to the contrary, and it should therefore be construed as limited to joint lives.

*Langstone* v. *Hayes* [1946] K.B. 109; 62 T.L.R. 74; [1946] 1 All E.R. 114, considered.

Decision of Barnard J. affirmed.

APPEAL from Barnard J. (sitting in chambers).

On March 23, 1936, the petitioner, Eunice Olwen Hinde, was granted a decree absolute against the respondent, Walter Stanley Hinde, in the suit which she had instituted.

The petitioner applied for maintenance and the solicitors for the parties appeared before the registrar. On March 25, 1936, a maintenance order was made by consent. By that order:

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"Upon hearing the solicitors for the parties and by consent I do "order that Walter Stanley Hinde the respondent do pay or "cause to be paid to Eunice Olwen Hinde the petitioner until "remarriage as from the date of the decree absolute herein to "wit March 23, 1936, maintenance at and after the rate of £300 "per annum gross the said sum to be payable monthly and to "pay maintenance for Eleanor Margaret Hinde the child of the "marriage as follows:—(*a*) payment of accounts as and when "rendered up to the amount of £50 per annum. (*b*) Payment of "the whole of her educational expenses. Petitioner's costs."

The respondent died on January 18, 1952, and probate of his will was granted on June 21, 1952, to Lloyds Bank Ld. and Richard Trevis Scriven Hinde, the executors named in his will. When the respondent died the child of the marriage was over 21. Maintenance was paid in accordance with the order up to the death of the respondent, and there were no arrears when he died. After his death his executors refused to pay any more to the petitioner because they were of opinion that the order for maintenance only applied during the joint lives of the petitioner and respondent, and, consequently, when he died nothing more was due to the widow. The petitioner took out a summons on September 12, 1952, in the Divorce Division applying for leave to issue execution against the respondent's estate or, alternatively, against his executors. That application was made pursuant to Ord. 42, r. 23 (*a*),[1] which applied by reason of rule 80 of the Matrimonial Causes Rules, 1950. The summons was supported by an affidavit by the solicitor for the petitioner in which it was said that the petitioner had not remarried.

By paragraph 7 of the affidavit: "As a result of the death of "the above-named respondent no steps have been taken to "enforce the said order without leave under the provisions of "rule 62 (1)[2] of the Matrimonial Causes Rules, 1950. 8. I am "advised and verily believe that the above-named respondent's "estate is amply sufficient to satisfy the terms of the said order "relating to the maintenance of the petitioner. 9. There are no "arrears of maintenance due at the date of death of the above-"named respondent. 10. On February 18, 1952, I caused a copy

[1] Ord. 42, r. 23 (*a*): "Where six "years have elapsed since the judg-"ment or date of the order, or any "change has taken place by death or "otherwise in the parties entitled or "liable to execution . . . (*d*) . . . the "party alleging himself to be entitled "to execution may apply to the court "or a judge for leave to issue execu-"tion accordingly. And such court or "judge may, if satisfied that the party "so applying is entitled to issue exe-"cution, make an order to that effect, "or may order that any issue or "question necessary to determine the "rights of the parties shall be tried "in any of the ways in which any "question in an action may be tried. "And in either case such court or "judge may impose such terms as to "costs or otherwise as shall be just."

[2] Matrimonial Causes Rules, 1950, r. 62 (1): "In default of payment to "any person of any sum of money at "the time appointed by any order of "the court for the payment thereof, "a writ of fieri facias, sequestration, "or elegit shall be sealed and issued "as of course out of the Divorce "Registry upon an affidavit of service "of the order and of non-payment."

" of the said order to be sent to Messrs. Hepherd, Winstanley " and Pugh, the solicitors for the said executors, and the receipt " thereof was acknowledged by letter dated February 29, 1952. " 11. The said executors by their said solicitors have refused to " pay the petitioner maintenance in accordance with the terms " of the said order."

On September 22, 1952, Mr. Registrar Kinsley dismissed the petitioner's summons, and on October 14, Barnard J., sitting in chambers, dismissed the appeal from the registrar's order and granted leave to appeal.

*P. Wien* for the appellant wife.
*E. S. Fay* for the respondents.

The following cases were cited in the course of the argument: *Maidlow* v. *Maidlow*,[3] *Mills* v. *Mills*,[4] *Kirk* v. *Eustace*,[5] *Robins* v. *Robins*,[6] *Langstone* v. *Hayes*,[7] *In re Aylmer*,[8] *The British Wagon Co. Ld.* v. *Gray*,[9] *Wentworth* v. *Bullen*,[10] *Conolan* v. *Leyland*,[11] and *Jenkins* v. *Jenkins*.[12]

December 19, 1952. BIRKETT L.J. [in a written judgment, stated the facts substantially as set out above, and continued]:— The order of March 25, 1936, is, of course, unusual in form, and the circumstances in which it came into being cannot now be accurately ascertained. Counsel who addressed us on the appeal spoke about the mechanics of the order and how orders of this kind possibly come to be made, but on that matter it is enough to say that I think that the exact circumstances in which this rather unusual order came into being cannot now be accurately ascertained.

The provisions of the Supreme Court of Judicature (Consolidation) Act, 1925, were then in force, but the order which we have to consider did not follow either subsection (1) or subsection (2) of section 190 of that Act. Subsection (1) of section 190 is in these terms: " The court may, if it thinks fit, on any " decree for divorce or nullity of marriage, order that the husband " shall, to the satisfaction of the court, secure to the wife such " gross sum of money or annual sum of money for any term, not " exceeding her life, as having regard to her fortune, if any, " to the ability of her husband and to the conduct of the parties, " the court may deem to be reasonable, and the court may for " that purpose order that it shall be referred to one of the " conveyancing counsel of the court to settle and approve a

[3] [1914] P. 245.
[4] [1940] P. 124; 56 T.L.R. 561; [1940] 2 All E.R. 254.
[5] [1937] A.C. 491; 53 T.L.R. 748; [1937] 2 All E.R. 715.
[6] [1907] 2 K.B. 13; 23 T.L.R. 428.
[7] [1946] K.B. 109; 62 T.L.R. 74; [1946] 1 All E.R. 114.
[8] (1887) 20 Q.B.D. 258; 4 T.L.R. 174.
[9] [1896] 1 Q.B. 35; 12 T.L.R. 64.
[10] (1829) 9 B. & C. 840.
[11] (1884) 27 Ch.D. 632.
[12] (1930) 46 T.L.R. 309.

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" proper deed or instrument, to be executed by all the necessary " parties, and may, if it thinks fit, suspend the pronouncing of " the decree until the deed or instrument has been duly " executed."

It is perfectly obvious that the provisions of subsection (1) were not embodied in any form in the order with which we are concerned. Subsection (2) reads: " In any such case as afore- " said the court may, if it thinks fit, by order, either in addition " to or instead of an order under subsection (1) of this section, " direct the husband to pay to the wife during the joint lives of " the husband and wife such monthly or weekly sum for her " maintenance and support as the court may think reasonable."

Those provisions were in force at the time of the making of the order with which we have to deal, but there is no mention in the order of secured payments or any mention in terms of joint lives.

Counsel for the petitioner—and I think that I ought to say how greatly we were assisted by the arguments of counsel on both sides, who fully discussed all the relevant law in this matter—suggested that the omission of the words " joint lives " was deliberate, and that the reference to " until remarriage " in the order confirmed this view. He further said that the provisions relating to the maintenance of the child, and for her education, supported the view that the order was not intended to be for joint lives, but was to continue after the death of the respondent, if the petitioner had not remarried.

Counsel for the respondents submitted that the order being stated to have been made by consent, it would appear to be an order drawn up by the solicitors on one side and agreed to by the solicitors on the other side, and recorded as an order of the court, although the court would have have had no jurisdiction to make an order extending beyond the joint lives. He submitted, therefore, that if this was to be regarded as an order of the court, which the court could enforce, it must necessarily be an order for joint lives and no more. Counsel for the respondents submitted further, that on the true construction of the order, it was not intended to outlast the respondent's life, and an examination of the wording of the order would support that view. He contended that if the view of the petitioner that the order purported to extend beyond joint lives was right, then there was no power in the court to enforce it as an order, and that, at the most, it was evidence of an agreement between the parties which might be enforced in other proceedings, but not in these.

The summons in the present case asked for leave to issue execution against the estate of the respondent, but that, counsel said, was not permissible in these proceedings because in any event there was no power in the court to make an order extending beyond joint lives. He also submitted that the order should be construed by this court to give the order validity, and if it did so, the contention of the petitioner must fail.

In the last resort, I think that this appeal turns on the true construction of the order of March 25, 1936. It is to be observed that the order is "that Walter Stanley Hinde the respondent "do pay or cause to be paid," and would seem to indicate that the respondent is alive to fulfil his obligation. Nothing at all is said that contemplates his death, or as to what is to happen to the provision for maintenance in that contingency. Nothing is said to indicate that the maintenance is to be paid "during the "life of the wife," as was said in *Kirk* v. *Eustace*.[13] It is true that the order states that the respondent do pay or cause to be paid to the petitioner "until remarriage," and the petitioner has never remarried. But I do not think that this provision is in any sense conclusive of the matter, and must be read in conjunction with the rest of the order. In my view, the event of remarriage was remarriage in the lifetime of the respondent, and I see no ground for saying that the respondent, by that provision, was binding his estate to pay maintenance after his death if the petitioner had not remarried. If the petitioner had remarried in the lifetime of the respondent, the liability of the respondent would have ceased, and that, I think, was the intent and meaning of the words.

The provision for the child Eleanor Margaret Hinde is made part of the order. Walter Stanley Hinde is to pay accounts when rendered, up to £50 per annum, and the whole of the educational expenses. The jurisdiction of the court to order payments is contained in section 193 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925. The court cannot order payment after the child reaches the age of 21. The provisions of the order relating to the child of the marriage would seem to have been framed on the view that Walter Stanley Hinde would be alive to meet them, and nothing whatever is said about what is to happen if the father dies before the educational expenses are complete, or what is to happen to the payments of £50 per annum in the event of his death. All these matters seem to me to point to the conclusion that the order was made on the footing of joint lives.

In the course of the argument many cases were cited to us, but I do not think that any of them was in any sense of decisive help in this case. In *Kirk* v. *Eustace*,[13] the headnote reads: "By a deed made in 1922 providing for a separation between "husband and wife, and containing mutual covenants to live "separate and apart, the husband covenanted with his wife to "pay her the weekly sum of £2 during her life for her mainten- "ance and support, but determinable upon reconciliation. In "1936 the husband died. The widow claimed that his estate was "liable to continue paying the maintenance during the rest of "her life, but the executors contended that the liability had "come to an end by the husband's death:—*Held*, that as the

[13] [1937] A.C. 491.

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"deed provided that the weekly payment to the wife should "continue during her life and as there was nothing in the "language used to show an intention that the husband's obliga- "tion should continue only during his life, his estate remained "liable to pay the weekly sum to the widow," and the decision of the Court of Appeal was reversed.

It is to be observed that in the argument of counsel for the appellant it was said that "The obligation undertaken by the "husband was to pay that sum to the wife during her life, and ". . . it follows by virtue of section 80 of the Law of Property "Act, 1925, that it is binding on the husband's estate." Lord Atkin said [14]: "Therefore, this contract, which is under seal, "is to be read as if it were made by the husband for his executors "and administrators, unless a contrary intention is found "expressed in the covenant. So far the matter seems to me to "be beyond question, and the wife has the right expressed in "the deed. From the judgment given by the late Mr. Owen, "sitting as deputy county court judge—the judgment of a very "careful, learned and experienced lawyer—he apparently had no "doubt upon the matter, and he gave reasons which appear to "me to be convincing for holding that the plaintiff was entitled "to recover. On appeal, the majority of the Court of Appeal "took a different view; Slesser and Scott L.JJ. differed from "Eve J., the majority taking the view that in this particular "deed a contrary intention was expressed as to the covenant "binding the estate of the testator, or, in other words, continuing "after his death. The view that was taken was that in a deed "of this kind (I am now paraphrasing the grounds of the judg- "ment, but I think I am expressing them accurately) the main "object was to provide for the parties living apart; on the death "of the husband they could no longer live apart—I think that is "true—and inasmuch as they could no longer live apart, the "whole basis of the contract had disappeared, and thereupon all "the agreements came to an end."

That case was considered by the Court of Appeal in *Langstone* v. *Hayes*,[15] and I think that that case is perhaps the most helpful of the cases cited, though, I repeat, none of the cases, in my view, was of decisive help in this case. The headnote of that case reads: "There is no rule of law that a covenant in a "separation deed by a husband to pay his wife an annuity is "intended to bind the estate of the covenantor. Whether it does "so or not, depends on the construction of the provisions of the "deed." "By a deed of separation executed on June 10, 1926, "by Cecil Joseph Langstone and his wife, it was provided by "clause 1 (i) that the wife might at all future times live apart "from the husband and free from his control. By clause 1 (iii) "'The husband will pay to the wife . . . for her separate use "'and for the maintenance and support of herself a clear

[14] Ibid. 496. [15] [1946] K.B. 109.

" ' annuity of £104 . . . payable by weekly payments of £2 cash " ' . . . until determined as provided by clause 3 (ii),' which " was that: ' if, at any future time, the spouses shall with their " ' mutual consent again cohabit as man and wife, or the wife " ' shall not remain chaste, the annuity . . . shall thereupon " ' determine and the deed shall then become void ' "; and there were various other clauses about non-molestation and the like.

MacKinnon L.J., who read the judgment of Scott L.J. in that case as the judgment of the court, said [16]: " The sole issue tried " by the learned judge was whether on its true construction the " covenant by the husband bound his personal representative, or " was limited to the joint lives of the spouses. Counsel for the " widow both below and before us relied on the decision of the " House of Lords in *Kirk* v. *Eustace*,[17] or alternatively, if that " decision did not conclude the appeal in his favour, he submitted " that his contention gave the proper meaning to the covenant and " he further relied on certain observations of Lord Atkin, and " possibly of Lord Russell of Killowen in that case. In our view " neither argument avails the widow. Unless the deed or written " contract under consideration is a matter of common form, at " least in respect of the particular provision which falls to be " considered, it is dangerous to seek to apply to it the judicial " interpretation of another document unless that other docu- " ment is so similar in its terms as to be almost identical; " a principle applied to a separation deed by Bowen L.J. in " *Nicol* v. *Nicol*.[18] In *Kirk* v. *Eustace* [19] the deed of separa- " tion stated repeatedly and expressly that the husband's " obligation to pay was to endure ' during the life of the " ' wife.' The majority of the Court of Appeal in that case " (Slesser and Scott L.JJ., Eve J. differing) thought that even " that clear expression of intention ought to give way to other " indications in the deed of an intention that it was only to " operate during the joint lives of the spouses "—that was the view of the Court of Appeal, which was reversed, of course, in the House of Lords—" The instant deed, as the county court " judge has pointed out, differs in an important respect from the " deed in *Kirk* v. *Eustace*,[19] that is to say, by the complete " omission from the deed of the phrase ' during the life of the " ' wife.' There were apparently no children of the marriage."

MacKinnon L.J. then read clauses 1 (i), 1 (iii) and 3 (ii) of the deed and continued [20]: " I can see nothing in these provisions " to extend the husband's covenant beyond the term of their " joint lives: everything presumes the continuance of his life " during performance of the covenant to pay. This view of the " agreement is supported by other terms in the deed. Every " one of these provisions seems to us in terms to assume that " the husband is still alive and therefore to apply only to the

[16] [1946] K.B. 109, 111.
[17] [1937] A.C. 491.
[18] (1886) 31 Ch.D. 529.
[19] [1937] A.C. 491.
[20] [1946] K.B. 109, 112.

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"period of their joint lives; thus distinguishing this deed of "separation, on a radical point of its terms, from *Kirk* v. "*Eustace*.[21]"

*Langstone* v. *Hayes*[22] seems to make it clear that the construction of the order in this present case is the all-important thing, and that the order must be read as a whole. The conclusions to which I have come, therefore, are these: (1) If this order is to have validity as an order of the court, it must be construed as an order made for joint lives; and (2) the construction of the order, in its use of the name of the respondent simply, in the absence of any reference to the life of the wife as the period in which maintenance is to be paid, in the use of the words "until remarriage" in the context of the order, in the provisions for maintenance of the child of the marriage contained in the same order, all seem to me to point to the order being one in which the liabilities of the respondent were limited to the joint lives of the husband and wife.

For these reasons, I think that the decision of Barnard J. was right, and that this order does not extend the liability of the respondent to his estate after his death.

Counsel for the respondents cited several cases in support of the view that where there was an order of the court, the contract which lay behind the order might, in certain circumstances, be enforced and sued upon; but the circumstances in which this order was made by consent in 1936 were not before us, and on that part of the case I do not think that it would be useful or profitable to say anything.

I think that the present summons, which sought leave to issue execution against the estate of the respondent, cannot succeed, and, for the reasons which I have given, I think that the order of March 25, 1936, imposed liability on the respondent for joint lives only. In my opinion, therefore, this appeal ought to be dismissed.

MORRIS L.J. [reading his judgment, stated the facts and continued]:—The form of the proceedings makes it clear that the application to the court is for enforcement of an order of the court for maintenance of the wife. It does not appear to be suggested that any order of the court for the maintenance or education of Eleanor Margaret Hinde, the child of the marriage, still has effect. What is said, however, either expressly or by implication, is that by the order of March 25, 1936, the court made an order binding the husband or, after his death, his estate, to pay maintenance at the stated rate to the wife until her remarriage.

When the order was made the statutory provisions in force were those contained in section 190 of the Supreme Court of Judicature (Consolidation) Act, 1925. [His Lordship read subsections (1) and (2) of section 190 and continued:] Then section

[21] [1937] A.C. 491. [22] [1946] K.B. 109.

193 (1) provides: "In any proceedings for divorce or nullity of "marriage or judicial separation, the court may from time to "time, either before or by or after the final decree, make such "provision as appears just with respect to the custody, main- "tenance and education of the children, the marriage of whose "parents is the subject of the proceedings, or, if it thinks fit, "direct proper proceedings to be taken for placing the children "under the protection of the court."

It follows that the only jurisdiction which the court had to order the husband to pay £300 per annum to the wife was limited to the period of the joint lives. Though parties may agree upon amounts or may make agreements as to payments, they cannot by consent confer on the court a jurisdiction which it does not possess. Thus, in *In re Aylmer*[23] Lord Esher M.R., in the course of his judgment, referred to the "well-known rule" that "the consent of parties cannot give the court a jurisdiction which "it does not otherwise possess." See also *British Wagon Co. Ld.* v. *Gray*.[24]

In *Maidlow* v. *Maidlow*[25] there was an agreed order for payment of maintenance to a wife "for her life." It was held in this court, affirming the decision of the president, that the court could not accede to the husband's petition for a decrease of the amount of maintenance. It was said by Swinfen Eady L.J. that if there had been an order by consent in the language of the statute for the payment of maintenance to the wife during the joint lives of the husband and wife, then the mere fact that the parties had agreed the amount to be paid would not have prevented an application from being made for a modification of the order, if the circumstances of the parties afterwards changed. But the order which was made by consent was for payment to the wife "for her life." In reference to it, Swinfen Eady L.J. said[26]: "It is objected that, unless the parties consented to an "order in that form, there was no jurisdiction in the judge to "make such an order. He could order payment of maintenance "during the joint lives under the statute, but there is no power "under section 1 (2) to order payment to the wife during her "life. Under section 1 (1) there is power to secure to the wife "such gross sum of money or such annual sum of money for any "term not exceeding her life as, having regard to the various "circumstances, may be deemed reasonable, and under subsec- "tion (2) power to order payment to the wife during their joint "lives of such monthly or weekly sum as may be reasonable. "It is urged that there was a bargain between the husband and "wife, which the court is not at liberty to vary, and that the wife "accepted a less sum than she might otherwise have claimed, "so that she might have the advantage of receiving it for her "life. In my opinion an order so made cannot be subsequently "varied."

[23] 20 Q.B.D. 258, 262.
[24] [1896] 1 Q.B. 35.
[25] [1914] P. 245.
[26] Ibid. 249.

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That case shows that the court will recognize a consensual arrangement and will not interfere with it, but the case does not establish that the court will lend its process to enforce as an order that which is drawn up in the form of an order, but which in reality is the statement of an agreement in terms which the court would have no jurisdiction to impose. It is to be pointed out that in the present case there are not the words "for her "life," though there are the words "until her remarriage."

In *Mills* v. *Mills* [27] the facts were that "A wife obtained a "decree absolute of divorce on November 21, 1932. An order "by consent was made on December 29, 1932, directing the "husband to pay to the wife during their joint lives and until "further order maintenance of £5 a week, 'without prejudice to "'any further order.' In 1933 payments fell into arrear, and "the wife took out a judgment summons for £90. The parties "then agreed that the husband should pay the wife a lump sum "of £1,250 in full discharge of all claims by her to maintenance. "On October 9, 1933, an order was made embodying the agree-"ment. The order also discharged the order of December 29, "1932, and dismissed the maintenance petition and the judgment "summons. On January 31, 1940, the wife took out a summons "calling on the husband to show cause why she should not have "liberty to apply for maintenance in accordance with the pro-"visions contained in the order of October 9, 1933:—*Held*, "reversing Bucknill J., that the application was not 'on' a "decree for divorce within the meaning of section 190 of the "Supreme Court of Judicature (Consolidation) Act, 1925, and "that the court had no jurisdiction to grant it."

In the course of his judgment Sir Wilfrid Greene M.R. said [28]: "The order on the face of it also purports to direct payment of a "lump sum. That payment is something which the court had "not jurisdiction in itself to order, because the jurisdiction of "the court, so far as relevant, is confined to securing, under "subsection (1) of section 190 a gross or annual sum, or under "subsection (2) ordering the payment of a periodical sum to the "wife. It is settled that the court has not power to order "payment to the wife out and out of a lump sum. But it has "also been held that the court has jurisdiction by consent to "make an order of that character. The order, therefore, on the "face of it, is an order by consent directing the husband to do "something which the court, apart from consent, could never "order him to do; and by consent it is discharging the original "order, and dismissing the petition upon which it was made."

Then later, the Master of the Rolls said [29]: "There is one "further point, before I leave this matter, on the form of order, "on which I should like to comment. I have already said that "there is no jurisdiction in the court to order payment to the

[27] [1940] P. 124.
[28] Ibid. 130.
[29] Ibid. 134.

"wife of a lump sum. Such payment can only be consensual. "That being so, I take the view that in such cases it is not "desirable that the court should direct the payment of such a "lump sum, which is merely consensual. There is no necessity "for the court to be appearing by consent to be making an "order which it has no jurisdiction to make at all. There are "many other ways of providing for these matters. What the "court has jurisdiction to do is, of course, to discharge its "previous order. The sum can be paid first, in which case all "that is required is a recital in the order that such and such "an agreed sum having been paid in full satisfaction, and an "order by consent that the existing maintenance order be "discharged. If the sum has not been paid, I see no reason why "the order should not take the form that upon payment of the "sum the existing order should stand discharged, when the "ordinary routine would be, as is the practice in another "Division, that upon the party producing before the registrar an "affidavit verifying the payment, the existing maintenance order "would be discharged."

But it may well happen that the parties, who have made a contract, cause a consent order to be drawn up, which in its effect is no more than evidence of their contract. Thus, in *Wentworth* v. *Bullen*,[30] Parke J. said: "Now though there is no remedy "for disobedience of a judge's order (as such) by one of the "parties against another by action, but by attachment merely, "yet if it be made by the consent of both, and is founded on a "binding agreement, an action will not the less lie upon that "agreement, though it have also the additional sanction of a "judge's order. The contract of the parties is not the less a "contract, and subject to the incidents of a contract, because "there is superadded the command of the judge."

The words "by consent" in the order of March 25, 1936, may denote that the parties agreed the amounts which the court, acting within its jurisdiction, could order the husband to pay, or they may denote that the parties agreed to the terms extending beyond those which the court, acting within its jurisdiction, could order. A consent order may amount to a contract, or may be evidence of, or corroboration of, some contract which has already been made. But if the court is invited to make an order by consent, and if an order is then drawn up which, according to one construction, is within the powers of the court, but according to another construction is not, the court will proceed on the basis that the order is an order made within the powers of the court until it is shown that the position was that the parties merely made a contract, and that the consent order was intended to be the embodiment or the evidence of the terms agreed.

The application made in the present case was to enforce in the Probate, Divorce and Admiralty Division an order made

[30] 9 B. & C. 840, 850.

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in that Division; that is, the order of March 25, 1936. That order, if it was an order which was made within the power and jurisdiction of the court, must have been one to operate during the joint lives of the husband and wife, even though this is not expressly stated in the order. If, therefore, it was such an order, the application to enforce it after the death of the husband rightly failed. If it was not such an order, but if it is contended that there was a contract imposing an obligation not affected by the death of the husband, then the existence of such a contract must be established before there could be leave to issue execution.

The present proceedings, which are brought against the executors, are brought for the purpose of enforcing in the Probate, Divorce and Admiralty Division an order made in that Division, and are not appropriate for advancing a contention that a purely contractual obligation has not been fulfilled. If it is sought to be said that the order of March 25, 1936, went beyond an order of the court made within its jurisdiction and was a contract in terms beyond the powers of the court, or was evidence of such a contract, then this contention must be advanced in some proceedings raising it as an issue to be tried. It may be that there is no evidence of a contract other than such as is afforded by the circumstance that in the order of March 25, 1936, which on this basis was not merely or strictly an order, there is no stated overriding limitation referable to the continuance of the joint lives.

Whether any other evidence exists is not known to the court; none has been mentioned. If the parties had wished to make provision extending beyond their joint lives they could have done so in some clear, formal document. The order of March 25, 1936, does not on its face, or by its terms, contain any clear indication that it overran the statutory powers of the court.

In my judgment this appeal must fail, because leave to issue execution upon the order of March 25, 1936, was rightly refused for the reason that if it was an order of the Divorce Court it was not made, and could not have been made, so as to operate beyond the period of the joint lives.

The possibility of asserting in an action, and of seeking to prove and establish, that there was a contract as alleged by the wife, can neither be excluded nor encouraged.

*Appeal dismissed.*

Solicitors: *Rhys Roberts & Co. for C. James Hardwicke & Co., Cardiff; Hepherd, Winstanley & Pugh, Southampton.*

E. D.

[QUEEN'S BENCH DIVISION.]

## *PAULEY *v.* KENALDO LD.

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*Nov.* 17, 18;
*Dec.* 18.

[1951, P. No. 2455.]

Birkett L.J. (sitting as an additional judge of the Queen's Bench Division).

*Master and servant—Catering business—Minimum wages scale—Worker "employed in" undertaking — Restaurant cloakroom attendant — Remuneration by tips only—Self-employed person—Work performed in pursuance of arrangement made by worker by way of trade—Worker "deemed to be employed"—Catering Wages Act,* 1943 (6 *& 7 Geo.* 6, *c.* 24), *s.* 1 (2) (4).

The Catering Wages Act, 1943, under which minimum rates of wages are laid down in the case of various classes of employees in the catering business, provides in section 1 (2) that "the workers "to whom this Act applies are all persons employed in any under-"taking" coming within the Act, and by section 1 (4) that for the purposes of the Act, "any worker who, for the purposes of any "undertaking . . . performs any work in pursuance of an arrange-"ment . . . made by the worker by way of trade with the persons "carrying on that undertaking shall be deemed to be employed by "them in that undertaking. . . ."

A cloakroom attendant in a restaurant, for which class of employee a minimum rate of wages is provided, was engaged on the terms of a verbal agreement under which she was to be remunerated by tips only, and by the terms of which her employers, while entitled to dismiss or suspend her, did not exercise over the manner in which she did her work such a control as would constitute a contract of service between the parties. On the termination of her employment she brought an action in which she claimed to be entitled to the minimum rate of wages applicable to an employee in her grade:—

*Held,* (1) that she was not "employed in" the undertaking within the meaning of section 1 (2) of the Act, since the words "employed in" contemplated the existence of a contract of service, and did not mean merely "working in" the undertaking; but (2) that the arrangement between the parties provided for the worker doing the kind of work to which a minimum rate of wages applied; that such arrangement was made by the worker by way of trade, using that term in the sense of commercial employment; and that she must accordingly be deemed to have been employed by the persons carrying on the undertaking within the meaning of section 1 (4) of the Act and was, therefore, entitled to the minimum rate of wages applicable in the case of a cloakroom attendant.

*Skinner* v. *Jack Breach Ld.* [1927] 2 K.B. 220; 43 T.L.R. 484, considered.

ACTION.

The facts as found by Birkett L.J. were substantially as follows: The plaintiff, Bertha Celina Pauley, had been a cloakroom attendant since 1946. In 1949 she was out of employment and entered her name on the books of an employment agency, who sent her name to the defendants, Kenaldo Ld., the proprietors of the "96" Restaurant, Piccadilly. On July 10, 1949, she was interviewed by the general manager of the defendant

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company. Pursuant to instructions received from the board of directors of the company, the plaintiff was asked whether she would take over the cloakroom at the defendants' restaurant "on "her own." She was told that she would have to do the cleaning, all materials being provided by the defendants, and was informed as to the hours of work and the free meals which would be provided for her, and that she would have no wages, but would be allowed to keep all the tips. In the event of her wanting an evening off, she would be expected to provide a proper substitute and remunerate her. The plaintiff was also informed that she was not being employed by the defendants as one of their own servants, but was self-employed and on her own.

The plaintiff in her evidence said that it was originally suggested that she should pay 10s. a week for being allowed to have the cloakroom, but that the suggestion was subsequently withdrawn. This was not accepted by the defendants' general manager, who said that he had no recollection of it. The plaintiff also said that it was never suggested that she should take the cloakroom "on her own," and that she regarded herself as being employed in the same way as all the other members of the staff. She admitted that she stamped her own national insurance card as a self-employed person after the secretary of the company had refused to stamp them on behalf of the defendants as employers, and agreed that she did not clock in like other members of the staff.

On July 7, 1950, the plaintiff gave a week's notice to the defendants, and subsequently her union, the National Union of General and Municipal Workers, made a claim for arrears of wages to which she claimed to be entitled under the provisions of the Catering Wages Act, 1943, and of the Wages Regulations (Licensed Residential Establishment and Licensed Restaurant) Order, 1949 (S.I. 1949, No. 908), made on May 12, 1949. The claim was repudiated by the defendants on the ground that the plaintiff had never been in their employ within the meaning of section 1 (2) of the Catering Wages Act, 1943. The plaintiff thereupon brought the present action in which it was agreed that the arrears of wages, if recoverable, amounted to £200.

*Patrick O'Connor* for the plaintiff.
*Rodger Winn* for the defendants.

The following cases were cited in argument: *Skinner* v. *Jack Breach Ld.*[1]; *Morgan* v. *Parr*[2]; *Simmons* v. *Heath Laundry Co.*[3]; *Gould* v. *Minister of National Insurance.*[4]

*Cur. adv. vult.*

[1] [1927] 2 K.B. 220; 43 T.L.R. 484.
[2] [1921] 2 K.B. 379; 37 T.L.R. 587.
[3] [1910] 1 K.B. 543; 26 T.L.R. 326.
[4] [1951] 1 K.B. 731; [1951] 1 T.L.R. 341; [1951] 1 All E.R. 368.

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December 18, 1952. BIRKETT L.J., in a written judgment, stated the nature of the plaintiff's claim and continued:—Before I consider the facts, or the law to be applied, it might, perhaps, be well to summarize the effect of the pleadings and the submissions of counsel on the evidence. In its simplest form, the case for the plaintiff was that she came within the provisions of the Catering Wages Act, 1943, and the case for the defendants was that she did not, and it was agreed that if she did come within the provisions of the Act she was entitled to the £200, but not otherwise. The Act is described as: "An Act to make "provision for regulating the remuneration and conditions of "employment of catering and other workers and, in connexion "therewith, for their health and welfare and the general improve- "ment and development of the industries in which they are "employed."

Mr. O'Connor, for the plaintiff, submitted: (1) that the plaintiff was at all material times a worker to whom the provisions of the Act applied; (2) that she was therefore a worker for whom "statutory minimum remuneration for employment" had been fixed by the provisions of a Statutory Instrument, 1949, No. 908, made on May 12, 1949, called the Wages Regulation (Licensed Residential Establishment and Licensed Restaurant) Order, 1949, made by the Minister of Labour and National Service by virtue of his powers under the Act contained in section 8; the minimum rate for a cloakroom and toilet attendant is set out in paragraph 2 of the first schedule to the order; (3) that she was employed by the defendants as a cloakroom and toilet attendant under a contract of service made orally between the parties in June, 1949; (4) alternatively, that she was employed by the defendants within the true meaning of section 1 (2) of the Act; and (5), in the further alternative, she was "deemed to be employed" by the defendants by reason of section 1 (4) of the Act.

Mr. Rodger Winn, for the defendants, submitted: (1) that on the facts of this case, the Catering Wages Act of 1943, and the Statutory Instrument of May 12, 1949, had no application to the plaintiff; (2) that there was no contract of service made between the parties in June, 1949, or at all; and (3) that the provisions of section 1 (2) and (4) of the Act did not enable the plaintiff to say that she was employed within the meaning of subsection (2), or that she was "deemed to be employed" within the meaning of subsection (4).

The facts were very much in dispute, and at times the evidence was a little confused. What was said at one interview was mixed up with what was said at another, the reason no doubt being that it was a matter of some difficulty in 1952 to recall clearly and coherently what had been said in 1949. But the main points of difference are fairly clear, and without intending to cast the smallest aspersion on the plaintiff, I will say at

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once that I prefer and accept the evidence of the defendants on the main facts in dispute.

[His Lordship stated the facts and continued:] The first question I have to decide is whether the plaintiff was a worker employed in the defendants' undertaking. Subsection (1) of section 1 of the Catering Wages Act, 1943, reads: "The Minister "of Labour and National Service (hereafter in this Act referred "to as 'the Minister') shall establish a commission, to be called "the Catering Wages Commission, (hereafter in this Act referred "to as 'the Commission') to perform, in relation to the workers "to whom this Act applies and their employers, such functions "as are entrusted to the commission by this Act." Subsection (2) is in these terms: "The workers to whom this Act applies "are all persons employed in any undertaking, or any part of "an undertaking, . . . which consists wholly or mainly in the "carrying on (whether for profit or not) of one or more of the fol-"lowing activities, that is to say, the supply of food or drink for "immediate consumption, the provision of living accommodation "for guests or lodgers or for persons employed in the undertaking "and any other activity so far as it is incidental or ancillary to "any such activity as aforesaid of the undertaking."

It is first said on the plaintiff's behalf that she was so employed under a contract of service made orally in June, 1949. This is a question of fact, as was stated by Warrington J. in *In re Winter German Opera Ld.*,[5] where he said[6]: "The question in "this and similar cases must turn upon the particular facts of "each particular case, and the authority of other cases, and "particularly of cases based upon different statutes, was of very "little assistance." Much point is given to that observation by a glance at Stroud's Judicial Dictionary, vol. 2, pp. 943 to 949, where a bewildering array of decisions on various statutes is set out, and the construction of the word "employment" is dealt with.

In *Gould* v. *Minister of National Insurance*,[7] Ormerod J. said: "It is easy in some cases to say that the contract is a contract "of service and in others that it is a contract for services, but "between these two extremes there are a large number of cases "where the line is much more difficult to draw. Although the "authority of cases based on different statutes may be of very "little assistance in deciding any particular case, it is possible "to extract from these authorities a common principle upon "which the decisions are founded. It is clear that the real "question is one of the degree of control exercised by the person "employing the artiste, and this, as I see it, means not only the "amount of control but the nature of that control and the direc-"tion in which it is exercised." He then went on to deal with the matter at further length: "In *Short* v. *J. & W. Henderson*

[5] (1907) 23 T.L.R. 662.
[6] Ibid.
[7] [1951] 1 K.B. 731, 734.

" *Ld.*,[8] a case in the House of Lords under the Workmen's " Compensation Acts, Lord Thankerton recapitulated with ap- ' proval the four indicia of a contract of service derived by the " Lord Justice Clerk in the Court of Session in *Park* v. *Wilsons* " *& Clyde Coal Co. Ld.*[9] from the authorities referred to by him. " These are: (a) the master's power of selection of his servant; " (b) the payment of wages or other remuneration; (c) the " master's right to control the doing of the work; and (d) the " master's right of suspension or dismissal. He goes on to say " ' that the principal requirement of a contract of service is the " ' right of the master in some reasonable sense to control the " ' method of doing the work, and that this factor of super- " ' intendence and control has frequently been treated as critical " ' and decisive of the legal quality of the relationship.' "

In this case before me, the defendants selected the plaintiff; there was remuneration solely by tips (and, of course, a person may be none the less a servant by reason of the fact that his remuneration consists solely of tips); the defendants could suspend or dismiss the plaintiff; but, in my opinion, they did not control the manner in which the work should be done. The plaintiff was not obliged to clock-in as the other servants were; she stamped her own card as a self-employed person within section 1 (2) (*a*) and (*b*) of the National Insurance Act of 1946; she could stay away when she pleased, and provide and pay for a substitute or an assistant; and though the defendants required the work to be done, they did not control the manner in which it was to be done.

I have come to the conclusion on all the facts of this case that there was no contract of service between the plaintiff and the defendants, and that it was well understood between them that the plaintiff was a self-employed person, and I do not accept the evidence of the plaintiff when she says otherwise. For the space of a year she appears to have been quite content, and with good reason. I was given no reliable evidence of the amount which she received in tips, for she kept no accounts and paid no income tax. There was no P.A.Y.E. card as in the case of other employees, and whilst she told me that the amount she received was about £7 a week, from certain other information she gave, and from the evidence about banquets and other special occasions, I incline to the view that she received more than that. It would appear to me that the Union took up this matter as a question of principle, and the fact that the plaintiff, as I think, was remunerated on a handsome scale by the tips she received, must not obscure the point of principle to be determined.

It was then said on behalf of the plaintiff that if she was not employed under a contract of service, the meaning of the word " employed " in subsection (2) of section 1 of the Act was merely

[8] (1946) 62 T.L.R. 427; 39 B.W.C.C. 62.

[9] 1928 S.C. 121, 133.

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that of "working in," and that the section should therefore be read as "The workers to whom this Act applies are all persons "working in any undertaking." I cannot accept this contention, for it seems to me that if that interpretation is to be put upon the words, it is a strange thing that Parliament did not use the words "working in" instead of the word "employment." I think, therefore, that the plaintiff fails to bring herself within subsection (2) of section 1 of the Act.

Subsection (4) of section 1 seems to me to be the substantial question in the case. That subsection reads: "For the purposes "of this Act, any worker who, for the purposes of any under- "taking or part of an undertaking, performs any work in pur- "suance of an arrangement express or implied made by the "worker by way of trade with the persons carrying on that "undertaking shall be deemed to be employed by them in that "undertaking or part."

If the Act is looked at as a whole, it is plain that the intention is to provide a complete code for the catering industry so far as conditions of work and remuneration are concerned. The Catering Wages Commission referred to in subsection (1) of section 1 is given very wide powers. In the Statutory Instrument 1949, No. 908, made by the Minister of Labour and National Service, which came into operation on June 1, 1949, the cloakroom attendant is specifically provided for. On page 12 of that order: "Cloakroom and toilet attendant is a worker aged 21 "years or over who is wholly or mainly employed on one or more "of the following duties, that is to say, the receipt, custody and "issue of personal effects deposited in the cloakroom, or the "charge of, and responsibility for cleaning, or for the cleanliness "of, toilets." And in paragraph 2 of the First Schedule the rates applicable to cloakroom and toilet attendant (female) are set out. In paragraph 22 of the order the workers to whom the schedule applies are listed: "Subject to the provisions of para- "graph 23 the provisions of this schedule apply to all workers "employed in Great Britain in a catering undertaking who are "employed by the person or body of persons carrying on that "undertaking and who are so employed either" and then various categories are set out; and, finally under "(*h*)," "any work "other than that specified in sub-paragraphs (*a*) to (*g*) hereof "performed on or about the premises or place where food or "drink is prepared or served or where living accommodation is "provided, including work in connexion with any service or "amenity provided on or about such premises or place."

Looking at subsection (4) in the light of all this, it is plain, and, indeed, it is not contested by Mr. Rodger Winn, that the plaintiff is a worker; she is in fact a cloakroom and toilet attendant. Secondly, her work is for the purpose of an under- taking, that is, the defendants' restaurant; thirdly, that work is performed in pursuance of an express arrangement made by the worker with the defendants who are carrying on that undertaking.

The crucial question which remains, and I think the only question, therefore, is: is that arrangement made by the worker by way of trade? If the answer is in the affirmative, then the plaintiff "shall be deemed to be employed" by the defendants "in that "undertaking."

The contest on this point was simple and short. Mr. Rodger Winn submitted that the words "by way of trade" meant that the worker who made the arrangement with the persons carrying on the undertaking must be carrying on a specific trade and made the arrangement as such trader. He submitted that the plaintiff was not carrying on any trade, and that the arrangement she made in this case with the defendants was therefore not made "by way of trade."

When one looks at the "Table of Weekly Minimum "Remuneration" in paragraph 2 of the First Schedule, and at all the various workers who are there set out, barman, barmaid, cashier, cellarman, chamber maid, chef, cleaner, clerk or receptionist, cloakroom attendant, cook, fireman and housekeeper, it would be difficult to say that any of them carried on a trade in the ordinary acceptation of that term, but they are all listed as workers to whom minimum rates apply.

Mr. Rodger Winn said that the meaning of the words "by "way of trade" ought not to be extended beyond the definition for which he contended. Mr. O'Connor, on the other hand, submitted that the words should not be so narrowly construed, and that they were wide enough in this case to cover the arrangement made; and, indeed, were intended to do so in order that the scheme of the Act of 1943 should not be weakened by any attempts at evasion. Mr. O'Connor said (and it is right that I should repeat) that in this case the good faith of the defendants had never been impugned, and I should add that under the arrangement made with the plaintiff, that could scarcely be suggested, because it was, I think, of an extremely profitable character, far exceeding the minimum wages laid down in the schedule to the order.

In the Trade Boards Act, 1909, these same words, "by way "of trade," appear, and it is to be observed that the marginal note to section 9 of that Act reads "prevention of evasion." Section 9 is in these terms: "Any shopkeeper, dealer, or trader, "who by way of trade makes any arrangement express or implied "with any worker in pursuance of which the worker performs "any work for which a minimum rate of wages has been fixed "under this Act, shall be deemed for the purposes of this Act "to be the employer of the worker, and the net remuneration "obtainable by the worker in respect of the work after allowing "for his necessary expenditure in connexion with the work shall "be deemed to be wages."

I gain considerable assistance, although the facts are very

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different, from *Skinner* v. *Jack Breach Ld.*[10] The headnote of that case reads: "By Orders made under the Trade Boards Acts, "1909 and 1918, the Minister of Labour directed that those Acts "should apply to 'the mending, refitting and reconditioning of "'drift nets,' which thereby became a 'specified trade' within "the meaning of the Acts, and in due course the trade board "fixed for certain classes of female workers in the trade minimum "rates of wages, which were made obligatory by an order of "the Minister of Labour. The appellant, one of the workers in "respect of whom the trade board had fixed minimum wages, had "been employed for over three years, and was employed, with "30 other women, by the respondents, who were fishermen and "owners of fishing boats, in mending drift nets, which were "exclusively the property of the respondents and were only used "by them in their business:—*Held*, that the Trade Board Acts "applied to workers in a 'specified trade' by whomsoever they "were employed, if their employment was regular and for "commercial purposes, and not only to workers employed in a "'specified trade' by an employer who was solely engaged in "the same trade, and, therefore, the respondents were bound to "pay to the appellant the minimum wage fixed by the trade "board for workers of her class in her branch of industry."

Whilst, as I have said, the facts in that case were wholly different from the facts with which I have to deal, it does assist in some degree in shedding light on the meaning of the words "by way of trade," and I observe that in his argument Sir Douglas Hogg A.-G. said[11]: "In the Trade Boards Acts, the "object of which is to prevent the underpayment of workers, "'trade' is used in the sense of the operations which are carried "on by the worker by way of business; see section 1 (1) and (2), "section 4 (1), and other sections of the Act of 1909; and it is "immaterial that the employer is engaged in a trade different "from that which he employs the worker to carry on." Then a little later he said[12]: "Section 9, which compels the payment "of the minimum wage to those who might be thought to be "independent contractors, shows that the legislature regarded "the matter from the point of view of the worker and his work, "and wished to secure that a worker who was commercially "employed should receive proper wages for his work, whatever "the object for which that work was produced." That, of course, was the argument.

Lord Hewart C.J., in his judgment, used these words[13]: "We have to regard the true meaning of the Trade Boards Acts "and the orders and regulations made under them. No doubt in "a great many contexts the word 'trade' indicates a process of "buying and selling, but that is by no means an exhaustive "definition of its meaning. It may also mean a calling or "industry or class of skilled labour. When one looks at Acts of

[10] [1927] 2 K.B. 220.
[11] Ibid. 224.
[12] Ibid. 225.
[13] Ibid. 225, 226.

"Parliament like the Trade Disputes Act, 1906, it appears that "the word 'trade' is commonly used to indicate the position "created by the relation of employer and employed in certain "branches or classes of industry." Then further on the Lord Chief Justice said [14]: "The meaning which has to be collected "from phrases like that—and they by no means stand alone— "and from the whole scheme and purpose of the Act is rein- "forced by the particular language of section 9. That section, "no doubt, deals with an individual matter, but it contains words "which illuminate the purpose of the statute as a whole. It "shows that, even where an outworker, or a worker who provides "some of the requisite materials or tools, is concerned, the Act "regards the nature of the work performed, and that, if the "worker is doing a kind of work to which a minimum rate of "wages applies, it matters not that the 'shopkeeper, dealer, or "'trader' would not describe his business, or the whole of it, by "words applicable to that particular branch of industry." Then a little further on in the judgment [15]: "It is enough to say that "casual work is not within the scope of the Acts, nor is work "given to another by a private person. There must be trade in "the sense of commercial employment, but if that is present it "does not matter that the description of the work done by the "worker is not exhaustive of the description of the whole "business of the employer."

In the present case I think that I have to consider the whole purpose and design of the Catering Wages Act of 1943, and I think that its purpose was to see that the workers employed in an undertaking supplying food and drink for immediate consumption, such as the "96" Restaurant, or in any incidental or ancillary activity of the undertaking, should receive wages based on the figures laid down by the commission; and where on the special facts of any particular case it would not be said that they were employed within the meaning of section 1 (2) of the Act, either by a contract of service or otherwise, nevertheless, if there was an arrangement made by the worker with the persons carrying on the undertaking, and that arrangement provided for the worker to do the kind of work to which a minimum rate of wages applied, and that arrangement was by "way of trade," using and interpreting the term in the sense of commercial employment, the worker shall "be deemed to be employed by "the persons carrying on the undertaking." That, I think, was the position of the plaintiff on the facts of this case, and I therefore give judgment for her for the agreed sum of £200 and the costs of the action.

*Judgment for the plaintiff.*

Solicitors: *L. Bingham & Co.; Fladgate & Co.*

P. B. D.

[14] Ibid. 226.

[15] Ibid. 227.

[QUEEN'S BENCH DIVISION.]

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*Nov.* 11, 12, 13, 17, 18; *Dec.* 19.

Havers J.

# * DICKSON *v.* FLACK.

[1951 D. No. 300.]

*Factory—Dangerous machinery—Woodworking machine—Fencing—Protection against contact—Not against parts accidentally flying out of machine—Factories Act,* 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 67), *s.* 14 (1)—*Woodworking Machinery Regulations* (*S.R. & O.* 1922, *No.* 1196), 1922–1945, *reg.* 17.

By the Woodworking Machinery Regulations, 1922–1945, reg. 17: "The cutter of every vertical spindle moulding machine shall when "practicable be provided with the most efficient guard having "regard to the nature of the work which is being performed."

The plaintiff was operating a vertical spindle moulding machine when one of the cutters flew off and he was struck in the eye by the cutter's bolt. The Shaw guard fitted to the machine was the most effective guard to protect an operator from coming into contact with the cutters, but another type of guard would have been more efficient to protect him against the danger of pieces flying out from the machine. In an action for damages for personal injuries the plaintiff alleged that the defendant employer, in failing to provide an efficient guard to protect him from flying pieces of metal, was in breach of regulation 17 of the Woodworking Machinery Regulations, 1922 to 1945.

*Held*, first, following *Miller* v. *William Boothman & Sons Ltd.* [1944] K.B. 337; 60 T.L.R. 218; [1944] 1 All E.R. 333, that the regulations modified the absolute obligation to fence securely imposed by section 14 (1) of the Factories Act, 1937. Secondly, that when the regulations specified in detail the guard which had to be used, that guard and nothing else, must be provided, and if a guard of that specific type was fitted and a part of the machine flew out and injured the operator, it would appear that he would have no cause of action on the ground of a breach of the regulation. Where, however, as in regulation 17, the regulations did not specify in detail the particular guard to be provided, any ambiguity was to be resolved by having regard to the general object of section 14 (1) of the Factories Act, 1937, as interpreted by the House of Lords in *Nicholls* v. *F. Austin (Leyton) Ld.* [1946] A.C. 493; 62 T.L.R. 320; [1946] 2 All E.R. 92, and *Carroll* v. *Andrew Barclay & Sons Ld.* [1948] A.C. 477; 64 T.L.R. 384; [1948] 2 All E.R. 386—that the obligation was to guard against contact with any dangerous part of the machine (the cutters in the present case) and not against dangerous materials ejected from it. The object of regulation 17 was therefore to prevent an employee from making contact with the cutters, and on the facts there had been no breach of the regulation which caused the accident to the plaintiff.

*Harrison* v. *Metropolitan Plywood Co.* [1946] K.B. 255; 62 T.L.R. 109; [1946] 1 All E.R. 243 not followed.

ACTION.

The plaintiff was employed by the defendant as a wood-cutting machinist and was in charge of several wood-working machines

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in the defendant's joiner's shop. On March 29, 1950, the plaintiff had to set up a machine for the purpose of running a windowsill from a straight piece of wood 5 ins. wide, 3 ins. thick and 5 ft. 6 ins. long. The machine which he used was a vertical spindle moulder powered by electricity; it had a spindle head piece unit, which received and carried an interchangeable square cutter block and attained a speed of 4,500 revolutions a minute. The cutter block was 4 ins. by 3 ins. by 3 ins. with a groove, dovetail fashion, running lengthwise on four sides which received cutter bolts; the grooves, with washers and nuts, were the only means of securing the cutter to the block. Although old, the machine was in good condition.

The plaintiff put two cutters on the cutter block and tightened them up with a spanner. He fitted a guard on the machine and, before operating it on the wood, proceeded to make the usual test run to ascertain whether the cutters were properly balanced, using, as was his practice, a piece of thin cardboard or cigarette carton between the cutter and the block. The machine was just about to reach its maximum speed, and the plaintiff was standing about 2 ft. 6 ins. away from it, when a bolt securing one of the cutters broke; the cutter came off the machine and a portion of the bolt struck him in the eye, inflicting a serious injury.

The guard fitted by the plaintiff, and which was on the machine at the time of the accident, was a spring guard [as shown in fig. 69, Safety Pamphlet No. 8, Woodworking Machinery Regulations], known as a Shaw guard. That guard covered the aperture on the machine on the operator's side, and one of its advantages was that it exerted pressure on the wood and so enabled the operator to keep his fingers away from danger. In general, the type of guard used on a wood-cutting machine was determined by the particular work to be performed, and the Shaw guard was widely used on the type of machine in question, in particular when the operation was on a small section of straight wood. Although it was the most effective guard in preventing the operator from coming into contact with the cutters, the Shaw guard gave little protection against broken pieces of the machinery flying out, a danger against which a cage guard was more effective; but the danger of an operator being injured by pieces of machinery flying out was more remote than that of his being injured by coming into contact with the cutters.

The plaintiff brought this action for damages for personal injuries against the defendant, alleging that the injury to his eye was due to negligence and/or breach of statutory duty by the defendant in that the defendant failed to provide and maintain a safe system of work or to comply with section 60 of the Factories Act, 1937. In particular the plaintiff alleged that the defendant failed to guard the machine in accordance with

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section 14 [1] of the Factories Act, 1937, and regulation 17 [2] of the Woodworking Machinery Regulations, 1922 to 1945.

The defendant denied liability.

This report is concerned only with the alleged breach of statutory duty.

*F. Donald McIntyre* for the plaintiff.

*Martin Jukes* for the defendant.

The following cases were cited in argument: *Miller* v. *Bootham (W.) & Sons, Ld.*[3]; *Nicholls* v. *Austin (F.) (Leyton) Ld.*[4]; *Carroll* v. *Barclay (Andrew) & Sons Ld.*[5]; *Harrison* v. *Metropolitan Plywood Co.*[6]; *Paris* v. *Stepney Borough Council*[7]; *Bolton* v. *Stone*[8]; *Hindle* v. *Birtwistle*.[9]

*Cur. adv. vult.*

December 19: HAVERS J. stated the facts and continued: On page 7 of the Safety Hints pamphlet it is stated: "Work done "on the spindle moulding machine varies so much that no single "guard can be relied upon to give the operator security on every "job. Many satisfactory guards are available, but the best "guard for one job does not necessarily give complete protection "for other kinds of work." That statement seems to me to be amply justified by the evidence which has been called before me. I find that the type of guard to be used is determined by the particular job which the operator has to perform, and I think that is why regulation 17 does not specifically describe the exact type of guard for vertical spindle moulding machines, as it does in the case of similar machines, and that it is for that reason that the regulation uses more general language and says that "the cutter of every vertical spindle moulding machine shall "when practicable be provided with the most efficient guard "having regard to the nature of the work which is being per-"formed." Regulation 18 says: "For such work as cannot be

[1] Factories Act, 1937, s. 14 (1): "Every dangerous part of any "machinery . . . shall be securely "fenced unless it is in such a posi-"tion or of such construction as to be "as safe to every person employed ". . . as it would be if securely "fenced: Provided that, in so far as "the safety of a dangerous part of "any machinery cannot by reason of "the nature of the operation be "secured by means of a fixed guard, "the requirements of this subsection "shall be deemed to have been com-"plied with if a device is provided "which automatically prevents the "operator from coming into contact "with that part."

[2] Woodworking Machinery Regulations, 1922 to 1945, reg. 17: "The "cutter of every vertical spindle "moulding machine shall when prac-"ticable be provided with the most "efficient guard having regard to the "nature of the work which is being "performed."

[3] [1944] K.B. 337; 60 T.L.R. 218; [1944] 1 All E.R. 333.

[4] [1946] A.C. 493; 62 T.L.R. 320; [1946] 2 All E.R. 92.

[5] [1948] A.C. 477; 64 T.L.R. 384; [1948] 2 All E.R. 386.

[6] [1946] K.B. 255; 62 T.L.R. 109; [1946] 1 All E.R. 243.

[7] [1951] A.C. 367; [1951] 1 T.L.R. 25; [1951] 1 All E.R. 42.

[8] [1951] A.C. 850; [1951] 1 T.L.R. 977; [1951] 1 All E.R. 1078.

[9] [1897] 1 Q.B. 192; 13 T.L.R. 129.

"performed with an efficient guard for the cutter, the wood "being moulded at a vertical spindle moulding machine, shall, "if practicable, be held in a jig or holder of such construction as "to reduce as far as possible the risk of accident to the worker." I find that where a machine of this type is going to operate upon a small section of straight wood, the Shaw guard, or a guard of similar type, is the most effective guard.

[His Lordship considered the various types of guard in use in the trade and continued:] I do not feel able to express any opinion whether any guard would be completely effective to protect the operator from a flying cutter. If a cutter is likely to fly off a machine going at 4,500 revolutions a minute, I really do not know what sort of guard would be required to prevent that, but I think that a cage guard might do so, and would protect the operator from flying pieces if a part of the machine, such as a nut or a bolt, breaks.

At the time when this accident happened the machine was not on load; it was merely being operated for a test which was being made for the balance of the cutter. I have to consider, therefore, the position about the guards in those circumstances. It seems to me that there is little, if anything, to choose between the Shaw guard and the cage guard in such circumstances. It is not necessary to exert pressure, as there is no wood on which the machine is being operated, and this advantage of the Shaw guard over the cage guard, therefore, disappears. From the point of view of convenience, the Shaw guard is more suitable, because the operator may require to adjust the cutters, and also because, as soon as the test for balance is over, the practice is to make a test run on the wood, and for that I think the Shaw guard would be the most effective guard. Of course, the advantage still remains of its completely covering up the aperture on the operator's side. So that while the machine is running purely for the purpose of making a test of the balance of the cutters, it is enough for me to say that I am not satisfied that the Shaw guard is not the most effective to protect the operator from coming into contact with the cutters. If, however, I have to take the possibility of the danger from both the two sources into account, namely, the risk of flying fragments being ejected from the machine and the danger of the operator coming into contact with the cutters, the danger of the operator coming into contact with the cutters is still very great even if a test for balance only is being made; whereas the danger from being injured by a fragment of a broken part of the machine seems to me to be very remote. For these reasons, I am not satisfied that the Shaw guard is not the most effective guard in the circumstances.

I turn now to consider the case which is brought on section 14 (1) of the Factories Act, 1937, and the Woodworking Machinery Regulations. In *Miller* v. *William Boothman & Sons Ltd.*[10] the

[10] [1944] K.B. 337; 60 T.L.R. 218; [1944] 1 All E.R. 333.

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Court of Appeal held that regulations, such as these Woodworking Regulations, modify the strict and absolute obligation which is imposed on the occupier of a factory under section 14 (1) and substitute a code for the duty imposed by that section. In view of that decision, Mr. McIntyre, for the plaintiff, conceded that he could not rest his case on section 14 (1) of the Act, but that he must rely on the regulation, though he reserved to himself, in case this case reaches the House of Lords, the right to argue that *Miller* v. *William Boothman & Sons Ltd.*[10] was wrongly decided. *Miller* v. *William Boothman & Sons Ltd.*[10] was considered in the House of Lords in *Nicholls* v. *F. Austin (Leyton)*,[11] but that case was decided on another ground, and the House of Lords neither expressed approval nor disapproval of the decision in *Miller* v. *William Boothman & Sons Ltd.*[12] On that point, therefore, I am clearly bound by the decision of the Court of Appeal.

My attention was called to certain authorities, and the first one in order of date was *Hindle* v. *Birtwistle*,[13] a case of a flying spindle. The headnote reads: "The occupier of a cotton factory "was summoned under the above section for neglecting to fence "the shuttles of his looms. It appeared that shuttles do occa- "sionally in the process of weaving fly out from the bed upon "which they slide to and fro (called the shuttle-race) under "circumstances which render them dangerous to any persons "who happen to be in the line of flight. The flying out of the "shuttles may be caused by the negligence of the weaver in "charge of the machine, or by reason of some foreign substance "getting accidentally into the shuttle-race, or by defect in the "yarn:—*Held*, that the obligation to fence under the above "section was not confined to machinery which was dangerous in "itself in the ordinary course of careful working; and that the "shuttles, even though not in themselves defective, were "'dangerous parts of the machinery' if any of the above- "mentioned causes of their flying out of the shuttle-race were "likely to occur with any degree of frequency."

Wills J. said[14]: "This case is one of considerable import- "ance, but the enactment seems to be plain and intelligible, and "I feel no difficulty in construing it. The learned recorder has "supplied us with the keynote of his judgment in one sentence, in "which he says that 'the manufacturer is only responsible for "'machinery which is in itself dangerous in the ordinary course "'of careful working.' He seems to think that no machinery "can be said to be dangerous unless it is dangerous in itself, "however carefully worked. I entirely disagree with such an "interpretation, and think that it would limit most materially "a very beneficial Act of Parliament. It seems to me that "machinery or parts of machinery is and are dangerous if in the

[10] [1944] K.B. 337.
[11] [1946] A.C. 493; 62 T.L.R. 320; [1946] 2 All E.R. 92.
[12] [1944] K.B. 337.
[13] [1897] 1 Q.B. 192; 13 T.L.R. 129.
[14] [1897] 1 Q.B. 192, 195.

" ordinary course of human affairs danger may be reasonably " anticipated from the use of them without protection. No doubt " it would be impossible to say that because an accident had " happened once therefore the machinery was dangerous. On the " other hand, it is equally out of the question to say that " machinery cannot be dangerous unless it is so in the course of " careful working. In considering whether machinery is dan- " gerous, the contingency of carelessness on the part of the " workman in charge of it, and the frequency with which that " contingency is likely to arise, are matters that must be taken " into consideration. It is entirely a question of degree. As the " recorder has not dealt with the matter from that point of view, " the case must go back to him for reconsideration." Wright J. said [15]: " It seems to me that the chances that the workmen " will be negligent, that foreign material will get in, or that the " yarn may be of bad quality, must all be taken into considera- " tion. The mere fact that the shuttle will sometimes fly out, " and that when it flies out it is dangerous, is not enough. It " is a question of degree and of fact in all cases whether the " tendency to fly out is a tendency to fly out often enough to " satisfy a reasonable interpretation of the word ' dangerous.' "

*Harrison* v. *Metropolitan Plywood Co.*[16] was a decision of Hilbery J. on the interpretation of the very regulation which I have to interpret, regulation 17. The headnote is: " The plain- " tiff, who was employed as a press operator at the defendants' " woodworking factory, was at work at his machine when a " piece of the cutter of the machine next to his, which was a " spindle moulding machine, broke away, flew out of its holder " and struck and injured him. The spindle moulding machine " had a guard of the type usually provided for such machines, " but it was proved that it would have been possible to provide " a guard which would probably have prevented the injury to " the plaintiff: *Held*, that the defendants' duty was to fence " the machines in their factory in accordance with the Wood- " working Machinery Regulations, 1922, and that they had " failed to discharge that duty; that those regulations ought " not to be construed as made only for the protection of workers " at their particular machines; and that the plaintiff was en- " titled to damages." Hilbery J. said [17]: " The question that " then remains is whether or not the plaintiff has established " a breach of these regulations. Regulation 17 requires the " provision for the machine in question of the most efficient " guard having regard to the nature of the work being per- " formed. It was proved that there was a known form of cage " guard which would have fenced the major part of the " circumference of a circle round the vertical spindle with a " wire-mesh screen, and that the work in hand could have been

[15] Ibid. at p. 196.

[16] [1946] K.B. 255; 62 T.L.R. 109; [1946] 1 All E.R. 243.

[17] [1946] K.B. 255, 259.

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"performed with that guard in position. Such a guard is in "fact the subject of an illustration in the Safety Pamphlet "No. 8 issued by the Home Office. It was further clear from "the evidence that the so-called ring guard employed at the "time was only a guard against certain dangers to which the "worker at the machine would be exposed if it were not there; "but there was no evidence that it was 'the most efficient "'guard.' When asked whether it was, the expert called for "the defendants replied that it was a 'usual' form of guard "for such a machine. On balance I think it is established that "the plaintiff probably would not have sustained his injury if "the regulation had been complied with."

That case is not so helpful to me as it might otherwise have been, because, first, the point which was taken by Mr. Jukes before me was not taken before Hilbery J., and, secondly, the decision of the House of Lords in *Nicholls* v. *F. Austin (Leyton), Ld.*[18] had not then been given. The headnote to the last-mentioned case [18] is as follows: "The appellant, while operating "a circular saw belonging to her employers, the respondents, "was injured through a piece of wood flying out of the machine "which was fenced so as to comply with the requirements of "the Woodworking Machinery Regulations, 1922, which by "section 150 of the Act were to be deemed to have been made "under that Act. *Held*, that the respondents were not in "breach of any statutory obligation, since the obligation to fence "imposed by section 14 (1) was an obligation to guard against "contact with any dangerous part of a machine and not to "guard against dangerous materials ejected from it, a matter "depending solely on the making of regulations under the dis-"cretionary power conferred by section 14 (3) on the Secretary "of State and not exercised by him."

Lord Thankerton, who delivered the leading opinion, summarized the matter in this way [19]: "My Lords, on consideration "of the terms of section 14, I am of opinion that there is a "simple answer to the contention of the appellant, namely, "that the obligation to fence imposed by subsection 1 is an "obligation to provide a guard against contact with any dan-"gerous part of a machine, and that it does not impose any "obligation to guard against dangerous materials or articles "ejected from the machine in motion, that matter depending "solely on the making of regulations by the Secretary of State "under the discretionary power conferred on him by the last "paragraph of this section. This view appears to be amply "confirmed by the language used." He then considered the other subsection, and said [20]: "I will only add that if sub-"section (1) was intended to include fencing against the ejection "of materials or articles, I would not expect to have two "separate provisions for the making of regulations, or to have

[18] [1946] A.C. 493.
[19] Ibid. at p. 499.
[20] Ibid. at p. 500.

" the second one in a separate general paragraph at the end " of the section, instead of in a subsection of its own, for the " last paragraph of the section is clearly not part of subsection " (3). It being admitted that no regulations have been made " under the last paragraph of section 14, I am of opinion that " there is no obligation imposed by section 14 on the respondents " as regards these flying bits of wood, and therefore they are " not in breach of any statutory obligation, and the appellant's " main contention fails." Then he said he was not going to express any opinion on *Miller's* case.[21]

Lord Macmillan came to the same conclusion. He said[22]: " They observed and indeed more than observed all the require- " ments of the Woodworking Machinery Regulations, 1922, " under the Act for the fencing of circular saws. But the " fencing did not prevent a fragment of wood flying off while " the saw was working. Was it the statutory duty of the " respondents so to fence the saw as to prevent this possibility ? " In my opinion the statute imposes no such duty." He said that no regulation had been made under subsection (3) and continued: " No such regulations have been made and in the " absence of any such regulations there is no statutory duty " to fence materials or articles which are dangerous while in " motion in a machine." Lord Wright came to the same conclusion, and Lord Simonds said[23]: " The fence is intended to " keep the worker out, not to keep the machine or its product " in."

I was also referred to *Carroll* v. *Andrew Barclay & Sons Ld.*,[24] which was a decision on the interpretation of section 13 (1) of the Act. The headnote to that case is: " The require- " ment of section 13 (1) of the Factories Act, 1937, that ' every " ' part of the transmission machinery shall be securely fenced ' " imposes on occupiers of factories a duty to erect a barricade " to prevent any employee from making contact with the " machinery, and does not in ordinary cases oblige them to " erect an enclosure to prevent broken machinery from flying " out and injuring him. Quære whether, in the case of a " machine which in working might be expected to throw off " loose or broken parts, there might be an obligation to fence " it for the purpose of protecting the workman against that " danger." That quære is largely due to certain dicta of Lord du Parcq. Lord Porter said[25]: " In my opinion, it is not " necessary for your Lordships to consider in respect of any of " these cases how far the facts support the decision: the " principle is plain. Any risk arising from the working of a " dangerous machine must be guarded against under section 14 " and any danger emanating from the working of transmission " machinery must likewise be guarded against under section 13.

[21] [1944] K.B. 337.
[22] [1946] A.C. 493, 501.
[23] Ibid. 505.
[24] [1948] A.C. 477.
[25] [1948] A.C. 477, 486.

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"The working of transmission machinery is deemed to be dangerous; other machines need not be fenced unless they, or some part, are in fact dangerous. But in neither case does the Act aim at protection against breakage. In the present instance it was, no doubt, the duty of the respondents to fence the transmission machinery. That part, however, which a workman could enter upon was securely fenced and the belt was in such a position as to be as safe as it would be if securely fenced unless it broke. Had it been in such a position that the workman could come into contact with it, it would not have been so safe and in that case it would have been necessary to fence it. Fencing, in my opinion, means the erection of a barricade to prevent any employee from making contact with the machine, not an enclosure to prevent broken machinery from flying out."

Lord du Parcq agreed with the opinion of Lord Porter and of Lord Normand; he said [26]: "I wish to add, however, that, while I agree with Lord Normand that the words 'securely 'fenced' must be given the same meaning in each of the three sections (sections 12, 13 and 14), I think that they may well mean 'so fenced as to give security from such dangers as may be reasonably expected.' If machines exist, or are hereafter invented and used, which are dangerous because fragments or loose parts of the machinery are sometimes ejected from them, then I am not prepared to say that section 14 does not require such machines to be fenced for the purpose of protecting workmen against that danger. If the dictum of my noble and learned friend Lord Simonds in *Nicholls* v. *F. Austin (Leyton) Ld.*[27] is to be understood as meaning that such a machine need not be fenced, I respectfully doubt its accuracy, and must reserve my opinion upon it." Lord Jowitt did not dissent from the views of the other noble Lords; he said [28] "I should desire to leave open for further consideration the question which Lord du Parcq raises in his opinion."

It is interesting to note that *Harrison* v. *Metropolitan Plywood Co.*[29] is referred to by several of their Lordships in their opinions, but none of them expressed any opinion one way or the other about the correctness of that decision, because they said that it was a decision upon a regulation in different language from the section which they were called upon to consider, and therefore they did not offer any opinion about it. Lord Normand took the same view; he said [30]: "In *Harrison* v. *Metropolitan Plywood Co.*[31] the plaintiff, who was injured when a piece of the cutter of a spindle moulding machine broke away, flew out of its holder and struck him, was held entitled to recover damages because the defendants had been

[26] Ibid. 486.
[27] [1946] A.C. 493, 505.
[28] [1948] A.C. 477, 482.
[29] [1946] K.B. 255.
[30] [1948] A.C. 477, 491.
[31] [1946] K.B. 255.

" in breach of an obligation to fence under a regulation the " wording of which is not identical with that of the Act. The " point taken by the respondents in the present case that there " is no obligation to fence against parts of a machine which " break and fly off was not taken. It is not necessary to con- " sider whether that case was rightly decided, and I have " already reserved my opinion on the effect of section 14 in " relation to cases resembling it."

I now turn to consider the particular regulation. The Woodworking and Machinery Regulations were made in pursuance of section 79 of the Factory and Workshops Act, 1901; they were preserved by section 159 of the present Act and are deemed to be made and have effect as if made under section 60 of the Factories Act, 1937. It will be observed that these regulations apply to certain particular types of machines. " Woodworking " machine " is defined as " a circular saw, plain band saw, " planing machine, vertical spindle moulding machine or chain " mortising machine operating on wood." The first nine regulations are of a general character applying to all these woodworking machines. Regulation 10 prescribes in detail the way in which a circular saw is to be fenced. Regulation 11 makes a further provision with regard to a circular saw which is fed by hand, saying that a suitable push-stick must be kept available. Regulation 12 deals with a plain band saw, and again prescribes with some particularity the way in which a plain band saw is to be guarded. Regulation 13 deals with a planing machine, and regulation 15 again prescribes the particular type of guard which is to be used for a planing machine. Regulation 16 deals with the feed roller of planing machines.

Then comes regulation 17, and the difference in the language employed is very marked. It does not prescribe in any detail the type of guard which is to be used for a vertical spindle moulding machine. It uses much more general language, saying: " The cutter of every vertical spindle moulding machine " shall when practicable be provided with the most efficient " guard having regard to the nature of the work which is being " performed." Regulation 18 deals with cases where work cannot be performed with an efficient guard for the cutter, and regulation 19 deals with the suitable spike or push-stick for this type of machinery. Regulation 20 deals with the chain of a chain mortising machine, and says that it " shall be pro- " vided with a guard which shall enclose the cutters as far as " practicable." Then regulation 21 prescribes generally, saying that " the guards and other appliances required by these regula- " tions shall be maintained in an efficient state and shall be " constantly kept in position while the machinery is in motion, " except when, owing to the nature of the work being done, " the use of the guards or appliances is rendered impracticable. " The guards shall be so adjusted as to enable the work to be " carried on without unnecessary risk." Regulation 22 states

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that "Regulations 10, 12, 15 and 16 shall not apply to any "woodworking machine in respect of which it can be shown "that other safeguards are provided and maintained which "render the machine equally safe as it would be if guarded "in the manner prescribed by these regulations." Regulation 23 imposes a duty on the persons employed on the woodworking machines to "use and maintain" these guards and other appliances.

The only actual decision on this particular regulation is *Harrison* v. *The Metropolitan Plywood Co.*,[32] and, as I have already said, that case was decided before *Nicholls* v. *F. Austin (Leyton) Ld.*[33] and *Carroll* v. *Andrew Barclay & Sons Ld.*[34] I need hardly say that I pay the greatest respect to the decision of Hilbery J., and, if the point taken by Mr. Jukes before me had been taken before him and he had had also the advantage or reading the above-mentioned decisions of the House of Lords, I should have felt inclined to follow him. But it seems to me that as the point was not taken, his decision has not the weight which otherwise it would have, and I feel that I am bound to make up my own mind on this question.

When the regulations specify in detail the guard which has to be used on a particular machine it seems clear that that specific guard, and nothing else, must be provided in order to comply with the regulation, subject only to what is said in regulation 22. On the other hand, if that specific type of guard is fitted and, notwithstanding that, a fragment or part of a machine flies out and injures the operator, it seems to me that the operator in such a case would have no right of action on the ground of a breach of the regulation. Nor would he under section 14, because of the decision in *Miller* v. *Wm. Boothman & Sons.*[35] Where the regulations do not specify in detail the particular guard to be provided, but where they use more general language as we find in regulation 17, namely, that the cutter is to be "provided with the most efficient guard having regard to "the nature of the work which is being performed," if there is any ambiguity I think that I am entitled to have regard to the general object of section 14 (1) of the Act as interpreted by the House of Lords. It has to be observed that the regulation specifies the cutters as being part of the machine which is to be provided with a guard. The regulation does not require that the machine as a whole is to be provided with a guard; nor does it require that the spindle or any other part of the machine which may throw off a detached or broken part is to be provided with a guard.

The conclusion, therefore, to which I have come is that the object of regulation 17 is to prevent any employee from making contact with the cutters. In considering, therefore, what is the most efficient guard I have to decide what is the most efficient

[32] [1946] K.B. 255.
[33] [1946] A.C. 493.
[34] [1948] A.C. 477.
[35] [1944] K.B. 337.

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guard for the purpose of preventing any employee from making contact with the cutters having regard to the nature of the work which is being performed. On that interpretation, and in the light of the facts that I have found, I hold that a breach of regulation 17 has not been proved. It follows also that I am not satisfied that the plaintiff's accident and injury was caused by a breach of that regulation.

[His Lordship having considered the plaintiff's other heads of claim found that the accident to the plaintiff was not caused by any negligence at common law or failure to observe a safe system of work and gave judgment for the defendant.]

*Judgment for defendant.*

Solicitors: *Timothy W. Donovan; Tiddeman, Coules & Co.*

J. F. L.

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[QUEEN'S BENCH DIVISION (COMMERCIAL LIST)]

1952
*Dec.* 11, 12.

Sellers J.

## * GETREIDE-IMPORT-GESELLSCHAFT m.b.h. *v.* CONTIMAR S.A. COMPANIA INDUSTRIAL COMERCIAL y MARITIMA

*Arbitration—Contract—Appeal from award—Notice to be given within 14 days—Notice deemed to be received not later than 24 hours after posting—Letter incorrectly addressed—Delivery out of time—Whether notice deemed to have been received within time.*

*Jurisdiction—Obtaining of an award a condition precedent to right to sue in respect of claim arising out of contract—Action for a declaration that award valid and conclusive—Action in substance to enforce award—Right of appeal from award in issue—Issue concerning jurisdiction of arbitrator—Jurisdiction of court—Arbitration Act,* 1950 (14 *Geo.* 6, *c.* 27), *s.* 25 (4).

The plaintiffs contracted to buy, and the defendants to sell, a quantity of wheat by a contract incorporating the terms of Form No. 41 (Rye Terms) of the London Corn Trade Association Ltd., which provided that all disputes arising out of the contract should be referred to arbitration and that should any party be dissatisfied with an award a right of appeal should lie to the Committee of Appeal provided that within 14 days of the date of the award notice that appeal had been claimed was given by the appellant to the other party, "notices under this rule to be given in writing, "and sent by post to . . . the place where the . . . company to "whom they are addressed is carrying on . . . business, and shall be "deemed to have been received not later than 24 hours after the same "are so sent . . ." The contract also contained a clause whereby the parties expressly agreed that the obtaining of an award "shall be "a condition precedent to the right of either contracting party to "sue the other in respect of any claim arising out of this contract . . ."

A dispute arose over the performance of the contract which was referred to arbitration, and on July 30, 1952, an award was made

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in favour of the plaintiffs. On August 12, 1952, the defendants posted a letter giving notice of appeal to the plaintiffs. The letter was addressed to the plaintiffs by name at an address in a town where they carried on business, but the street and number given in the address were in fact those of another company with a similar name carrying on business in the same town. That company received the letter and forwarded it to the plaintiffs but it did not reach the plaintiffs until after the expiry of 14 days from the date of the award.

The plaintiffs contended that the award dated July 30, 1952, was conclusive and final. The defendants contended that they had a right of appeal. In an action by the plaintiffs for declarations that the award was valid and final and that the Appeal Committee had no power to entertain an appeal, the defendants contended (1) that, as the notice had been addressed to the plaintiffs at the town where they carried on business and that notice had been posted on August 12, it must be deemed to have been received within 24 hours of its posting the conditions of appeal had been complied with, and (2) that the plaintiffs were precluded by the terms of the contract from pursuing the action unless and until an award had been obtained on those matters in issue:—

*Held*, first, that the deeming clause for receipt within 24 hours only covered a notice sent out properly addressed; that, although an address might be a little inadequate, where a notice was posted with a wrong or misleading address, so that the chances of its being received in the ordinary course of post were remote, it could not be said that it was from the outset a proper notice which must be deemed to have been received within the contractual period and, therefore, the conditions which alone entitled an appeal to be pursued had not been complied with.

*Held*, secondly, that although in its particular form the action was for a declaration, in substance it was to enforce an award which had been obtained; that that award was not something arising out of the contract, but had been obtained by reason of the arbitration proceedings and gave a separate right to the plaintiffs; and that, as the arbitration clause in its terms only made the obtaining of an award a condition precedent to the right to sue in respect of a claim arising out of the contract, the jurisdiction of the court in the matter in issue was not ousted. The plaintiffs, accordingly, were entitled to the declarations sought.

Unless it was clear from the contract that the parties intended to refer to arbitration matters which went to the jurisdiction of arbitrators, an arbitration clause would not oust the jurisdiction of the court concerning those matters, and where an application was made for a stay of proceedings on the ground that the court had no jurisdiction and that the dispute should be referred to arbitration, and the circumstances were such that it could be foreseen that if a stay was granted the arbitrators' findings would be referred to the court for decision, the court, if it had a discretion, would be reluctant to grant such a stay.

ACTION.

The plaintiffs were a trading corporation incorporated under the laws of Germany. Their principal place of business was at Duisberg, Germany, and they had a branch establishment at Niedenau 59, Frankfurt am Main, Germany. By an agreement in writing entered into on November 17, 1950, the plaintiffs agreed to buy, and the defendants, who carried on business in Buenos

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Aires, to sell, a quantity of River Plate wheat. The agreement provided that the contract should incorporate and be subject to the London Corn Trade Association Ltd. contract No. 41 (Rye terms), which contained provisions for arbitration in London, and provided, among other things, as follows: "Buyer "and seller agree that for the purpose of proceedings either "legal or by arbitration, this contract shall be deemed to have "been made in England, and to be performed there, . . . and "the courts of England or arbitrators appointed in England ". . . shall, . . . have exclusive jurisdiction over all disputes "which may arise under this contract. Such disputes shall be "settled according to the law of England . . . . Any party to "this contract . . . shall, for the purposes of proceedings at "law or in arbitration, be considered as ordinarily resident or "carrying on business at the office of the London Corn Trade "Association Ltd. . . . The service of proceedings upon any "such party by leaving the same at the office of the London "Corn Trade Association Ltd. together with the posting of a "copy of such proceedings to his address abroad . . . shall be "deemed good service. . . ."

The contract further provided: "All disputes . . . arising "out of this contract, including any question of law appearing "in the proceedings . . . shall be referred to arbitration, accor-"ding to the arbitration rule endorsed hereon . . . . Neither "buyer, seller, . . . nor any . . . person claiming under either "of them, shall bring any action against the other of them "in respect of any such dispute until such dispute has been "settled by arbitrators or by the Committee of Appeal, . . . "and it is expressly agreed that the obtaining of an award from "either tribunal . . . shall be a condition precedent to the right "of either contracting party to sue the other in respect of any "claim arising out of this contract . . . . The arbitration to be "held in London."

By rule 11 of the contract: "Arbitration. All disputes "from time to time arising out of this contract shall be referred "to two arbitrators, . . . or to an umpire to be appointed by "the arbitrators if . . . they disagree. . . .

"Appeal. In case any party to an award shall be dissatis-"fied with the award a right of appeal shall lie to the "Committee of Appeal . . . provided the following conditions "are complied with: . . . (*b*) Notice claiming appeal is given "to the secretary of the Association within 14 consecutive days "from the date of the award, . . . (*c*) Within the said 14 con-"secutive days, notice that the appeal has been claimed is "given by the appellant direct to his seller or buyer, as the "case may be . . . . Notices under this rule to be given in "writing, and sent by post to, or left at the place where the "person, firm or company to whom they are addressed is carry-"ing on or (by reason of the provisions of the contract) is to "be considered as carrying on business, and shall be deemed

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" to have been received not later than 24 hours after the same " are so sent or left."

A claim by the plaintiffs against the defendants arising out of the performance of the contract was submitted to arbitration in accordance with the terms of the contract. The arbitrators disagreed, and they appointed an umpire who, on July 30, 1952, by an award in writing awarded, on a finding that the defendants were in default under the contract, that they should pay to the plaintiffs $ (U.S.) 195,750. On August 11, 1952, the defendants' agents notified the secretary of the London Corn Trade Association Ld. by letter that they had received instructions to give notice of appeal against the umpire's award. On August 11, 1952, the secretary of the London Corn Trade Association Ld. wrote to the plaintiffs at their Duisberg address notifying them of the defendants' appeal against the award of July 30, 1952. The defendants received that letter on August 13, 1952.

On August 12, 1952, the defendants from Buenos Aires wrote to the plaintiffs giving notice that on August 11, 1952, they had given notice of appeal against the award to the secretary of the London Corn Trade Association Ld. The letter was addressed to the plaintiffs by name at Friedrich-Ebert Strasse, 27, Frankfurt am Main, and was posted in Paris on August 12 in an envelope similarly addressed. That was not in fact the address of the plaintiffs' branch office in Frankfurt, but was the address of another company with a similar name. That company received the letter on August 14, and forwarded it by post to the plaintiffs' office at Niedenau 59, Frankfurt, where it was received on August 15. On the same day it was forwarded to the plaintiffs' main office at Duisberg, where it was received on August 16, 1952.

The plaintiffs contended that the dispatch of the letter of August 12 did not constitute a compliance with condition (*c*) of the conditions of appeal contained in the contract in that it was not sent to them at the offices of the London Corn Trade Association Ld.; alternatively, that it was not addressed to them at their place of business nor was it received by them within 14 consecutive days of the date of the award, and they claimed declarations that the award dated July 30, 1952, was valid, final and conclusive in the circumstances; that the defendants had no right to prosecute an appeal from the award; and that the Appeal Committee had no power to hear or entertain any appeal from the award, or to vary or reverse it. They further claimed an injunction restraining the defendants from prosecuting an appeal.

The defendants contended that they had complied with the conditions of the contract in respect to appeal; that the notice must be deemed to have been received 24 hours after the posting of their letter of August 12, 1952; alternatively, that by forwarding the letter the recipients became the agents of the plaintiffs. They also contended that the matters in issue in

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the action were disputes arising out of the contract, and therefore the plaintiffs were precluded by the condition precedent clause in the contract from maintaining the action unless and until an award was obtained from abitrators or an umpire.

*T. G. Roche* for the plaintiffs.
*Eustace Roskill* for the defendants.

The following were among the cases referred to in argument: *Smith* v. *Martin* [1]; *Gresham House Estate Co.* v. *Rossa Grande Gold Mining Co.* [2]; *Radcliffe* v. *Bartholomew* [3]; *Franco-British S.S. Co. Ld.* v. *Watson and Youell* [4]; *Dennehy* v. *Bellamy* [5]; *Heyman* v. *Darwins Ld.* [6]; *Produce Brokers Co. Ld.* v. *Olympia Oil and Cake Co. Ld.* [7]; *Attorney-General for Manitoba* v. *Kelly* [8]; *Hirji Mulji and Others* v. *Cheong Yue S.S. Co. Ld.* [9]; *May* v. *Mills* [10]; *Jungheim, Hopkins & Co.* v. *Foukelmann* [11]; and *Scott & Sons* v. *Del Sel.* [12]

SELLERS J. The plaintiffs in this action were the buyers and the defendants were the sellers of a quantity of River Plate wheat under a contract entered into between the parties on November 17, 1950. That contract was brought about through the agency of one Franz Hagen in Hamburg, acting on behalf of both parties. The plaintiffs were transacting their business from Duisberg, in Germany, and the defendants were in Buenos Aires. The contract was made subject to the London Corn Trade Association Ld. contract No. 41 (Rye terms) London arbitration. That well-known contract is, I apprehend, not infrequently used throughout the world by parties contracting with regard to the sale of grain. Because of that, this contract has some terms which seem to be unusually complicated, but are no doubt present in order to cater for the use of this contract by people who are resident abroad.

[His Lordship stated the facts and continued:] The plaintiffs have taken up the attitude that the Appeals Tribunal is not entitled to proceed with the hearing of the appeal, which is in the nature of a rehearing or a further arbitration, because they have no jurisdiction so to do, and the Appeals Committee have very properly decided not to proceed with the appeal pending the decision of this court on the matter. To prevent the Appeals Committee from proceeding the plaintiffs have instituted these proceedings, in which they claim that they are entitled to a

[1] [1925] 1 K.B. 745.
[2] [1870] W.N. 119.
[3] [1892] 1 Q.B. 161.
[4] (1921) 9 Ll.L.R. 282.
[5] [1938] 2 All E.R. 262.
[6] [1942] A.C. 356; 58 T.L.R. 169; [1942] 1 All E.R. 337.
[7] [1916] 1 A.C. 314; 32 T.L.R. 115.
[8] [1922] 1 A.C. 268; 38 T.L.R. 281.
[9] [1926] A.C. 497; 42 T.L.R. 359.
[10] (1914) 30 T.L.R. 287.
[11] [1909] 2 K.B. 948; 25 T.L.R. 819.
[12] 1923 S.C.(H.L.) 37.

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declaration that the award is valid and subsisting, final and conclusive, and to a further declaration that the defendants have no right to appeal. There is an application also for an injunction with which I need not deal at the moment.

The question arises whether the award in favour of the plaintiffs is enforceable as it stands or whether it is subject to the appeal which the defendants seek to prosecute. I think both parties agree that the right of an appeal from the award of the arbitrators arises only from the contract. This not being a question of law which can be referred to the court, but a question relating to the merits of the matter on the contract of sale which has been entered into, the rights of appeal are derived solely from the contract between the parties. Those rights are set out in some detail in the latter part of the conditions and rules of the contract of the London Corn Trade Association, Ld. contract No. 41. The provision for appeal is stated to be as follows: "In any arbitration proceedings under these rules the arbitrators "may order that there shall be included in the sum awarded "for any breach of contract interest at such rate as they think "fit on the whole or any part of the damages and for the whole "or any part of the period between the date of the breach of "contract and the date of the award. In case any party to an "award shall be dissatisfied with the award a right of appeal "shall lie to the Committee of Appeal elected for that purpose "in accordance with the rules and regulations of the London "Corn Trade Association Ld. in force at the date of the contract, "provided the following conditions are complied with." Then there are set out four conditions which have been described, and I think rightly, as conditions precedent or conditions essential to be fulfilled before the right to appeal lies.

The first condition relates to the payment of the costs of the award. That has been done in this case and therefore no question arises on it. The second one; (b), requires that notice claiming appeal shall be given to the secretary of the Association within 14 consecutive days from the date of the award. That, likewise, has been done and the appropriate amount of £52 10s. has been lodged. No question arises under (b). The requirement in (d) is as follows: "When the appeal is lodged by an intermediate party, "such party shall state whether he appeals as a buyer or seller." Nothing turns on that here.

The matter which has given rise to the whole controversy is condition (c), which reads as follows: "Within the said 14 "consecutive days, notice that the appeal has been claimed is "given by the appellant direct to his seller or buyer, as the case "may be." It has been submitted here that notice that appeal has been claimed has not been given by the appellant, that is, by the sellers, to the successful party under the award as is required by the provision. When looking at the period of time during which the notice has to be given, there has to be read a further provision, which appears right at the foot of this very

detailed set of rules and conditions: "Notices under this rule to "be given in writing, and sent by post to, or left at the place "where the person, firm, or company to whom they are addressed "is carrying on or (by reason of the provisions of the contract) "is to be considered as carrying on business, and shall be deemed "to have been received not later than 24 hours after the same "are so sent or left." The rule referred to is rule 11, which deals with arbitration and occupies about half of the back page of the contract, from which I have read only a small extract relating to appeals. In considering this provision in relation to the vital one, namely, (c), the question which arises for immediate consideration is: what is the effect of those two together, and, applying them to this contract, by what time had the notice to be given?

Fourteen days from the date of the award I find would have expired at midnight on August 13/14. The question arises: what is the effect of the provision that the notice "shall be "deemed to have been received not later than 24 hours after "the same has been so sent or left." That particular provision is not without its ambiguities and its difficulties. It would appear to me that the notice, to be effective, should be actually received by the party who had to receive it within the period specified, that is, within the 14 days. The notice should therefore have been received by the plaintiffs on or before midnight on August 13. If it were left, instead of posted, then one would have thought that it could have been left at any time right up to midnight on that day. If it is posted, then the provision that it shall be deemed to have been received not later than 24 hours after it had been sent would seem to indicate that a posting 24 hours before the time of expiry of the period when notice had to be given would be a good compliance with the provision whether the document was actually received or not; that is, that where posting was utilized, to post up to midnight on the 12th would be adequate whether or not the document was in fact delivered on the following day, because it is deemed to have been received during the following 24 hours. That is how I would construe it so far as this case is concerned. Whether the position with regard to being received 24 hours after it had been left would extend it beyond the 14 days as I have described them to finish here I do not know. I should have thought not. But it does add a little more complication to construing this particular clause.

Therefore, to comply strictly with this requirement, the notice must either have been received or deemed to have been received, under the provisions which I have read, before midnight on August 13. It is necessary to see whether that has been done. The notice which was given to the secretary of the London Corn Trade Association was clearly in time and was in every way a proper notice, and one which clearly indicated that the defendants were seeking to invoke these provisions and take the matter

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to the Appeals Tribunal. That intention is likewise apparent from their letter of August 12, 1952, but unfortunately that letter did not reach the hands of the plaintiffs before the material date as I have defined it. It was posted on August 12, and, if the posting of it can be regarded as sufficient, that is, if it can be deemed to have been received within 24 hours afterwards, then that would be a complete compliance with the requirements of the contract. For myself, I would have been prepared to find that, if this notice had been sent to the plaintiffs at Frankfurt am Main, the provision deeming its receipt within 24 hours would have been effective. The plaintiffs are a well-known company who could have been discovered in Frankfurt, and I think that that would have been an adequate address.

The problem which arises is whether it can be regarded as adequate and whether the defendants can rely on the deeming clause when in fact the notice which they sent out was wrongly addressed. This is a real misfortune and, as regards any merits, is really all that there is in this case. There was an unfortunate slip, by whoever was responsible for putting the address on the letter, in confusing the plaintiffs with another company in Frankfurt. The other company, as it happened, had almost, but not quite, an identical name. The clerk or typist who was looking for the address of the plaintiffs in Frankfurt must, because of the similarity in names, have got the wrong address. The letter went forth addressed to a street in Frankfurt where the other company carried on business, and, therefore, there was a little delay, not very long, but enough to carry the actual receipt of the letter over the vital date for notice to be given to the other side.

With real reluctance and regret, because I think that is a most excusable error and there has been no prejudice whatsoever to the other side, I have come to the conclusion that I cannot regard this letter in those circumstances as an adequate notice. The deeming clause for receipt within 24 hours can, I think, only cover a notice which was sent out with the proper address. I do not think it can be redeemed from every fault. An address might be a little inadequate—that is why I said that "Frankfurt am Main" might be enough—but when a notice is sent out with a wrong and misleading address so that the chances of it being received in the ordinary course of post are remote, I do not think I could say that that was from the outset a proper notice which must be deemed to be received within the contractual time. I say that with regret, because I think that it is quite apparent that before the time had expired information had been given to the plaintiffs that the appeal had been launched; they knew all about it, and all that they would have known if they had in fact received this or any other letter within the time. The point which is taken is purely technical, and the facts reveal no sort of prejudice to them at all by the oversight. If they had had this letter they would have been in

no better or no worse position than they were in fact, and the appeal could then have proceeded in the ordinary way.

That letter failing to be a compliance with the provisions in (*c*) of the appeal clauses, the defendants next rely on a letter of August 11, sent by the secretary of the London Corn Trade Association Ld., to the plaintiffs in Duisberg, Germany, notifying them of the defendants' appeal and stating clearly at that stage, August 11, that they had appealed against an award dated July 30, 1952. That letter was received on August 13 and gave all the information required, from any practical business point of view, but it was not the actual letter which was sent out by the defendants. The defendants seek to say that that is a sufficient compliance with the rule. The objection which is taken to that, on behalf of the plaintiffs, is that it is not, as is required by clause (*c*) of the appeal clauses in the contract, a notice given by the defendants, the sellers, direct to the plaintiffs, the buyers, and is not a notice by them at all. It is alleged by the defendants that the letter was written by the secretary as agent for them, following receipt of the notification of appeal from their agents.

I was shown a form, which appears to be a common form which is no doubt rightly sent out, intimating not only to the other side, but to the arbitrators as well, that notice of appeal has been given, but there is nothing in the rules about it. Attractive in some ways as the defendants' argument is, I do not feel that I can find that when the secretary sent this letter he was either acting as, or purporting to act as, the agent for the defendants. There is no indication that they in any way ratified his letter, except, by their pleadings, when they came to court, and I do not think that that can be regarded as a compliance with provision (*c*). The provisions are contractual terms and, whilst one is tempted to give reasonable business latitude to them, they have to be complied with. This is really a minor obligation, the major requirement being that notice of appeal shall be given to the secretary, but if there is a requirement, the fact that notice has been given to the Association but not communicated direct to the other party does not alter the position—that notice to the other party still has to be given, and I do not find it to have been given here. On those grounds, on my reluctant interpretation of the facts here, there has been no compliance with one of the essential provisions giving the basis for an appeal to the Appeals Committee.

If the above submission on behalf of the plaintiffs was not successful, it was argued that there was a fundamental error in these letters to which I have referred, whether it be the one from the defendants or the one from the secretary of the Association; they were addressed, it was said, the one improperly merely to a branch of the plaintiffs in Frankfurt, and the other to their main office in Duisberg, when the contract required that any such notice as was requisite under these

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provisions should be addressed to the plaintiffs at the London Corn Trade Association Ltd. That submission is derived from the clause which states that notices under the rule must be "in writing, and sent by post to, or left at the place where, "the . . . company to whom they are addressed is carrying on "or . . . is to be considered as carrying on business." It is said that under the provisions of the contract the place where the plaintiffs, being a German and a foreign company, carry on business is at the address of the London Corn Trade Association in London, and that all such notices as I am concerned with in this case should be addressed to them at that address.

That submission is based on provisions in the contract which are to be found, oddly enough, under a long series of sentences or paragraphs which have no description placed against them, as all the other paragraphs seem to have, as to their subject-matter. The most convenient reference to make in regard to them is that they are the sentences or paragraphs which come under "Brokerage." They have nothing to do with brokerage. Perhaps it would be most convenient to call them the unnamed paragraphs. They provide: "Buyer and seller agree that, for "the purpose of proceedings, either legal or by arbitration, this "contract shall be deemed to have been made in England, and "to be performed there, any correspondence in reference to "the offer, the acceptance, the place of payment or otherwise "notwithstanding, and the courts of England or arbitrators "appointed in England, as the case may be, shall, except for "the purpose of enforcing any award made in pursuance of "the arbitration clause hereof, have exclusive jurisdiction over "all disputes which may arise under this contract. Such dis-"putes shall be settled according to the law of England "whatever the domicile, residence, or place of business of the "parties to this contract may be or become. Any party to this "contract residing or carrying on business elsewhere than in "England or Wales, shall, for the purposes of proceedings at "law or in arbitration, be considered as ordinarily resident or "carrying on business at the office of the London Corn Trade "Association Ld., and if in Scotland, he shall be held to have "prorogated jurisdiction against himself to the English courts, "or if in Northern Ireland to have submitted to the jurisdiction, "and to be bound by the decision of the English courts."

It is submitted that that is a clear provision that any party to this contract who resides outside England and Wales shall, for the purposes of proceedings at law or arbitration, be considered to be ordinarily resident or carrying on business at the London Corn Trade Association office. That clause, so far as I have read it, refers substantially to the law of the contract, which is to be English law, and the form of any dispute, which is to be England, either the courts of England or the arbitration. That is emphasized by the further provision that those who are

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outside England and those who may be in Scotland or in Ireland, shall be treated as being resident in England.

Counsel submitted that the effect of that is that when a party is called upon to give the appropriate notice under the appeal provisions, where by reason of the provisions of the contract a party is to be considered as carrying on business in London at the London Corn Trade Association office, that is where the notice should be given. I can see no reason for that, and it does not seem to me at all desirable, if it can be avoided, that that should be enforced. I think nothing would be better and more satisfactory in the interests of everybody than that, if the party who is seeking an appeal so desires, he should give notice direct to the actual place of business of the person who is concerned on the other side of the appeal. It would be quite unreasonable to say that, if he does that, he is wrong and that he should have done something not nearly as good, namely, sent his notice to the office of the London Corn Trade Association, without apparently there being any regular recognized procedure for their transmitting any such notice directly to the party concerned. Happily, although I find the whole of the provisions which I have to consider far from clear, I do not so construe this contract.

It may be difficult, as a matter of construction, in the part which I have just read relating to the law of the country and the proceedings by way of arbitration, to substitute the word "*may*" for "*shall* be considered" in some circumstances. But the passage at the end of that clause—that notice sent to the office of the London Corn Trade Association address should be deemed good service—would seem to lend some support for the construction that, where this provision says, "any party "to this contract residing or carrying on business elsewhere "than in England or Wales, shall, for the purposes of pro-"ceedings at law or in arbitration, be considered as ordinarily "resident or carrying on business at the office of the London "Corn Trade Association Limited," the word "*shall*" can be construed as "*may* be considered as ordinarily resident," but I do not think that that is altogether an easy construction. I am prepared to hold, although having regard to my other finding it does not become strictly relevant here, that under the last provision with regard to notice in writing there are two alternatives: the appellant can either give notice at the address where the other party is carrying on business, or, if he so desires, can utilize the provision and give notice at the office of the London Corn Trade Association in an appropriate case. I think, on the whole, that that is the best way of dealing with these rather obscure provisions, regrettably obscure, since the vital matter of appeal ought to be so perfectly clear to ordinary people engaged in this trade that no mistake could arise about it. I was pleased to hear that there was some prospect of this being altered in the near future.

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If I be wrong in that construction, it seems to me that this is a provision which exists for the benefit of the party who has to give a notice to a foreign party who may be quite inaccessible, and I should hold that it is a provision which could have been waived by the defendants in this case, if they wished, and that they could have given notice direct to the buyer that they were proposing to appeal: if the buyer had received a direct notice, I would not entertain a submission on his behalf that, although he knew all about it and had a direct notice, it was not a fulfilment of the conditions because it was not sent to the London Corn Trade Association office. I am happy to think that I have not to come to that very unfortunate and nonsensical conclusion.

In the circumstances, as I find the facts here and in the light of the other matters which I have considered, I am not in a position to find that notice under (*c*) has been given. Therefore it has not been established that the conditions which alone entitled an appeal to be pursued have been complied with. I have come to that conclusion and I have expressed it, although on one view of this case it was suggested that I ought not to express my opinion on these matters, but that I should leave for the consideration of the arbitrators, who, it was submitted, alone can deal with such an issue as has arisen before me. Counsel on behalf of the defendants, not without some apology, but recognizing that the claim of the plaintiffs was really nothing more than seeking to take advantage of an unfortunate slip and had no merits other than the highly technical point on the contract, sought to counter it by taking another point which was, perhaps, no less technical than that with which he was opposed.

It was submitted that, if the view which I have expressed is right, nevertheless I cannot give effect to it because of the provisions with regard to arbitration in the contract, and that there is here a requirement that there should be an award on such a matter as is in issue before me as a condition precedent to the right of bringing the matter to the court; in other words, as it is sometimes put, that there is here a *Scott* v. *Avery* clause which ousts the jurisdiction of the court, and that I must give effect to that and say that this proceeding in front of me is misconceived. Again, this is a point which is by no means easy of solution, but I have formed a view about it, which I propose to express, although I shall have to do so in the circumstances in somewhat brief form.

The provisions in the contract which are relied on are to be found towards the end of this unnamed set of clauses to which I have already referred; they are as follows: " All disputes from " time to time arising out of this contract, including any question " of law appearing in the proceedings, whether arising between " the parties hereto, or between one of the parties hereto and the " trustee in bankruptcy of the other party, shall be referred to " arbitration, according to the arbitration rule indorsed hereon

" and this stipulation may be a rule on any of the Divisions of " His Majesty's High Court of Justice in Northern Ireland, on " the application of either contracting party, for the purpose " of enforcing an award against a party residing or carrying on " business in Northern Ireland. Neither buyer, seller, trustee " in bankruptcy, nor any other person claiming under either of " them, shall bring any action against the other of them in respect " of any such dispute until such dispute has been settled by " arbitrators, or by the Committee of Appeal, as the case may " be, and it is expressly agreed that the obtaining of an award " from either tribunal, as the case may be, shall be a condition " precedent to the right of either contracting party to sue the " other in respect of any claim arising out of this contract." Then at the end of that paragraph it says: " The arbitration to be held in London."

It becomes material to consider the claim in this action; it is for a declaration that the award of July 30, is a valid award and is final and conclusive between the parties, and for another declaration that the Appeals Tribunal of the London Corn Trade Association Ld. has no right to hear the appeal. Although in its particular form the action is for a declaration, an award has been obtained, and is binding unless it is to be subject to an appeal, there being no other complaint against it. The claim in this action is, in substance, to enforce that award, and the award is not something which arises out of the contract. It is something which has been achieved by reason of the arbitration proceedings and gives a separate and distinct right to the party who has obtained the award in his favour. I think that that is a sufficient answer to the defendants' technical claim that this is a matter which cannot be considered by this court because it is only a dispute arising out of the contract which is subject to arbitration between the parties. The arbitration clause in its terms only makes the obtaining of an award a condition precedent to the right of either contracting party to sue the other if it is sued in respect of a claim arising out of the contract, but for the reasons I have just given and as I understand this case, I do not regard the plaintiffs' claim as a claim arising out of the contract.

A broader issue, however, discussed before me, was whether what was in issue here was a matter for arbitration at all; it was said that the jurisdiction of the Appeals Tribunal is in question and that the law is clear that arbitrators or an arbitration tribunal cannot decide their own jurisdiction, but that that is a matter essentially for the court. A number of authorities were relied on. Counsel for the plaintiffs relied on the well-known case in the House of Lords of *Heyman and another* v. *Darwins Ld.*,[13] and in particular on some remarks of Lord Parker in *Produce Brokers Company Ld.* v. *Olympia Oil and Cake Co. Ld.*[14] He also

[13] [1942] A.C. 356; 58 T.L.R. 169; [1942] 1 All E.R. 337.

[14] [1916] 1 A.C. 314; 32 T.L.R. 115.

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referred to *Attorney-General for Manitoba* v. *Kelly and Others*,[15] before the Judicial Committee of the Privy Council. In that case Lord Parmoor who delivered the judgment of the Board said[16]: "Whenever there is a difference of opinion between the parties "as to the authority conferred on an umpire under an agreed "submission, the decision rests ultimately with the court and "not with the umpire." Lord Parmoor cited *Produce Brokers Co.* v. *Olympia Oil and Cake Co.*[17] and said: "It would be "impossible to allow an umpire to arrogate to himself jurisdiction "over a question which, on the true construction of the sub-"mission, was not referred to him. An umpire cannot widen "the area of his jurisdiction by holding, contrary to the fact, "that the matter which he affects to decide is within the "submission of the parties." He then sought to apply that to the facts of that case. I was also referred to *Hirji Mulji* v. *Cheong Yue Steamship Co. Ld.*,[18] where Lord Sumner referred[19] to *May* v. *Mills*.[20]

That is a formidable array of authority to support the proposition that, where jurisdiction arises, as here, the matter is essentially for the court and not for the arbitrator. If it were that the Appeals Tribunal was being called on here to adjudicate on its own jurisdiction, I think that that submission would be unanswerable and that it would be a matter for the court, but the position here is rather different. I do not say that the result is different, because I do not propose to decide it, but here the arbitration has taken place on the merits of this case and an award has been given. The contract itself, and the contract only, provides the circumstances of an appeal and sets out the require-ments. It is not the appellate tribunal which, on the submission of the defendants, would have to decide whether it had jurisdiction or not, that is, whether all these requirements have been complied with, but the arbitrators appointed in accordance with the provisions of the contract. That does make the position somewhat different. But it does not seem to me that that is of much practical importance because, if either party wish to say that this is a matter which must go for arbitration, their appro-priate course would be to apply to the court to stay the action which had been brought. If they applied for a stay the court would have to adjudicate on the matter in its discretion, and subject to the *Scott* v. *Avery* clause, as to whether it was an appropriate case in which to grant a stay or not. The issues which would come to the court if the arbitrators were to decide this matter would be entirely issues on questions of law, and, I apprehend, if a stay was asked for, that the court would be reluctant to grant it because, if I made an order now that this

[15] [1922] 1 A.C. 268; 38 T.L.R. 281.
[16] [1922] 1 A.C. 268, 276.
[17] [1916] 1 A.C. 314; 32 T.L.R. 115.
[18] [1926] A.C. 497.
[19] Ibid. at p. 504.
[20] (1914) 30 T.L.R. 287.

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court had no jurisdiction to hear this matter or could not give effect to its decision because of the arbitration clause, all that would happen is that, if the matter continued, it would go to the arbitrators, who would make a decision and then their findings, being so wrapped up with law, if not entirely a question of law, would come back to the court for decision. If that were the position then the court would not normally grant a stay where it had a discretion.

Taking the view that I do, that this condition precedent clause only applies to a claim and would not apply to such an issue as that, it would be in the discretion of the court to say whether effect should be given to the arbitration clause or not. I think that that is all I will say about this rather difficult and vexed question, but it does seem to me that there are to be found here and there observations which might support the view that arbitration would prevail where in a contract it was abundantly clear that there would be referred to arbitration matters which were of the type which have been indicated here which go to jurisdiction. On the other hand, there is the authority to which I referred which makes it clear that, unless it is clear from the contract that the parties had intended to refer the actual matter of what may generally be called jurisdiction to an arbitrator, the jurisdiction of the court prevails.

One other question was raised, namely, that, notwithstanding that there is in this contract an arbitration clause that an award is a condition precedent to a right to sue or to recover, the court has power to remove that clause or to treat it as non-existent. Reliance was placed on section 25 (4) of the Arbitration Act, 1950, which has been repeated from the previous Act and which provides as follows: "Where it is provided (whether by means "of a provision in the arbitration agreement or otherwise) that "an award under an arbitration agreement shall be a condition "precedent to the bringing of an action with respect to any "matter to which the agreement applies, the High Court, if "it orders (whether under this section or under any other enact-"ment) that the agreement shall cease to have effect as regards "any particular dispute, may further order that the provision "making an award a condition precedent to the bringing of an "action shall also cease to have effect as regards that dispute."

I have found that the condition precedent clause does not assist the defendants to this action. It is only if I had found otherwise that the plaintiffs would wish to rely on that provision, but perhaps I ought to give some indication of what my discretion would be if I felt empowered to utilize that section. The submission was supported by an authority of the Court of Appeal, *Dennehy* v. *Bellamy*,[21] where the section in the previous Act was under consideration in relation to a claim under an insurance policy, and where the plaintiff brought an action

[21] [1938] 2 All E.R. 262.

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relying on the effect of the Third Parties (Rights against Insurers) Act, 1930. The Court of Appeal made some observations which were wide in their terms and which may have at some time to be considered in relation to the section as a whole in other circumstances. I am inclined to think that the power of the court to exercise a discretion under that section is one which would arise in the circumstances which are set out at p. 80 of the 15th edition of Russell on Arbitration and in those circumstances only, and that it is not a wide unlimited discretion. It is there stated: "There is power to make such an "order: (1) Where the authority of an arbitrator or arbitrators "or umpire is revoked by leave of the court. This would seem "to cover any case where either the *Scott* v. *Avery* clause is "contained in a submission proper, and leave is given to revoke "this, or it is contained in an agreement to submit and leave "is given to revoke a submission made pursuant to the agree-"ment. (2) Where the whole arbitral tribunal is removed by the "court: that is, for misconduct or delay. (3) Where the dispute "involves charges of fraud."

If it is limited to these matters, then I do not think that I would have discretion in this case to make that clause ineffective. Since another view may be taken of that, and it is a matter of discretion for the trial judge, I think that I have a very difficult decision to make, because, as I have already indicated, the plaintiffs here are taking advantage of a very slight error occasioned merely by a slip without any prejudice to them at all, because they had full knowledge of this appeal well within the 14 days. I would not, therefore, be inclined to grant any indulgence to them and exercise a discretion in their favour, acting, I apprehend, on the most judicial basis. On the other hand, if I had the power to give effect to this section and did not do so the position would only be that which I have indicated, that the matter would have to be adjudicated upon by the arbitrators and eventually come back to the court; that would be very unsatisfactory and in itself would be strong ground for not exercising discretion in the other way.

On the whole, although I hold the views which I have expressed with regard to the plaintiffs, if I had a discretion under section 25 (4) I would exercise it and let the matter be decided once and for all by the court. Indeed, it may be that Mr. Roche is right in his submission that, notwithstanding the rather complicated circumstances of this contract and the fact that the matter arises after one award and is relevant to the appeal, this being a question of jurisdiction the cases are strong enough to require the court or entitle the court in its own jurisdiction to deal with it to the exclusion of the arbitrators.

In those circumstances I find that this action is successful, that the plaintiffs are entitled to their declaration that the award is valid and is final and conclusive, and I am prepared to grant

the second declaration that the defendants have in the circumstances no right to prosecute an appeal from the award to the London Corn Trade Association Appeal Committee.

*Judgment for the plaintiffs.*

Solicitors: *Richards, Butler & Co.; Thomas Cooper & Co.*

J. F. L.

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GETREIDE-IMPORT-GESELLSCHAFT M.B.H. *v.* CONTIMAR S.A. COMPANIA INDUSTRIAL COMERCIAL Y MARITIMA.

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[HAMPSHIRE AUTUMN ASSIZES.]

## * COOPER *v.* RAILWAY EXECUTIVE.

[1952 C. No. 2100.]

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*Dec.* 10, 11, 12.

Devlin J.

*Railway—Fencing—Cattle killed on line—Calves separated from dams—Exceptional force used to break through fence—Whether dams "strayed"—Trespass—Train derailed—Cost of repairs to train and track as damages—Railways Clauses Consolidation Act,* 1845 (8 & 9 *Vict. c.* 20), *s.* 68.

Calves were separated from their dams and penned to the north of a railway line while the herd was confined to the south thereof. During the ensuing night the dams, anxious to rejoin their calves, broke down the railway fence, which was in good repair and as strong as an ordinary farm fence, and three were killed by a train, which was derailed by the impact. On a claim by the owner of the cattle which were killed for their value, alleging a breach of section 68 of the Railways Clauses Consolidation Act, 1845, in respect of the railway fencing, the Railway Executive counterclaimed for damages for cattle trespass.

*Held*, applying the dictum of Bramwell B. in *Child* v. *Hearn* (1874) L.R. 9 Ex. 176, and distinguishing *Bessant* v. *Great Western Railway* (1860) 8 C.B.(N.S.) 368, that the Railway Executive were not in breach of section 68, and that they succeeded on the claim and the counterclaim, damages being assessed as the cost of repairs to the train and the track.

ACTION.

In the early morning of October 11, 1951, 12 of a large herd of Aberdeen Angus cattle belonging to the plaintiff, a farmer, through whose land the main Portsmouth railway line ran, broke down the railway fence and got on to the railway line, and three of them were killed by a passing train. The accident caused a derailment of the train. The value of the beasts was agreed at £60 apiece, and the plaintiff claimed £180 damages, alleging that the defendants, the Railway Executive, were in breach of their statutory duty to maintain a proper fence as provided by section 68 of the Railways Clauses Consolidation Act, 1845. The defendants denied liability and counterclaimed for a sum of rather more than £300 for the expenses and consequences of the derailment.

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*A. Lyell* for the plaintiff.
*E. S. Fay* for the defendants.

DEVLIN J. Under the Railways Clauses Consolidation Act, 1845, s. 68, a railway company—whose duties and obligations are now taken over by the Railway Executive—is under an obligation to make and maintain "sufficient posts, rails . . . or "other fences for separating the land taken for the use of the "railway from the adjoining lands not taken, and protecting such "lands from trespass, or the cattle of the owners or occupiers "thereof from straying thereout. . . ." The Railway Executive therefore are under a duty to fence so as to keep cattle off the railway.

The plaintiff contends that they failed to erect and maintain a proper fence and accordingly sues for breach of this statutory duty. If the fence was defective, then there can be no doubt—and it is not otherwise disputed—that the claim succeeds and the counterclaim fails. If, on the other hand, the fence was not defective, then it is agreed that the plaintiff has no answer to an action for trespass. His beasts got on somebody else's land, and under the law of cattle trespass there is a strict liability on the owner of beasts not to let them go on somebody else's land. It is only if he can show that there was a duty on the owner of the land—that is the Railway Executive—to keep a proper fence and that they failed to do so that he can resist that claim in trespass. It is conceded that if he has no answer to a claim for cattle trespass the damages which flow from it, and which are recoverable by the Railway Executive, are all the damages which they have sustained as a direct consequence of the derailment; and subject to a few minor points that arise on the figures, there is no dispute about what that sum would be.

Thus, the only question which I have to determine is whether or not the fence which was erected at this place was a proper fence within the meaning of the statute. Prima facie, if cattle get on to a railway line the presumption would be, in the absence of some satisfactory explanation, that the fence which was supposed to have kept them off could not have been doing its duty. It is therefore necessary, before I consider the condition of the fence itself, to go a little into the history of the matter to see how it came about that cattle were on the railway line in the early morning of October 11, 1951.

The plaintiff's Aberdeen Angus herd consists of about 180 beasts, and they are allowed, as is no doubt quite common with beef herds, to run in the fields. They calve in the fields and they suckle their calves in the fields, and apart, I suppose, from a little feeding in the winter, they find all their feed in the fields. In those circumstances they are not much accustomed to being handled. They are not brought into the farm buildings, except occasionally for grading and sending to market those which are

considered suitable, and for the castrating of any bull calves which have been born during the period.

The plaintiff's land, as I said, is divided by the railway, and communication between the two parts is secured by means of an occupation crossing and a cattle creep. The two run side by side across the railway, being separated from each other by about 30 ft. The cattle creep is simply a sort of tunnel underneath the railway through which the cattle can go. The herd is kept in fields on the south side of the railway—the farm building being on the north side—and ordinarily the plaintiff does not rely simply on the railway fence for keeping the herd off the railway; it is put in some fields beyond that adjoining the railway and which in themselves are fenced in.

This case is concerned only with the fence on the south side of the railway, and only with a short piece of fencing, 30 ft. in length, which runs between the occupation crossing and the cattle creep. The fence is broken, so to speak, by a gate leading into the occupation crossing and the gate leading into the cattle creep. And there is a short length of fence, therefore, in the 30 ft. which supports those two gates. The fence consists of concrete posts let into the ground at a distance of some 2½ ft. or 3 ft. with chain link fencing secured by three runner wires, one at the bottom, one at the top and one in the middle, and on top of that there are three or four straining wires which keep the posts in position. In this 30 ft. length there are two end or corner posts, which take the strain and which therefore have struts let into the ground which support the straining posts; and in between there are three centre posts. It was through the fourth or westernmost partition, in this fence that the cattle got in the morning of October 11. What they had done was to dig out and knock down the strut which supported the corner post, then they had pushed up the netting which was secured to the middle posts by a " U " pin, and had been able, without breaking the runner wires, to push up the netting and so get underneath the netting and make their way on to the railway.

[His lordship referred to the evidence of employees of the defendants that on the day before the incident the length of fence in question was in good condition, and continued:] The round-up of the plaintiff's herd took place on that day, October 10, and ordinarily what happens is that the herd is brought in, the grading takes place, and those calves which have to be castrated are separated and castrated and then they rejoin the herd, so that the whole herd goes back to its ordinary pastures before the end of the day. What happened on this occasion was rather different, and it was so because the round-up was not started as early as it should have been. An appointment had been made with the vet. to attend at 11 o'clock, as presumably it was intended that the castration should take place then. The round-up having started late, when he came he found they were not ready for the castration; it was thought that the other business

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of grading should take place first, and accordingly it was arranged the vet. should go away and come back the following morning at 11 o'clock and do the castration then, the arrangement being that the calves—there turned out to be about 27 of them—which needed to be castrated were to be penned in the farm buildings overnight and then would be taken back to rejoin the herd on the next day. That meant, of course, that the herd had to spend the night in two parts, and the evidence shows that that division is likely to cause agitation and excitement in the herd, mainly, I think, to those dams which were separated from their calves, particularly those separated from the young calves. But of course under the conditions in which they are kept calves had been sucking the dams, it may be, right up to the point when the next calf comes. It is also said that excitement would be caused by the mere fact of splitting a herd which is accustomed to run together. There is no doubt that for one or both of those reasons—and I think principally the separation of the calves from the dams—there was a great deal of disturbance during that night. The calves were penned in the farm buildings; their bellowing could be heard by the dams who were just the other side of the railway line, not very far away. The main part of the herd was not put into its usual place behind the other fence which I mentioned, which would have been an additional protection to the railway fence. They were right up against the railway fence. The mothers could hear their calves and they, or the herd generally, were bellowing all through the night.

I am satisfied there was a considerable amount of excitement in the herd; whether it amounted to frenzy, as some of the witnesses said, I do not know, and I do not think that it very much matters. It was, however, in that condition that the herd did what I am satisfied under ordinary conditions the beasts would not have done, namely, broke through this fence. I think that the fair inference is—though one cannot be precise about the time—that they did not find their way on to the railway line until fairly early in the morning. The accident occurred to a train at 4.45 a.m. There had been trains running on the ordinary electric service up to 1 a.m. that morning, and there had been steam trains which went in between, and the probability therefore is the cattle had not been on the line long before the accident took place. Twelve of them got through in this place, and I am satisfied that this was the only place where they did break through.

It is right to say that the chain link fencing—and this is a point on which the plaintiff much relies—was secured to the runner wires, and the runner wires in turn were secured to the centre posts, on the north or railway side of those posts. Had they been secured on the south side, that is to say, the field side, then the beasts pushing against the chain link would have pushed the chain link into the posts; as it was, they were pushing the chain link away

from the posts. The runners which held the chain link in position were secured by " U " pins; that is, a pin with a little circle through which the wire runs, and then two long tails which go into a hole in the post and are bent on the other side so as to keep the pin in position. Some of those pins had been pulled out of the centre post by the cattle pushing against it, and in that way they had been able to lift the chain link. That covers all the facts which it is necessary for me to find.

I have now to consider whether the fence as so constructed was one which fulfilled all the obligations of the Railway Executive under the statute. I am satisfied that it was as strong as any ordinary farm fence could be to offer protection against the ordinary behaviour of cattle. Indeed, it was a great deal stronger, being made of concrete posts and having this strong chain link fencing.

Two criticisms have been made about it, first, the one to which I have already referred, that on the assumption that it was well enough constructed, nevertheless it was improperly designed because the chain link was on the middle posts, though not on the corner post, on the wrong side, and had it been on the right side it was said that this would not have happened. I am satisfied from the evidence that secured as it was by these " U " pins the chain link fencing was secured quite strongly enough to resist all what I may call the ordinary activities of cattle—any sort of animal pushing and rubbing against it. It is no doubt true that if the chain link fencing had happened in this case to have been on the other side of the posts it might have prevented the extraordinary, and, one might also say, violent, at any rate forcible behaviour of the cattle on this occasion and prevented them from getting through. But I am satisfied that, if the right test is that the fence must be strong enough to prevail against the ordinary forcible behaviour of cattle in ordinary circumstances, it was good enough for the purpose. The fact that it might have been better is not proper ground of complaint against the Railway Executive. They are not, in my judgment, obliged to provide the strongest possible fence, but only to provide a fence which is proper in the circumstances.

The other criticism is as to the condition of the fence. I have already referred to the evidence of the railway employees, who saw it shortly before October 10, that the fence was in good condition. I accept that evidence, and it therefore follows that I reject the evidence for the plaintiff with which it comes in sharp conflict.

I find that the fence was as strong as any ordinary farm fence, not merely a fence dividing fields, but a fence dividing fields from a place on to which it is highly undesirable that cattle should go; that it was as strong as that sort of fence could reasonably be expected to be, and I am satisfied that cattle behaving in a normal way would not have got through it, but only cattle using exceptional force or under unusual conditions.

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It is contended for the plaintiff that that finding is not enough to absolve the Railway Executive from blame. It is said that the operation which had taken place that day was not in any way an improper operation; that it was not contrary to the rules of good husbandry; that a proper agricultural use was therefore being made of the field; and that there is a duty on the Railway Executive to make a fence strong enough to resist the consequences of any proper agricultural operation that may be conducted on land which adjoins the railway.

That involves a consideration of the true construction of the Act as it had been construed in the authorities. It is, of course, an absolute obligation in this sense, that the Railway Executive is absolutely bound to maintain a fence, and it is no answer to say that some accident or act of a trespasser has made the fence defective. But the question is: what is the quality of the fence which it is absolutely bound to maintain? The Act says that it is to be such a fence as will protect "the cattle of the owners or "occupiers thereof from straying thereout." It is important not to ignore those words "from straying thereout," because those are the words which give a clue to the sort of fence which the Railway Executive shall be obliged to maintain. It is protection against straying, and all the cases which have been cited to me have been cases in which the cattle have, in the ordinary sense of the word, strayed through a gap in the fence, or something of that sort.

It is not necessary for me to define exactly what is meant by "strayed," but I do not think that it could be taken to include cattle which broke through by the use of exceptional force because they were subjected to some peculiar inducement or temptation to try to get across the fence. It may well be, of course, that constant rubbing will so weaken a fence that a cow or other beast acting quite normally will ultimately break it down and stray across. But here was a fence which, I am satisfied, was in good and proper condition on the afternoon of October 10, and which was broken through in the circumstances which I have related. I do not think that cattle in those circumstances can be said to be breaking through a protection against straying.

For this purpose the matter seems to be summed up in *Child* v. *Hearn*.[1] I need not do more than read a short passage from the judgment of Bramwell B. He said[2]: "Now the fence was "not sufficient to prevent the defendant's pigs from trespassing, "and it would seem to follow that the railway company must be "liable for the consequence of the pigs escaping through it. But "it does not follow as a consequence that they would be liable "for any mischief done by any pig escaping on to the line through "a defective fence. Nor do we lay down that there must be a "fence so close and strong that no pig could push through it, or "so high that no horse or bullock could leap it. One could

[1] (1874) L.R. 9 Ex. 176. [2] Ibid. 181.

" scarcely tell the limits of such a requirement, for the strength " of swine is such that they would break through almost any " fence, if there were a sufficient inducement on the other side. " But the company are bound to put up such a fence that a pig " not of a peculiarly wandering disposition, not under any " excessive temptation, will not get through it." I respectfully follow that as laying down the right test of the construction of the Act, and it is the test I seek to apply.

The plaintiff relied very strongly on *Bessant* v. *Great Western Ry.*[3] That was a case in which a farmer folded sheep and lambs adjoining a railway. He made three of the sides of the fold with hurdles in the ordinary way, and he used the railway fence as the fourth side. I have said " the railway fence," but in fact it consisted only of a quickset hedge. In that case the defendants, according to the evidence as stated in the report, called several competent persons who had inspected the fence and they stated that the fence was amply sufficient for all ordinary purposes, but they all said that it was not a proper fence to rely on for the folding of sheep. The case was tried with a jury. The sheep got through a gap in the quickset hedge; I should have thought that that was the sort of hedge through which sheep would be expected to get anyway, but no doubt the risk was greater in that they were confined in a comparatively small place as a fold. However, what was held in that case was that the matter was properly left to the jury at large and that they were entitled to take the view that the operation of folding was a normal farming operation, and a normal use of the land which the railway company must foresee, and must provide a fence that was strong enough for that purpose.

I do not think that that case really decides any more than that it was a proper direction to give to the jury, that such a fence was one which the railway company were bound by the Act to make. That is not a direction which could reasonably be disputed, though it may not be one which would be very illuminating for a jury. The case came on a Rule to the full Exchequer Court[4] and his lordship said that the general direction in those terms was a perfectly proper one.

There are some dicta in the case which may go a little farther. In the present case the plaintiff relied in particular on the direction of Martin B. in the court below, which was approved in the full court. He said[5]: " The broad question is, whether " or not the fence was a sufficient fence,—was it such a fence as " the company were bound by the Act to make? " And that was a direction which was approved. Then he went on to say[6]: " It " strikes me, that, if the use to which the adjoining land is put " is such (being an ordinary use) as to render a stronger fence " necessary, it would be the duty of the company to provide it;

[3] (1860) 8 C.B.(N.S.) 368.
[4] 8 C.B.(N.S.) 368, 370–2.
[5] 8 C.B.(N.S.) 368, 370.
[6] Ibid.

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" and to place hurdles along it if necessary." I think that those words were merely used by way of illustration by Martin B. and that they must be read in relation to the facts of the case; in particular, to the fact that they were dealing with sheep folding rather than the ordinary use of the land, and were dealing with a fence which was no more than an ordinary quickset hedge with a gap in it. I do not think that they meant that, whenever it could be shown that the land was being used for a purpose for which a farmer might properly use it, the railway company was bound to guard against that. Were it so, the burden on the railway company would really be intolerable, because they could not be expected to find out exactly what use the farmer was going to put his land to on any particular day and to strengthen the fence, which was strong enough for all normal purposes, to meet that particular use.

Counsel for the plaintiff, feeling the difficulty of forcing the argument as far as that, said that the obligation at any rate would exist if the Railway Executive knew of the particular use, and he said that they were told of the particular use—at any rate, that they were told of the round-up—to which this land was to be put on this particular day. But the Act does not say anything about knowledge; it does not impose any duty on the farmer to tell the Railway Executive of the use he is going to make of the land or on the Railway Executive to find out. It imposes a duty to provide and maintain a fence, and the only question is: What is the quality of the fence which has to be maintained? That does not depend, I think, on the particular use which is going to be made of a particular field on a particular day. On that ground, therefore, I reject that argument.

I do not strictly find it necessary for my purposes to inquire whether the use which was being made of the land on this occasion was in conformity with good husbandry—a matter which has been debated in the course of the case. I do not find that it was an improper thing to do, in the sense that it was necessarily a wrong and careless way of carrying on a farming operation; but I think I ought to express my view on the facts on this point in case it may be material hereafter. I think that a prudent farmer who did not want to run the risk of his cattle escaping would not have conducted the operation in the way in which it was conducted on this day. To that extent it was carelessly done—if that is the right word to use. That is to say, if he owed a duty to anybody else to conduct the operation in a prudent way, I do not think that he would have fulfilled it by the way in which he conducted this operation. The view of Professor McCunn, called on behalf of the defendants, is that an ordinary farm fence is not sufficient for confining cattle under the conditions in which this herd was. That, I think, was really accepted by Mr. Gauntlett, the expert who was called on behalf of the plaintiff. Mr. Gauntlett said: " An ordinary farm fence will " not do the job when the herd is separated, but such a separation " is comparable with penning cattle for inoculation or other

"purposes of that sort in a cattle crush or a cattle yard." Therefore, he said, if you put dams into an ordinary field the fence should be of extra strong construction, such as you want for a cattle crush or a cattle yard; and in effect he conceded, I think, that you should not, therefore, put cattle into the field unless you had an extra strong fence.

On a small farm there may not be such a place; they do not in the ordinary way in this country have stockades of the sort to which Professor McCunn referred, and it may be that on an ordinary farm there is not a yard large enough to hold 180 beasts; but to confine the dams, of which there would be 20 or 30, would mean splitting the herd into three. But the answer is, if the farmer has not those facilities it emphasizes the importance of conducting the whole operation on one day. I am satisfied that the whole operation could easily have been conducted on one day; that it was not so conducted was for no other reason than that it was not started earlier. Even then, I think that the calves could have been castrated on the same day, and possibly they would have been had it not been thought more convenient to do the other work of grading first.

A farmer who conducts this operation in that way and who has not any place in which he can conveniently keep the herd confined overnight is not, in my view, a prudent farmer. I think that a prudent farmer would see that the whole operation was conducted in the normal way in one day.

For these reasons I find that there was no breach of the Railway Executive's duty under the Railways Clauses Consolidation Act, 1845, and accordingly the consequences follow which I have already indicated. There will be judgment for the defendants on the claim and on the counterclaim.

Some minor points on the amount of the first item of the counterclaim were raised; that is, the item which claims £224 for repairs to the permanent way, and I shall assess the damages under that head as £190.

*Judgment for defendants on the claim and the counterclaim for £333 10s. 8d.*

Solicitors: *H. M. Gammans, Portsmouth; M. H. B. Gilmour.*

C. C.

[COURT OF APPEAL.]

C. A.

1952
*Dec.* 16.

Singleton, Birkett and Morris L.JJ.

# *PRESCOTT *v.* LANCASHIRE UNITED TRANSPORT CO. LD.

[1951 P. No. 3586.]

*Negligence—Conductor's duty on omnibus—Alighting of passengers.*

Because of work being done in a street which, at night, resulted in obstructions marked by red lights, the drivers of omnibuses had been accustomed to stop for passengers to alight from and enter them at some distance short of an official stopping place. That fact was known to the plaintiff and her husband travelling in a crowded single-decker motor omnibus at night owned by the defendants, approaching this official stop, but it was not known to the driver and conductor of that particular omnibus.

After leaving the last official stopping place, the conductor shut the door, which was at the front of the bus. The plaintiff's husband told the conductor that he wanted to alight at the next stop. The conductor then rang the bell, to inform the driver that he should stop at the next stopping place, and told the plaintiff's husband to wait until the bus stopped. The driver stopped the bus some 20 to 25 yards short of the official stopping place, close to the kerb, in order that, owing to the obstructions, an oncoming vehicle might have room to pass him. The plaintiff's husband thereupon alighted from the vehicle and the plaintiff was proceeding to follow her husband when the driver, the oncoming vehicle having passed him, restarted the bus without receiving any signal. The plaintiff was thrown to the ground and received injuries. The omnibus stopped at the official stopping place, when the driver first heard of the accident. In an action alleging negligence:—

*Held* that, (1) the plaintiff was free from blame in alighting pursuant to the invitation of the conductor to alight when the bus stopped; (2) the driver was free from blame; and (3) the conductor was guilty of a failure of duty in that he should either (a) have prevented the plaintiff from alighting then, or (b), by warning the driver, have prevented the omnibus from restarting whilst the plaintiff was alighting. The conductor ought to have taken control of the situation and his failure to do so caused the injury.

APPEAL from a judgment of his Honour Judge Rhodes given at Leigh County Court, Lancashire, in a remitted action.

The plaintiff and her husband were passengers on the evening of Saturday, December 16, 1950, in a motor omnibus owned by the defendants. The omnibus was a single-decker, access to and egress from which was obtained from a door in front of the vehicle. The omnibus was full—all the seats were occupied and from five to eight passengers were standing in the gangway.

After leaving the last stop near the "Red Lion," Leigh, the conductor said that he closed the door of the omnibus and that the plaintiff's husband told him that he was wanting to alight at the next stop. That stop was almost opposite "Manor Arms "Hotel" in Church Street. The conductor said: "I rang the "bell and told him"—the plaintiff's husband—"to wait until "the bus stopped."

At this date a new kerb was being put down in Church Street, with the result that there were obstructions in the road, marked at night by red lights. Owing to this work in the road, it happened that omnibuses approaching the stopping place opposite the "Manor Arms Hotel" had been stopping short of that official stopping place. That fact was known to the plaintiff and her husband, but was not known to the driver and the conductor of the particular omnibus in which they were travelling.

The county court judge found that because of the obstruction in the road it was not possible or desirable for two vehicles to pass at a certain place in Church Street. As a vehicle approached him the driver stopped his omnibus some 20 to 25 yards short of the official stop and, according to the evidence of the plaintiff's husband, the omnibus was close to the kerb.

The plaintiff's husband alighted from the omnibus and the plaintiff was proceeding to follow her husband when the omnibus restarted and the plaintiff was thrown to the ground and received injuries. The driver, who had stopped because of an oncoming vehicle, had restarted the omnibus without receiving any signal (except the original one, the bell to stop at the next official stop), and stopped at the permanent official stop opposite the "Manor "Arms Hotel," when he first heard of the accident.

The case for the defendants was that the omnibus had never stopped before it reached the permanent official stop, though it had slowed down to a crawl.

In an action by the plaintiff against the defendants claiming damages for negligence, his Honour found that the omnibus did in fact stop some 20 to 25 yards short of the official stopping place, that the driver of the omnibus was in no way to blame, and that there was no liability on the defendants, but he assessed the damages contingently at £180.

The plaintiff appealed.

*T. H. Pigot* for the plaintiff.
*R. H. Forrest* for the defendants.

SINGLETON L.J. I will ask Morris L.J. to give the first judgment.

MORRIS L.J. [after stating the facts]: It seems to me that once the crucial question of fact is decided as to whether the bus did or did not stop, the issue as to liability becomes very much more clear. In no sense, in my view, did the plaintiff do anything wrong. She, through her husband, had intimated her desire to get off the bus, and asked that the bus should stop at the next stopping place, and she with her husband were told by the conductor, who rang the bell at their request, to wait until the bus stopped. The bus did stop; the husband got off; the wife proceeded to do so, not unnaturally, and then the bus proceeded

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to move on. The conductor, being in a single-decker bus, doubtless encountered the difficulties that are inevitable when a bus is crowded, but the conductor does not say in his evidence that he did not know the position of the bus at the time of stopping; he apparently did not do anything in the way of calling out. He says that he knew that the door was closed before the bus left the "Red Lion" because he closed it, and thereafter having heard someone shout "Oh" he saw that the door was open; he apparently had not noticed anyone opening the door.

The judge, having found very definitely that the bus stopped, went on to say: "The bus stopped and the plaintiff's husband "made a genuine mistake." By that he meant that the plaintiff's husband thought that that was the stop that was being used that day by the bus in lieu of the official stop, because other buses for some time, on account of the work being done, had chosen a stop some yards away from the official stop. The judge went on: "I cannot see that the driver was in any way "to blame. He was entrusting the safety of passengers to the "conductor. It was a genuine mistake; the plaintiff has failed "to show negligence." And then he went on, contingently, to assess damages. His Honour does not appear, from the notes of the judgment which are before us, to have considered the allegation that there was negligence on the part of the conductor.

In my judgment, it is not shown that the driver in these circumstances did anything that he ought not to have done, or omitted to do anything that he should have done; but it is shown that there was a failure of duty on the part of the conductor. When the conductor said to the plaintiff's husband "Wait until "the bus stops," having been asked to ring the bell, that seemed a very clear invitation to the plaintiff and her husband to alight when the bus did stop. When the bus did stop and when it stopped short of the stopping place, the conductor, in my judgment, ought either to have warned the passengers, or ought to have communicated with the driver in some way. It would be easily possible to inform the driver that passengers were getting off the bus. The conductor ought to have taken control. It is clear that he could have seen that the plaintiff's husband had got off the bus. There were others waiting to get off. That could have been seen by the conductor. The plaintiff was following her husband. The conductor ought to have given a warning, or ought to have taken charge of the situation so as to ensure that either the plaintiff would be prevented from getting off the bus or that the bus should be prevented from going on while passengers were in the act of alighting.

We were referred by Mr. Pigot to a number of authorities. Many of the cases must depend upon their own particular facts. One of the cases cited was *Mottram* v. *South Lancashire Transport Co.*[1] In that case: "The respondent was a passenger

[1] [1942] 2 All E.R. 452.

"on one of the appellants' trolley buses. She was following "another passenger off the bus at a request stop, at the time "when the conductress was collecting fares on the upper deck of "the bus. The other passenger rang the bell once and the bus "slowed down, but just as he was getting off, thinking he was "acting in the interest of everyone, he rang the bell twice as a "signal for the bus to proceed. The respondent proceeded to "alight after him, but, the bus picking up speed at that "moment, she was thrown to the ground and injured. In an "action for damages for such injuries, it was contended that "the conductress was negligent in not coming to the platform "as soon as she heard the bell ring once, so that she might "supervise the restarting of the bus"; and it was held that there was no negligence on the part of the conductress.

In the course of his judgment Goddard L.J. said: "After the "man had given the signal for the bus to stop, and if the bus "had stopped, it would have been the duty of the conductress "to see that no one else was getting off before giving the signal "for the bus to start again. In this case the bus never did stop. "Before it could stop, the officious passenger gave the signal for "the bus to start again."

On the facts in the present case, once the bus did stop the plaintiff was acting quite properly in alighting; she was alighting pursuant to the invitation of the conductor to alight when the bus stopped, and the conductor should thereafter have seen what was happening. He should have given some warning; he should so have directed and controlled the whole situation that the bus would not proceed to move off while another passenger was alighting from it.

I consider, therefore, that on the finding of the judge, the result should have followed that there was liability on the defendants, and that there should have been judgment against the defendants for the amount of the damages assessed by the county court judge.

BIRKETT L.J. I am of the same opinion and have nothing to add.

SINGLETON L.J. I agree.

*Appeal allowed. Judgment entered for plaintiff for £180 damages.*

Solicitors: *Gregory, Rowcliffe & Co., for Frank Platt, Wigan; William Charles Crocker, for Thomas R. Dootson & Co., Leigh.*

C. G. M.

[COURT OF APPEAL.]

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Dec. 18.

Evershed M.R., Denning and Romer L.JJ.

## *VAUGHAN *v.* VAUGHAN.

*Husband and wife—Matrimonial home—Desertion by husband—Wife told she could live there for life—Subsequent divorce of husband—Right to possession of house.*

A husband was the owner of a house where he lived with his wife as their matrimonial home until he left her on February 10, 1948. The wife continued to reside there, and in 1950 she obtained a decree of divorce against the husband on the ground of his adultery. After a time he brought proceedings for possession of the house, but she resisted this on the ground that he, when leaving the house, had told her that she could always live there. She claimed, therefore, that she had an irrevocable licence to live there during her life:—

*Held*, that after they had ceased to be husband and wife she could not justify her claim unless she could set up a contract. As it was, the statement originally made to her could, after the divorce, amount to no more than that she, as ex-wife, was entitled to remain in occupation as a bare licensee, and the licence was therefore revocable.

*Per* Evershed M.R.: I did not intend to lay down in *Foster* v. *Robinson* [1951] 1 K.B. 149; 66 T.L.R. (Pt. 2) 120; [1950] 2 All E.R. 342, that "where a promise has been made which is not "contractual in form or effect and that promise has in fact been "acted upon, then and without more a right is given to the promisee "to go on enjoying the subject-matter of the promise indefinitely."

*Per* Denning L.J.: The wife ought to have protected her position by applying for maintenance in the divorce proceedings before decree absolute, and should have come to an arrangement with her husband whereby he agreed not to turn her out except by an order of the court, she agreeing to accept a reduced sum for maintenance as long as she lived there.

APPEAL from Judge Emlyn-Jones sitting at Birkenhead County Court.

The plaintiff, John E. Vaughan, was the owner of 65 Grosvenor Road, Birkenhead, where he resided as the matrimonial home with his wife, the defendant Effie M. Vaughan, until he left her on February 10, 1948. The wife continued to reside there, and she obtained in 1949 a decree of judicial separation and in 1950 a decree of divorce on the ground of the husband's adultery.

The plaintiff afterwards brought proceedings to recover possession of the house, which were resisted by the defendant on the ground that when the plaintiff left the house he had told her that she could always live there. She claimed, therefore, that she had an irrevocable licence to live there during her life, and that in the grant to her of maintenance her residence in the house was taken into account.

The county court judge said that there could be no doubt that by an irrebuttable presumption of law a wife's licence to occupy the matrimonial home was irrevocable, *Bendall* v. *McWhirter*,[1]

[1] [1952] 2 Q.B. 466; [1952] 1 T.L.R. 1332; [1952] 1 All E.R. 1306.

where, however, the marriage was still in being. Denning L.J. there said [2] that when a marriage came to an end the husband's former wife became a stranger to him and the presumption of law in her favour as the wife could no longer assist her. The wife, however, could rely on her contractual licence to the extent of the terms of the contract: *Errington* v. *Errington*.[3] In the present case he would hold that the plaintiff in 1948 licensed the defendant to live in the house always, but he could not see that any consideration moved for the defendant. But a contract supported by consideration was not essential, for although the defendant could not assert it as a cause of action, yet if the licensor sought to revoke the licence he would be restrained by the court for doing so: see the observation of Evershed M.R. in *Foster* v. *Robinson*.[4] He therefore dismissed these proceedings.

The plaintiff appealed.

*F. D. Paterson* for the plaintiff.
*W. G. Morgan* for the defendant.

EVERSHED M.R. This appeal raises, in a somewhat different form from that in which it has appeared in other recent cases, a problem concerning the occupation of the former matrimonial home by a former wife. I emphasize those last three words, "a "former wife," because it is important to note in this case that the marriage between the plaintiff and the defendant was dissolved (on the wife's petition) in June, 1950. Whatever may have been her rights as regards the matrimonial home before that date and so long as she remained the plaintiff's wife, from June, 1950, onwards any rights she can assert to remain in occupation of the former matrimonial home must rest on some other basis than that of her being the wife of the proprietor of those premises. [His Lordship stated the facts.]

By the present proceedings the husband, the plaintiff, seeks to obtain an order for possession of this dwelling-house. The county court judge refused to make the order, on the ground that the statement or promise made by the plaintiff to the defendant that she could always live there gave her a right, as a licensee, under a licence not revocable by the husband, to continue, and continue indefinitely, in the premises. That view was based on certain observations of my brother Denning in *Bendall* v. *McWhirter*,[5] and again in *Errington* v. *Errington*[6]; and in the course of the citations reference is also made to certain observations of mine in *Foster* v. *Robinson*,[7] to which I will return a little later.

[2] [1952] 2 Q.B. 466, 477.
[3] [1952] 1 K.B. 290; [1952] 1 T.L.R. 231; [1952] 1 All E.R. 149.
[4] [1951] 1 K.B. 149, 156; 66 T.L.R. (Pt. 2) 120; [1950] 2 All E.R. 342.
[5] [1952] 2 Q.B. 466.
[6] [1952] 1 K.B. 290.
[7] [1951] 1 K.B. 149.

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In my judgment, and without trying to expound this subject to any greater degree than is necessary to decide this case, the wife cannot, now that the marriage has been dissolved, assert a continuing right to remain in occupation of this house unless she can at least set up some kind of contract. I do not need to pursue the question whether there should be a good consideration, but there must be something contractual—that is, a promise made, intended to have, and having, contractual effect. And when reference is made to this statement of the husband's and regard is had to the time at which it was made, it seems to me impossible to suppose that what the husband said could have been intended by him, or understood by her, to have had any contractual basis or effect. Nothing, be it observed, was said about paying rent or rates, or what was to happen about repairs. Without more, it seems to me impossible to suppose that the husband intended to bind himself and that the wife regarded herself as entitled, for the whole of her life, come what might, to remain in occupation of this house—I suppose upon terms that her husband would provide the rent and the rates and possibly provide for repairs also.

If that is right, then this promise or statement, and the subsequent conduct of the parties, which is consistent with the statement originally made, can amount to no more than that the ex-wife was entitled to remain in occupation as a bare licensee of her former husband as the proprietor of the premises. If that view is right, then the licence was clearly revocable in the eye of the law. Being revocable, and having been in fact revoked in this case, either by notice (which I understand was given in March of this year) or, failing all else, by the issue of a summons, the only question remaining is, what length of time ought to be allowed for the defendant to remove herself from the premises? For it is well settled that though a licence may be revoked the licensee is not instantaneously turned into a trespasser; he or she must be given time, reasonable in all the circumstances, in which to remove himself or herself and his or her belongings from the house in respect of which the licence operated. Upon that matter I have been much assisted by Mr. Paterson's suggestion; for he said that he would not object to four to six months being allowed to the wife. I take the larger period; and I think that though it is generous it is also not unreasonable, bearing in mind the length of time during which the defendant has in fact occupied this house.

One other thing only need I say before I suggest the form of order which should be made, and it is this. *Foster* v. *Robinson* [7] was a somewhat special case. It was one in which possession was sought not against the person who had, as it was said, become a licensee of the premises, but against his daughter. The headnote states the substance of the case thus: "Shortly

[7] [1951] 1 K.B. 149.

"after the end of the first world war the plaintiff took over the "management of a farm and let a cottage near-by to a man who "worked on the farm at a rent of £3 5s. 0d. a half-year. Later "the plaintiff let the farm but the tenant of the cottage continued "to work till, in 1946, he became unfit to do so by reason of age "and infirmity. The plaintiff then told him that the existing "tenancy would cease but that he could live at the cottage rent "free till he died. The tenant accepted that offer and lived in "the cottage without paying rent till he died. The defendant, "his daughter, had lived in the cottage for nine years, and, on "her father's death, she took out letters of administration of his "estate and claimed to remain on at the cottage paying the old "rent. In proceedings by the plaintiff to recover possession, "*Held*, that the plaintiff was entitled to possession on the "grounds that the original tenancy had, as a result of the "arrangement in 1946, been surrendered by operation of law. ". . ." It follows from that citation that the court was not concerned with the question whether the former tenant could enforce the promise made to remain rent-free at the cottage. It is no doubt true that the pre-existing tenancy could only come to an end if its place were taken by something else. Certain findings of fact had been made by the county court judge. I observe from the judgment of Singleton L.J.[8] that the county court judge had found "that from May, 1946, until his death "the father was a licensee, paying no rent, but entitled to remain "in the cottage for the rest of his life."

The passage from my own judgment on which reliance was placed in the court below is this[9]: "Since the recent decision "in *Winter Garden Theatre (London), Ld.* v. *Millennium Pro-"ductions, Ld.*[10] I think that, although a licence of that kind "may, apart from the terms of the contract, be revoked, it may "now be taken that if the landlord, having made that arrange-"ment, sought to revoke it, he would be restrained by the court "from doing so. Thus the result is arrived at that the tenant "was entitled as licensee to occupy the premises without charge "for the rest of his days, and he did so. I prefer that analysis "of the case." I did not intend to lay it down in that passage that, where a promise has been made which is not contractual in form or effect and that promise has in fact been acted upon, then and without more a right is given to the promisee to go on enjoying the subject-matter of the promise indefinitely. I have thought it right to make that explanation because I think that the county court judge in the present case may have thought that these words of mine did lead to such a conclusion; that though there was in the present case nothing contractual, still, the promise having been made, the ex-wife was entitled to assert it as a defence to any proceedings by her former husband to

[8] Ibid. 160.
[9] Ibid. 156.
[10] [1948] A.C. 173; 63 T.L.R. 529; [1947] 2 All E.R. 331.

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recover possession of his premises notwithstanding that he had in the meantime revoked the licence. I think, therefore, that in the present appeal the defence which was set up is not available to the wife, and I think that this appeal must be allowed.

Taking advantage of what Mr. Paterson has said, I think that the proper order will be that the defendant should be required to deliver up possession by June 24, 1953. That period will give her ample time to make such application as she thinks fit for a review of the order of maintenance at present operating. That she may well be entitled to obtain, for, as I understand, the sum of maintenance which the plaintiff is now paying has been calculated after making due allowance for the circumstance that the defendant was living at this house while her husband was paying not only the rent (if it is a leasehold property) but also the rates.

DENNING L.J. The county court judge seems to have thought that there was a contractual licence by the husband giving the wife the right to stay in the house for the rest of her life. If such a contractual licence were established, I would agree that the husband's claim in this action should be dismissed; but I would like to say that, in that event, the contractual licence would be a "post-nuptial settlement" within the jurisdiction of the Divorce Court, which could then decide whether or not the husband should get possession, and if so, on what terms. As I understand the law on this matter, when a husband makes a continuing provision for the future needs of his wife, in her character as a wife, which is still continuing when the marriage is dissolved, the provision is a "settlement" which can be brought before the court to see whether the provision should continue now that she has ceased to be a wife: see *Smith* v. *Smith* [11]; *Gunner* v. *Gunner* [12]; *Halpern* v. *Halpern*.[13]

The difficulty is to see that a contractual licence was established. To establish a contractual licence there must be a promise which is intended to be binding; and which is either supported by consideration, or is intended to be acted on and in fact acted on: see *Dillwyn* v. *Llewelyn* [14] and *Plimmer* v. *Mayor of Wellington*.[15] In this case I cannot interpret the promise as one which was intended to create legal relations for life. It simply expressed in words the authority which the court would presume if nothing was said, namely, that the wife had authority to stay in the house in her capacity as a wife during the marriage. It is one of the familiar cases where the express authority is co-extensive with the presumed authority and, like

[11] (1945) 114 L.J.P. 30; 61 T.L.R. 331; [1945] 1 All E.R. 584.
[12] [1949] P. 77; 64 T.L.R. 513; [1948] 2 All E.R. 771.
[13] [1951] P. 204; [1951] 1 T.L.R. 461; [1951] 1 All E.R. 315.
[14] (1862) 4 De G.F. & J. 517.
[15] (1884) 9 App.Cas. 699.

it, is brought to an end by death or divorce: see *Bendall* v. *McWhirter*.[16]

The result is that the wife's right to stay in the house came to an end when she divorced her husband. She ought to have protected her position by taking steps in the divorce proceedings before decree absolute. She ought to have applied in those proceedings for maintenance, and then have come to an arrangement with her husband whereby he agreed not to turn her out of the house except by an order of the court, and she in return agreed to accept a reduced sum for maintenance so long as she lived in the house. Such an arrangement would undoubtedly be sanctioned by the Divorce Court on or after making the decree and thus become binding: *Bennett* v. *Bennett*.[17] The wife here unfortunately did not protect her position in that way. Upon the decree absolute she became simply a licensee with a revocable licence to stay in the house. But she could not be turned out at once. She was entitled to have a reasonable time in which to make her arrangements; and what is a reasonable time depends on all the circumstances of the case: see *Minister of Health* v. *Bellotti*.[18] Regard must therefore be had to the history of the marriage, to the fact that these two had been married for 21 years when the husband deserted her and later committed adultery, and also to the question whether any alternative accommodation was available for the wife. Any difficulty about fixing a reasonable time in this case was, however, solved when Mr. Paterson, for the husband, very fairly said that he was prepared to allow the wife another six months. That gives her time to go to the Divorce Court and get the maintenance increased up to a sum sufficient for her to live in comparable comfort somewhere else.

In these circumstances I agree that the appeal should be allowed and an order made for possession on June 24, 1953.

ROMER L.J. I agree. If a wife was to establish a contractual right to continue to reside indefinitely in the former matrimonial home after the dissolution of the marriage, it seems to me that she would need to have much more material at her disposal than the defendant has here, because all manner of things would have to be considered as incidental to that right. My Lord has mentioned the question of repairs and rates, which, of course, would be very material matters for consideration and agreement. Then there is the question whether the wife's right should continue after her remarriage or should cease upon such remarriage; the question whether she should have powers, and, if so, what powers, of subletting or assigning; and the further question whether, supposing she went abroad for three or four years, she would be entitled to resume possession on her return.

[16] [1952] 2 Q.B. 466, 477, 478.
[17] [1952] 1 K.B. 249; [1952] 1 T.L.R. 400; [1952] 1 All E.R. 413.
[18] [1944] K.B. 298; 60 T.L.R. 228; [1944] 1 All E.R. 238.

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Considerations of that kind would have to be considered as preliminary to the granting of a right to remain in possession of the former home. It is not suggested that any of these matters were considered between the parties in the present case.

I am satisfied that the wife is not entitled to the right which she is claiming, and I am unable, therefore, to agree with the judge when he said that the plaintiff was precluded from asserting his legal right as owner. I think that the position is as my Lord has indicated, and that, subject to reasonable notice being given, the defendant must leave the premises.

*Appeal allowed.*

Solicitors: *Field, Roscoe & Co., for Berkson & Berkson, Birkenhead; George A. Herbert, for E. A. Simans, Birkenhead.*

H. C. G.

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[QUEEN'S BENCH DIVISION.]

1953
*Jan.* 15.

## *FLOYD *v.* BUSH.

Lord Goddard C.J., Croom-Johnson and Pearson JJ.

*Road Traffic—Motor assisted pedal cycle—Mechanically propelled vehicle—Taken without consent of owner—Pedalled without using engine—Motor cycle—No insurance or driving licence—Offences—Road Traffic Act,* 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *ss.* 1, 2, 4, 28, 35.

The defendant, who had no driving licence, took and rode away a motor assisted pedal cycle without the consent of the owner. Although the engine was in working order, he pedalled the cycle for a mile and a half along a public road without using the engine. Charges of unlawfully using a motor vehicle without a policy of insurance and of driving it without being the holder of a licence contrary to sections 35 and 4 respectively of the Road Traffic Act, 1930, were preferred against him, and he was also charged with taking and driving the vehicle away without the consent of the owner, contrary to section 28 of the Act. The justices considered that the cycle, as being used at the material time, was not a mechanically propelled vehicle within the meaning of section 1 of the Act, and they dismissed the charges. On appeal by the prosecutor:—

*Held*, that the words "mechanically propelled vehicles" in section 2 of the Act meant vehicles constructed so that they could be mechanically propelled; that, as a vehicle equipped to be, and capable of being, mechanically propelled, the cycle was at the material time a motor-cycle within the meaning of the Act, although the engine was not in use; that the defendant, in causing the cycle to be moved—whether by pedalling or by mechanical power was immaterial—had brought himself within the ambit of section 28 of the Act; and that, therefore, all three offences had been committed.

*Lawrence* v. *Howlett* [1952] 1 T.L.R. 1476; [1952] 2 All E.R. 74; [1952] W.N. 308, distinguished.

*Shimmell* v. *Fisher* [1951] 2 T.L.R. 753; [1951] 2 All E.R. 672; [1951] W.N. 484, applied.

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CASE STATED by Lancashire justices sitting at Liverpool.

The prosecutor, a police inspector, preferred two informations against the respondent, Charles Robin Bush, charging that he, between 11.55 p.m. on May 19, 1952, and 12.45 a.m. on May 20, 1952, "unlawfully did use a certain motor vehicle, namely, a "motor assisted pedal cycle, on a . . . road . . . there not being "in force in relation to the use of the said vehicle by him such "a policy of insurance . . . as complied with the requirements "of Part II of the Road Traffic Act, 1930, contrary to section "35 . . ." of the Act, and that he "unlawfully did drive a certain "motor vehicle, namely, a motor assisted pedal cycle, on a . . . "road . . . he not being the holder of a licence, contrary to "section 4 . . ." of the Act. The prosecutor preferred a further complaint against the respondent, charging him with having on the same dates and between the same times unlawfully taken and driven away a motor assisted pedal cycle without the consent of the owner or other lawful authority, contrary to section 28 of the Act.

The following facts were proved or admitted before the justices. Between 11.55 p.m. on May 19, 1952, and 12.45 a.m. on May 20, 1952, the respondent took and rode away a motor assisted pedal cycle, the property of another person, without that person's consent. The respondent was not the holder of a driving licence as required by section 4 of the Road Traffic Act, 1930, nor was there any policy of insurance in respect of third party risks complying with Part II of the Act in force in relation to the user of the cycle by him. The respondent made no attempt to start or to use the motor of the cycle, but propelled it for about a mile and a half along a public road by pedalling.

On behalf of the respondent it was contended that the cycle, having been used simply as a pedal cycle, was not a mechanically propelled vehicle within the meaning of section 1 [1] of the Road Traffic Act, 1930, and he relied on the decision in *Lawrence* v. *Howlett*.[2] On the part of the prosecutor it was contended that *Lawrence* v. *Howlett* [2] could be distinguished in that the motor of the pedal cycle in that case was not in working order.

The justices were of the opinion that the cycle, as being used at the material time, was not a mechanically propelled vehicle within the meaning of section 1 of the Road Traffic Act, 1930, and they dismissed the informations and the complaint.

The prosecutor appealed.

*R. S. Nicklin* for the prosecutor.
*Peter Pain* for the respondent.

[1] Road Traffic Act, 1930, s. 1: "This part of this Act shall apply to "all mechanically propelled vehicles "intended or adapted for use on "roads. . . ."
S. 2: "Motor vehicles shall . . . "be divided into the following "classes:— . . . (*f*) motor cycles . . . "mechanically propelled vehicles . . . "with less than four wheels."

[2] [1952] 1 T.L.R. 1476; [1952] 2 All E.R. 74; [1952] W.N. 308.

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The following cases were referred to in argument: *Lawrence* v. *Howlett* [3] and *Shimmell* v. *Fisher*.[4]

LORD GODDARD C.J. This is a case stated by justices for the county of Lancaster, before whom the respondent was charged with taking away a motor vehicle without the consent of the owner, and with unlawfully using that motor vehicle uninsured; he was also charged with driving it not being the holder of a licence.

The vehicle in question is one of those bicycles which have an auxiliary motor fitted to them so that they can at any moment be used either as a motor cycle or as a pedal cycle. The respondent took away the cycle without the consent of the owner, and when he was stopped was pedalling it. He had apparently pedalled it for a mile and a half, and had not turned on the motor. The justices, having been referred to the decision of this court in *Lawrence* v. *Howlett*,[5] were of the opinion "that the "said motor assisted pedal cycle, as being used at the material "time, was not a mechanically propelled vehicle within the "meaning of section 1 of the Road Traffic Act, 1930," and dismissed all the informations.

In the opinion of this court they were wrong in so doing, and I do not think that they really thoroughly appreciated the decision in *Lawrence* v. *Howlett*,[5] which was a case which gave this court a great deal of trouble. We came to our conclusion with some hesitation, and Gorman J.,[6] in his concurring judgment, said that it was an exceptional case and must not be taken to be in any way extended beyond its particular facts. That case also concerned one of these so-called dual purpose vehicles, but there the motor had been dismantled; "certain "vital parts—namely, the cylinder, piston and connecting rod— "had been removed by the defendant, although there was some "petrol in the tank." In other words, the defendant had dismantled his motor so that the cycle was no longer, in the opinion of the court, a mechanically propelled vehicle; that is to say, a vehicle which was capable of being propelled by mechanical power.

In this case I think that we are bound to assume from the way in which the case is stated that this was a cycle in which the auxiliary motor was in working order, because the justices appear to have applied their minds, not to the question whether the engine could have been worked, as it obviously could have been, but as to whether at the moment when the respondent was stopped he was using it as a motor cycle, or, as they put it, as a pedal cycle. The definition of motor cycles in section 2 of the Road Traffic Act, 1930, is "mechanically propelled vehicles . . .

[3] [1952] 1 T.L.R. 1476.
[4] [1951] 2 T.L.R. 753; [1951] 2 All E.R. 672; [1951] W.N. 484.
[5] [1952] 1 T.L.R. 1476.
[6] Ibid. 1478.

" with less than four wheels and the weight of which unladen does " not exceed 8 cwt." I think that the only sensible construction of the words " mechanically propelled vehicles " is to mean vehicles constructed so that they can be mechanically propelled, and it would be going far beyond *Lawrence* v. *Howlett* [7] if we were to hold that one of these vehicles was not a mechanically propelled vehicle. If we were so to hold, a man might at any moment let his licence lapse, or not take out a licence, and yet might start his cycle up on the road as an ordinary cycle. For these reasons, I think that *Lawrence* v. *Howlett* [7] does not apply.

In *Shimmell* v. *Fisher* [8] this court decided that any movement of a car without the consent of the owner is enough to bring the person who moves it within the ambit of section 28 of the Road Traffic Act, 1930. It does not matter whether he drives it for 100 yards or a mile or two miles. If he is driving the car, that is to say, causing it to be moved without the consent of the owner, he is committing an offence. It may be that in certain cases if he were prosecuted for doing it, the justices would say that it was a trivial matter and would give an absolute discharge, but that is not the sort of case with which we are dealing here. Here is a man who, without any right, took a motor cycle, that is to say, a vehicle capable of being used as a motor cycle and equipped to be used as a motor cycle, without the consent of the owner, and drove it along the road —I say drove it, because he caused it to move—whether he caused it to move by pedalling or by mechanical power seems to me to be immaterial, because the vehicle at the material time was provided with a motor and could be used as a motor cycle.

For these reasons, I think that the case must go back to the justices with an intimation that all three offences have been proved.

CROOM-JOHNSON J. I agree. There is no finding by the justices that the mechanically propelled part of the vehicle had in any sense ceased to be in existence. The justices seem to have thought that the particular use to which the vehicle was being put by the alternative method of propulsion caused it to cease to be a mechanically propelled vehicle. Speaking for myself, but for the decision to which the justices have come, I should have thought that this was a self-evident case.

PEARSON J. I agree.

*Appeal allowed.*

Solicitors: *Norton, Rose, Greenwell & Co., for Sir Robert Adcock, Preston; Helder, Roberts & Co., for John A. Behn, Twyford & Reece, Liverpool.*

J. F. L.

[7] [1952] 1 T.L.R. 1476.

[8] [1951] 2 T.L.R. 753.

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*Dec.* 10 11, 12, 14, 15, 16, 17, 18, 19;
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[SUPREME COURT OF ADEN.]

# *ANGLO-IRANIAN OIL CO. LD. *v.* JAFFRATE AND OTHERS.†

[THE ROSE MARY.]

*International Law—Expropriation without compensation—Property of foreign national—Invalidity—Application of principle by domestic tribunal—Oil concession in Iran—British company—Expropriation by Iranian Government—Sale—Oil in tanker at Aden—Claim by company—Jurisdiction of Aden court—Plea of coercion—Whether oil movable—Interest of sovereign State in oil—Plea of purchase in good faith.*

By a Convention of 1933 between an English company and the Government of Persia the company were granted the exclusive right to extract oil within the territory of a specified concession in Persia. By laws of 1951, the Iranian Government purported to nationalize and expropriate all property vested in the company by the concession of 1933. Subsequently, by an action in detinue, the company claimed delivery up to them of oil from that concession contained in a tanker in Aden harbour, which had been sold by the Iranian authorities:—

*Held*, that the company were entitled to the oil, which remained their property, since (1) the Iranian laws of 1951 were invalid by international law, for, by them, the property of the company was expropriated without any compensation; (2) British courts treated international law as incorporated into their domestic law so far as it was not inconsistent with their own rules (*per* Lord Atkin in *Chung Chi Cheung* v. *Rex* [1939] A.C. 160, 168; 55 T.L.R. 184; [1938] 4 All E.R. 786); (3) the principle in *Aksionairnoye Obschestvo A. M. Luther Co.* v. *James Sagor & Co.* [1921] 3 K.B. 532; 37 T.L.R. 777, and *Princess Paley Olga* v. *Weisz* [1929] 1 K.B. 718; 45 T.L.R. 365, that a court would not inquire into the legality of acts done by a foreign government in respect of property situate in that government's territory applied only where the property was that of the government's own subjects; and (4), accordingly, following international law as incorporated in the domestic law of Aden, the court must refuse validity to the Iranian laws of 1951.

ACTION.

On June 17, 1952, the *Rose Mary*, flying the flag of Honduras, arrived in Aden harbour with a cargo of about 700 tons of crude oil which had been loaded at Bandar Mashur in Southern Iran. The Anglo-Iranian Oil Co. Ld. brought the present action in the Supreme Court of the Colony of Aden in detinue claiming delivery up to them of this oil, or alternatively a declaration that it was their property. The action was brought against Captain Giuseppe Jaffrate, then master, Compañia de Navegación Teresita S.A. of Panama City, Panama, the owners, and Bubenberg A.G. of Spiez, Switzerland, the charterers of the *Rose Mary*.

† This case is reported in the Weekly Law Reports as a reliable full report of it is unlikely to be readily available elsewhere.

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The plaintiffs claimed the property in, or the immediate right to possession of, the oil by virtue of the Convention between them and the Imperial Government of Persia concluded on April 29, 1933, by which they were granted the exclusive right within the territory of a specified concession to search for and extract petroleum for a period ending on December 31, 1993. The agreement provided by article 21 that it should not be altered by legislation, and by article 22 that in the event of any disputes they were to be referred to arbitration before an umpire appointed by the President of the Permanent Court of International Justice. The oil in question, the plaintiffs said, was produced by plants established by them in the concession in Southern Iran, and this was admitted by all the defendants.

The owners of the *Rose Mary* refused to give possession of the cargo to the plaintiffs on the ground that the title to it was in dispute, but said that it was loaded against their instructions. The master pleaded that the *Rose Mary* entered Aden harbour under duress, and that accordingly the Aden court had no jurisdiction in the matter, and also claimed that the cargo belonged to the charterers.

The charterers also alleged duress, and, alternatively, relied on the Iranian laws of March and May, 1951, which purported to nationalize and expropriate as from May 1, 1951, all property vested in the plaintiffs by the concession of 1933.

Count Ettore della Zonca, managing director of Ente Petrolifero Italia Medoriente (known as E.P.I.M.), was given a power of attorney by the charterers to defend the action on their behalf. His company was originally formed to exploit Mexican oil under the name E.P.I. Mexicano after the nationalization of Mexican oil in 1939, and that the name of the company was changed in January, 1952, to E.P.I. Medoriente. On February 17, 1952, E.P.I.M. entered into a contract for the purchase in the first year of 400,000 tons of crude oil from the National Iranian Oil Company, and the charterers bought 900 tons of that oil from E.P.I.M.

Accordingly the *Rose Mary* was chartered on March 28, 1952, to carry the oil from the Persian Gulf to Bari in Italy, and the vessel sailed from Bari for the Persian Gulf on April 25. While in port at Bari the shipowners' broker, Mario Cosulich, with whom was Count della Zonca, delivered a sealed letter to the master with instructions that it was to be opened only at Port Said. The letter instructed the master to proceed to Bandar Mashur. The plaintiffs, learning of the intention to load at Bandar Mashur, offered to supply a cargo for the vessel at Kuwait, and she went there, but after receiving a cable in code from Count della Zonca, the master sailed from there, closed his radio, and proceeded to Bandar Mashur. There about 700 tons of crude oil were loaded, for which the master signed bills of lading in which the cargo was shown as consigned to E.P.I.M.

The shipowners, finding that they were unable to make contact

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with the ship, requested the plaintiffs to deliver a message by one of their tankers to the master ordering him to proceed to Aden, and the master eventually received those instructions and informed the owners that he was going to Aden. Later three R.A.F. aircraft were instructed to watch for the *Rose Mary* during their routine navigational training flights. The master first saw one circling overhead on June 16, and the next day an aircraft circled above the ship for some time until, 40 miles from Aden, the tug *Protector* came alongside with one M. Martinelli (the representative of *Rose Mary's* owners) on board. The *Rose Mary* then proceeded to Aden harbour.

*Sir Hartley Shawcross Q.C.*, *John Megaw* and *E. W. Nunn*, for the plaintiffs, contended: (1) There was no possible case of duress; the master was ordered by the shipowners to go to Aden on a bona fide claim that the charter had been broken, and that could not amount to illegal or improper coercion. (2) The concession of 1933 gave the plaintiffs the property in or immediate right to possession of all oil derived from the concession area. (3) As regarded the Iranian nationalization laws, a municipal court would recognize their effect only if they were in accordance with international law. The English Court of Appeal cases, *Aksionairnoye Obschestvo A. M. Luther Co.* v. *James Sagor & Co.*[1] and *Princess Paley Olga* v. *Weisz*,[2] regarding Russian expropriation, were plainly distinguishable, since in both those cases the plaintiff whose property was nationalized was a subject of the nationalizing State, and, therefore, no question of breach of international law could arise. The plaintiffs relied on *Wolff* v. *Oxholm*,[3] *In re Fried Krupp A.G.*[4] and *Republic of Peru* v. *Dreyfus Brothers & Co.*[5] (4) The Iranian nationalization laws were a gross breach of international law since (a) the concession itself provided that it should not be terminated by any act of the Persian Government, and (b) the Iranian laws failed to provide for prompt, adequate and effective compensation, as international law required if such laws were to be valid. Numerous sources of international law to that effect included a series of notes from Secretary Cordell Hull on behalf of the United States Government to the Mexican Government after their oil expropriation: Hackworth, Digest of International Law, Vol. 3, pp. 655–62. The plaintiffs relied also on the *Norwegian Ships* case, in which the Permanent Court of Arbitration at The Hague gave judgment in 1922 against the United States Government in respect of the seizure of ships, and the *Chorzow Factory* case decided by the Permanent Court of International Justice in 1928.

*P. K. Sanghani* for the first defendant, the master, contended (1) that the court had no jurisdiction on the ground (a) of duress

[1] [1921] 3 K.B. 532; 37 T.L.R. 777.

[2] [1929] 1 K.B. 718; 45 T.L.R. 365.

[3] (1817) 6 M. & S. 92.

[4] [1917] 2 Ch. 188.

[5] (1888) 38 Ch.D. 348; 4 T.L.R. 333.

(*Sirdar Gurdyal Singh* v. *Rajah of Faridkote* [6] being cited), and (b) that this was really an action to test the rights of the Iranian Government, which, being a foreign government, could not be impleaded (*Vavasseur* v. *Krupp* [7] was cited); and (2) that whatever the legality of the Iranian laws in international law, the plaintiffs were estopped from contesting their validity by a letter, known as the "Middleton letter," of August 3, 1951, from his Majesty's Government, on their own behalf and on behalf of the plaintiffs, in which they had acknowledged the principle of nationalization.

*A. E. Kazi*, for the shipowners, maintained that they had acted in entire good faith and were quite unaware that their ship was being employed for the purpose in question.

*M. A. Mansoor*, for the charterers, adopted the contentions for the master on the question of jurisdiction, and contended that the concession was in respect of immovable property over which the court could have no jurisdiction (*Moryan* v. *Russell & Sons* [7a]), and that the case should not be decided in the absence of the Iranian Government. He relied on *Aksionairnoye Obschestvo A. M. Luther Co.* v. *James Sagor & Co.*[8] and *Princess Paley Olga* v. *Weisz*,[9] and contended that the nationalization laws had taken away the plaintiffs' property. He also relied on the Middleton letter, and argued that the compensation offered by the law of May 1, 1951, was adequate.

1953. January 9. CAMPBELL J. In this case the plaintiffs, the Anglo-Iranian Oil Co. Ltd., have brought a claim in detinue in respect of approximately 700 tons of crude oil at present in the tanker *Rose Mary* lying in Aden harbour. This oil they assert is their property. They ask for an order against the first defendant, who is the master; the second defendants, Compañia de Navegación Teresita S.A., who are the owners; and the third defendants, Bubenberg A.G., who are the charterers of the *Rose Mary*, that they deliver up to them the oil; and in the alternative they ask for a declaration that the oil is their property.

The defences of the three defendants may briefly be summarized as follows: The defence of the first defendant is that his ship came into Aden harbour solely as a result of coercion and that this court has therefore no jurisdiction. Secondly he pleads that he had no authority to hand over the cargo to the plaintiffs. Thirdly he denies that the cargo belongs to the plaintiffs. Lastly he pleads that as the plaintiff company is not registered in Aden it cannot institute a suit here. This last plea appears to be quite untenable, was not supported by argument or authority and I reject it now.

[6] [1894] A.C. 670; 10 T.L.R. 62.
[7] (1878) 9 Ch.D. 351.
[7a] [1909] 1 K.B. 357; 25 T.L.R. 120.
[8] [1921] 3 K.B. 532.
[9] [1929] 1 K.B. 718.

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The defence of the second defendants, the owners of the ship, is that they have a lien on the cargo of oil in respect of the charter dues and should therefore not be required to hand it over to the plaintiffs.

The third defendants, the charterers, plead that this court has no jurisdiction as they claim that the ship is only in Aden harbour as a result of coercion. They deny that the plaintiffs are the owners of the cargo of oil. They deny that any cause of action has arisen in Aden. Lastly they plead that they should not be ordered to hand over the oil to the plaintiffs as they are bona fide purchasers for value.

I propose to deal first with the issue of coercion. Early in 1952, Count della Zonca, the managing director of an Italian company known as Ente Petrolifero Italia Medoriente, arranged on behalf of his firm to buy oil from the National Iranian Oil Co. (which had taken over the property and business of the plaintiffs in Persia) and contracted to sell a quantity to Bubenberg A.G., a Swiss company. He appears to have had authority to act on behalf of the Bubenberg company almost from the beginning, and arranged for them a time charter of the tanker *Rose Mary* with Messrs. Cosulich who were acting as agents of the owners. The charter was for the vessel to go to a port in the Persian Gulf, take on a cargo of petroleum products and then to return to Bari. Both parties agreed that the object of the proposed voyage should be kept secret, and the owners were not informed of the details of the voyage. The master, Guiseppe Jaffrate, knew of the object of the voyage, but was told to keep his knowledge to himself. He was given a sealed letter and told to open it at Port Said.

The ship sailed from Bari on April 25, 1952. On May 1, 1952, having arrived at Port Said, Jaffrate sent a letter to his owners which stated: "I beg to inform you that charterers, "Bubenberg Co., Ld., Spiez, have ordered me by letter to pro-"ceed to Bandar Mashur in order to load a cargo of crude oil "with destination to an Italian port." The reaction of the owners on receiving this letter was to write to the Bubenberg company on May 12, 1952, saying that they considered that the proposed voyage was a breach of clause 2 of the charter and warning them not to put into execution the orders given to the master. Messrs. Cosulich, who up till then appear to have acted in a somewhat equivocal manner as owners' agents, then joined forces with the owners and jointly and severally they issued a stream of letters and radio messages to Jaffrate telling him not to go to Bandar Mashur or Abadan. They told him that the charter was cancelled and to proceed to Kuwait and load another cargo there. He received another stream of messages from Bubenbergs, E.P.I.M. and Count della Zonca telling him to carry out his first orders and not to put into Aden. He did in fact go to Bandar Mashur, and on May 27, 1952, he loaded approximately 700 tons of crude oil, which it is not disputed was

won from the plaintiffs' concession area. He started his return journey a few days later, and came into Aden harbour on June 17, 1952.

Jaffrate has given evidence and stated that but for coercion he would have passed Aden and gone on to Suez. He said that he was frightened by two matters: the first was the receipt of two radio messages from his owners on May 31 and June 5, 1952, threatening him with disciplinary action and legal proceedings if he refused to carry out their orders; the second was the arrival overhead on both June 16 and 17, 1952, of an R.A.F. aeroplane. On the second day the aeroplane circled round him for two hours, and he says that he thought that he might be bombarded. On the afternoon of June 17, 1952, and while 40 miles from Aden, he was met by the tug *Protector*, which had on board Martinelli, the owners' representative, who came on board the *Rose Mary* and told him to go into Aden. This he did.

Is this story of Jaffrate as to his state of mind true? In my view it is not. [His Lordship reviewed the evidence and continued:] To find that Jaffrate had decided since the beginning of June to follow the owners' instructions seems to be in accordance with the probabilities. In English law there is no doubt whatever that in a time charter the ownership and also the possession of the ship remain in the original owner through the master and crew, who continue to be his servants. It is unnecessary to give a decision as to what would be the ruling on this point where the law to be followed would be that which is applicable when a ship which is owned by a company registered in Honduras and herself registered in Panama is chartered by a Swiss company in Switzerland and sails under an Italian master from an Italian port to load a cargo from Persia. I think that there is a presumption that the English rule is universal from the very nature of a time charter. It is consistent with this time charter. It would follow, therefore, that Jaffrate would only be doing the normal and probable thing if he decided to follow the owners' and not the charterers' orders, and this is what I think in fact he did. For these reasons I find that the plea of coercion fails and does not deprive this court of jurisdiction.

The second main issue is whether or not the plaintiffs have proved that this cargo of oil is their property. They say that their title to it is by virtue of a concession granted to them by the Persian Government as the result of an agreement entered into in 1933, and which was due to expire in 1993. By article 21 of the agreement it was laid down that the concession should not be annulled by the Government and the terms therein contained should not be altered either by general or special legislation in the future, or by administrative measures, or any other acts whatever of the executive authorities.

On May 1, 1951, an Oil Nationalization Law was put into effect by the Persian Government. Although there is evidence that there was in existence another oil concession in Persia which

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had not produced any oil, it is not disputed that the law was passed to nationalize the plaintiff company only.

The plaintiffs contended that this Oil Nationalization Law was contrary to international law as being expropriation without compensation, and was really only confiscation, and that, as this court was bound to administer international law where it was appropriate, it should refuse to recognize any act which was contrary to international law. It must be decided, therefore, whether this expropriation was with or without compensation.

The provisions of the Oil Nationalization Law concerning the matter of compensation are articles 2 and 3. By article 2: "The "Government is bound to dispossess at once the former Anglo-"Iranian Oil Company under the supervision of the mixed board. "If the company refuses to hand over at once on the grounds of "existing claims on the Government the Government can, by "mutual agreement, deposit in the Bank Milli Iran or in any "other bank up to 25 per cent. of current revenue from the oil "after deduction of exploitation expenses in order to meet the "probable claims of the company."

It is hopeless to suggest that this, construed in its grammatical sense, is an offer to pay compensation. If it is loosely construed, and with every bias in favour of the contention of the defendants, I can only find that it consists of no more than a suggestion that at some future time the matter of compensation may be considered, and that it gives the Government power to deposit in a bank a proportion of the future profits of the expropriated business against that contingency. The proportion may apparently vary between 0 and 25 per cent. of the current revenues. By article 3: "The Government is bound to examine "the rightful claims of the Government as well as the rightful "claims of the company under the supervision of the mixed board "and to submit its suggestions to the two Houses of Parliament "in order that the same may be implemented after approval by "the two Houses." I cannot see that this is really any advance on the previous article. It says that a committee of senators and deputies shall consider the question of compensation. But the plaintiffs would have no rights even if the committee found that they were entitled to compensation, for the approval of the Houses of Parliament would then be necessary. They might approve: but they might not. A fair test to decide whether either of these two articles gives the plaintiffs any quid pro quo for having their business nationalized is to ask whether they would be any worse off if the articles had been omitted. The answer is clearly No. The plaintiffs have to rely for compensation in either case solely on the bounty of the expropriator.

Nor is the position affected by the fact that, some months after nationalization had been carried out, Dr. Mossadeq, the Persian Prime Minister, made another offer regarding compensation in a letter to Mr. Churchill dated September 24, 1952. By this time the plaintiffs had been expropriated without any

compensation. If it were necessary to evaluate this new offer to see whether it could amount to what is ordinarily understood by the word "compensation," the answer must be in the negative. It first insists on an advance payment of £49,000,000 by the expropriatee to the expropriator. Then it sets out that the arbitration shall take into account (1) a calculation of any unpaid taxes owed by the plaintiffs, and (2) a calculation of what extra royalties the plaintiffs would have paid if an agreement (known as the Gass-Golshoyan agreement) which the Persian Houses of Parliament had refused to ratify had in fact been ratified. The arbitration was then excluded from taking into consideration any loss which the company would suffer after the date of nationalization by reason of having its concession shortened from 60 years to 18 years. It could only award compensation for loss of the actual property expropriated.

In discussing what is meant by the word "compensation" in relation to international law it has sometimes been said that it must be "adequate, effective and prompt." The question of adequacy may often be difficult for a court to decide, and no doubt this has caused and will cause considerable trouble in other cases in dealing with the extraterritorial effect of foreign nationalization. But here I can only find to be true the plaintiffs' contention that expropriation has taken place without any compensation and that this is confiscation.

That the courts in England will do nothing to invalidate an act of confiscation by a sovereign State of the property of its nationals is not disputed by the plaintiffs. The cases of *A. M. Luther Co.* v. *James Sagor & Co.*[10] and *Princess Paley Olga* v. *Weisz*[11] are authority for the proposition. What has to be decided is whether the reverse is true when the property confiscated is that of a non-national.

The plaintiffs' contention can be based on two grounds: first, that no State can be expected to give effect within its territorial jurisdiction to a foreign law that is contrary to its own public policy or essential principles of morality; and secondly, that a foreign law that is contrary to international law or in flagrant violation of international comity need not be regarded.

International law is the settled practice of nations. As was said by Lord Atkin in the Privy Council in *Chung Chi Cheung* v. *Rex*[12]: "The courts acknowledge the existence of a body of "rules which nations accept amongst themselves. On any "judicial issue they seek to ascertain what the relevant rule is, "and, having found it, they will treat it as incorporated into "the domestic law, so far as it is not inconsistent with rules "enacted by statutes or finally declared by their tribunals." This settled practice can be ascertained from decided cases and from the writings of jurists, and to these I now turn.

[10] [1921] 3 K.B. 532.
[11] [1929] 1 K.B. 718.
[12] [1939] A.C. 160, 168; 55 T.L.R. 184; [1938] 4 All E.R. 786.

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The first English case cited on behalf of the plaintiffs is *Wolff* v. *Oxholm* [13] where it was held that payment to the Danish Government of a debt due to an Englishman, by virtue of a Danish order of sequestration, did not operate to discharge the Danish debtor from the claim of the English creditor. In the concluding paragraph of his judgment Lord Ellenborough said [14]: "Considering therefore, that the right of confiscating debts "contended for on the authority of these citations from Vattel "is not recognized by Grotius, and is impugned by Puffendorff "and others, that such confiscation was not general at any period "of time, and that no instance of it, except the ordinance in "question, is to be found for something more than a century, "we think our judgment would be pregnant of mischief to "future times, if we did not declare, that in our opinion this "ordinance, and the payment to the commissioners appointed "under it, do not furnish a defence to the present action; and "if they cannot do this of themselves, neither can they do so by "the aid of the proceedings in the Danish court. The parties "went into that court expecting justice, according to the then "existing laws of the country, and are not bound by the quashing "of their suit, in consequence of a subsequent ordinance, *not "conformable to the usage of nations*, and which, therefore, "they could not expect, nor are they or we bound to regard."

The next case is *Kaufman* v. *Gerson*.[15] A domiciled Frenchman coerced a domiciled Frenchwoman into signing a contract in France by threatening that if she refused to make the agreement he would prosecute her husband for a crime of which he was accused. The contract was valid by French law, but nevertheless an action for its breach was dismissed by the Court of Appeal. Romer L.J. held that "to enforce a contract so "procured would be to contravene what by the law of this "country is deemed an essential moral interest."

The third case is *In re Fried Krupp A.G.*[16] Here a German ordinance of September 30, 1914, forbade transmission of funds to Great Britain and Ireland or British colonies or foreign possessions, and provided that the date for satisfaction of claims relating to property in favour of persons or bodies situated in such areas was deemed to be postponed till further notice. It also enacted that "No interest can be claimed in respect of the period "during which the postponement continues." The court found that it was the ordinary rule of German law that such a debt would carry interest at 5 per cent. and refused to make effective the ordinance denying such interest. Younger J. said [17]: "In "that state of things it appears to me impossible that any court "in this country can recognize a German ordinance of this "description, and there is, I think, a choice of grounds on which

[13] (1817) 6 M. & S. 92.
[14] Ibid. 106.
[15] [1904] 1 K.B. 591; 20 T.L.R. 277.
[16] [1917] 2 Ch. 188.
[17] Ibid. 193.

" refusal to do so can properly be based. It may, I think, first " of all be said that such an ordinance as this is no part of the " general German law, by which the parties to this contract alone " agreed to be bound. And even if such an ordinance must be " treated as part of that law, it may, I think, properly be held " that no such essentially one-sided development of the system " could have been within the contemplation of either party to " the contract at the time when they entered into it and agreed " that their rights thereunder were to be regulated by German " law. But, further, this ordinance, with its marked bias in " favour of German nationals as against British subjects, can, in " my opinion, create in this country no disability upon a person " against whom its provisions are directed, and the language of " Lord Ellenborough, in *Wolff* v. *Oxholm* [18] may, with the neces- " sary modifications, justly be applied to it, so far as it operates " to extinguish all German liability for conventional interest, as " being one which is *not conformable to the usage of nations*, and " which, therefore, Messrs. Wild could not expect, and which " neither they nor we are bound to regard. Whatever ground of " decision is chosen, it is, I think, clear that in this court Messrs. " Wild's debt carries interest unaffected by the ordinance, and " that accordingly this summons must be dismissed."

I have been referred to a number of foreign decisions. In *Société Potasas Ibericas* v. *Nathan Bloch* [19] the French Court of Cassation held that decrees of expropriation by the Government of Catalonia were invalid in France on the ground that, as no just compensation had been provided for, they were against French public policy. In *Union des Républiques Socialistes Soviétiques* v. *Intendant Général Bourgeois Ès-qualité et Société la Ropit* [20] the same court held that " although the principle that the courts " of a State faced with a juridical situation governed by foreign " legislation should apply the foreign law must be admitted, this " rule is only obligatory in so far as the application of the foreign " law and respect for the rights acquired thereby are not incom- " patible with those principles and provisions of their national " law which are held essential for ordre public." The court then proceeded to disallow the intervention of the Russian Government to get possession of merchant ships which had been nationalized and were berthed at Marseilles.

In relying on French cases, however, it must be borne in mind that the domestic law of France is very explicit regarding the right of private ownership. Article 545 of the Civil Code provides: " No one in France can be forced to give up his " property except in the public interest and in return for a fair " and prepaid compensation." [" Nul ne peut être contraint de " céder sa propriété, si ce n'est pour cause d'utilité publique, et

[18] 6 M. & S. 92.

[19] (1939) Annual Digest of Public International Law Cases, 1938–1940, p. 150.

[20] (1928) Annual Digest of Public International Law Cases, 1927–1928, p. 67.

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" moyennant une juste et préalable indemnité."] The decisions in the two cases I have just mentioned actually referred to this section. But although in Aden there is no statutory enactment, so far as I know, similar to this section, it is nevertheless part of the common law. The cases therefore have some authority.

In Poland the Supreme Court in *Siuta* v. *Guzkowski* [21] refused validity to a requisition by Ukrainian troops in Poland of horses which they sold to local inhabitants. Its decision was based mainly on article 52 of the Hague Rules which forbids requisitions except for the needs of the occupying forces. Nevertheless, it is applicable here inasmuch as the principle was laid down that whether or not the Hague Rules were binding on the parties (and it would seem they were not binding on the Ukrainains, who were not recognized as belligerents) the Polish courts regarded confiscation such as this contrary to the " cardinal " principle of international custom," and if an act was contrary to international custom they would grant it no validity in Poland.

In Germany the Provincial Court of Kassel and the District Court of Waiblingen, when considering in 1947 and 1948 cases relating to the sequestration of property of Germans quâ Germans, living in Czechoslavakia, held that such sequestration was contrary to international law, and refused to recognize it. Where such property came into their jurisdiction they ordered its return to its owners. The cases are to be found in the New Juridical Weekly Review, 1947, p. 628, and the Monthly Review of German Law, 1949, p. 163, respectively. The Provincial court of Hildersheim, in a similar case to be found in the S. German Lawyers' Review, 1948, p. 143, came to a different conclusion, but gave no reasons for their decision.

In Italy the Tribunal of Florence in *Lucchesi* v. *Malfsti* [22] had to decide the subsequent ownership of a motor car which had been requisitioned by the Germans but not for the requirements of the occupying troops. They had seized it from the plaintiff and given it to the defendant on the ground that he was an invalid of the Great War. The tribunal found that the requisition was unlawful, and ordered the return of the car to its former owner. This case, like others previously mentioned, arose out of events which took place in time of war and partly depends on the law of war. But it would seem also applicable to peace time: for, if a court is willing to hold that a seizure is illegal in time of war, a fortiori it would be unwilling to recognize the same in time of peace.

I now come to the *Norwegian Claims Case*.[23] The Government of the United States of America had in 1917 requisitioned certain Norwegian ships. The two governments submitted the

[21] (1921) Annual Digest of Public International Law Cases, 1919–1922, p. 480.

[22] Il foro Italiano, Vol. 69, 1944–1946, p. 985.

[23] (1922) Hague Court Reports, 2nd series, p. 39 (Annual Digest of Public International Law Cases, 1919–1922).

question of compensation to an arbitration tribunal under the auspices of the Permanent Court of Arbitration at The Hague. Although compensation was the only issue, there are several observations in the award which seem relevant to the present case. It was said [24]: "The fifth amendment to the Constitution "of the United States provides: 'No person . . . shall be . . . "'deprived of life, liberty or property without due process of law; "'nor shall private property be taken for public use, without just "'compensation.' It is common ground that in this respect "the public law of the Parties is in complete accord with the "international public law of all civilised countries. . . . Whether "the action of the United States was lawful or not, just com-"pensation is due to the claimants under the municipal law of "the United States, as well as under the international law, based "upon the respect for private property."

In deciding what was meant by the word "compensation" in international law the tribunal said [25]: "Just compensation "implies a complete restitution of the status quo ante, based, "not upon future gains of the United States or other powers, "but upon the loss of profits of the Norwegian owners as com-"pared with other owners of similar property." Lastly it was laid down [26] that: "International law and justice are based upon "the principle of equality between States. No State can exercise "towards the citizens of another civilized State the 'power of "'eminent domain' without respecting the property of such "foreign citizens or without paying just compensation as deter-"mined by an impartial tribunal, if necessary."

In the case of the *De Sabla Claim* [27] the specially appointed Claims Commission inquired into the expropriation by the Government of Panama of land belonging to a national of the United States of America. In its judgment the Commission stated: "The Commission concludes that the adjudications and "the licences granted by the authorities on Bernadino constituted "wrongful acts for which the Government is responsible inter-"nationally. It is axiomatic that acts of a government in "depriving an alien of his property without compensation impose "international responsibility."

In 1938 the Government of Mexico nationalized their oil. A long correspondence then took place between the Government of Mexico and Cordell Hull, the Secretary of State of the United States. In many communications the latter contended that confiscation of the property of aliens was contrary to, and would not be recognized by, international law. He argued that confiscation did not cease to be so because there might be the express desire to pay at some time in the future. The plaintiffs invoke this correspondence in aid. They say that it is not only the

[24] Ibid. 68, 69.
[25] Ibid. 73.
[26] Ibid. 73, 74.
[27] (1933) Annual Digest of Public International Law Cases, 1933–1934, p. 241.

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opinion of the writer, but as he was then Secretary of State it is a statement of the opinion, and thus is an expression of what would be the practice, of the Government of the United States. This may well be, but it is an opinion set out when arguing a brief and as such, I think, it cannot have the weight which should be given to a judicial opinion. It has not got that salutary check upon the writer of the overhanging shadow of a Court of Appeal. But I think that the plaintiffs are entitled to invoke the dispute in their aid by reason of the fact that throughout the argument the Mexican Government do not appear to have denied the main premise of their adversary's argument. They refer to the blood of Mexico's sons shed in the revolutionary struggle, and assert that their acts were inspired by legitimate causes and the aspirations of social justice. But they do not deny the principle of compensation.

The defendants have cited *Princess Paley Olgá* v. *Weisz* [28] and *A. M. Luther Co.* v. *James Sagor & Co.*[29] as being in their favour. The first of these does no more than lay down the principle, as enunciated by Russell L.J.,[30] that "This court will "not inquire into the legality of acts done by a foreign govern- "ment against its own subjects in respect of property situate in "its own territory." It said nothing regarding property of those not its own subjects.

*A.M. Luther Co.* v. *James Sagor & Co.*[29] also concerned confiscation of property belonging to subjects of the confiscating government. It was also held that the confiscation was valid and would be upheld by the English court. The dicta in the judgments on which the defendants seek to rely are chiefly those of Scrutton L.J., who said [31]: "Should there be any government "which appropriates other people's property without compensa- "tion, the remedy appears to be to refuse to recognize it as a "sovereign state. . . . But it appears a serious breach of inter- "national comity, if a state is recognized as a sovereign indepen- "dent state, to postulate that its legislation is 'contrary to "'essential principles of justice and morality.'"

The court was considering the effect of the conduct of a sovereign State in regard to its subjects. If Scrutton L.J. had been specifically considering such conduct in regard to aliens, a far wider question of international law, I feel no confidence that he would have expressed the same opinion. His remarks were a good deal wider than necessary for the decision of the case. On the whole I think that the relevance to this case of a great part of the judgment in *A. M. Luther Co.* v. *James Sagor & Co.*[31] is more apparent than real, and that the case is in no way decisive here.

*Santos* v. *Illidge* [32] might also appear at first to favour the argument of the defendants. Here the non-delivery of slaves in

[28] [1929] 1 K.B. 718.
[29] [1921]3 K.B. 532.
[30] [1929] 1 K.B. 718, 736.
[31] [1921] 3 K.B. 532, 556, 558.
[32] (1860) 8 C.B.(N.S.) 861.

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Brazil under a contract made there which was lawful according to Brazilian law was held actionable in England, though the sale would have been criminal in England. The slaves were required by the defendants in Brazil after the passing of the Slave Trade Act, 1824, but before the passing of the Slave Trade Act, 1843. It would seem that the reason why the court did not refuse to entertain the claim was that no statute prohibited the holding of the slaves in Brazil, even though the purchasing of them there might be a felony in a British subject. The well-known case of *James Sommersett*,[33] where an escaped slave successfully sued out a writ of habeas corpus on the ground that although slavery might be recognized and lawful in the colonies it was not allowed and approved of by the law of England was, therefore, not overruled.

British courts are inclined towards resting international law on practice and precedent rather than on the opinions of speculative writers, however unanimous or eminent they may be. Nevertheless I have examined the opinions of jurists on international law in such of their writings as are available here. The conclusion I arrive at is that Dicey, Oppenheim, Cheshire, Fachiri and Hackforth endorse the view that expropriation without compensation is contrary to international law. I can find no opinions to the contrary, though the defendants have referred me to Martin Wolff.

For the reasons set out above, I am satisfied that, following international law as incorporated in the domestic law of Aden, this court must refuse validity to the Persian Oil Nationalization Law in so far as it relates to nationalized property of the plaintiffs which may come within its territorial jurisdiction. I find the oil in dispute to be still the property of the plaintiffs.

The defendants urge that even if the court has come to the above general conclusion there are certain obstacles which must prevent the oil which is in the *Rose Mary* from being handed back to the plaintiffs. It is argued that a British court has no jurisdiction to adjudicate upon the right to ownership or possession of foreign immovables. Practical considerations would make a decree concerning them ineffective. It is said that this oil must be classed as an immovable. The Aden Transfer of Property Ordinance and the Aden Documents Registration Ordinance are cited in support of this proposition. In addition I have been referred to *Morgan* v. *Russell & Sons*,[34] where an agreement had been made for a licence to remove slag and cinders from certain lands. When the licence was subsequently stopped it became a question whether or not damages could be obtained on the basis that the licence was a contract for the sale of goods under the Sale of Goods Act, 1893. It was held that it was not, but was a contract to grant an interest in land. The case is not applicable here, for it concerned a right to the land itself. If the dispute had

[33] (1772) 20 State Trials 1.

[34] [1909] 1 K.B. 357.

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related to *sale* of the slag after it had been taken away and put in bags there is no reason why the Sale of Goods Act should not have applied.

It is true that it can be argued that oil can be classed as an immovable. But there is nothing to show that it must necessarily be so classed. It is merely necessary or convenient to do so in certain circumstances and for certain purposes. To extend what is really only a fiction would lead to obvious absurdities. The oil in this case is clearly in the category of movables. Nor can I see that it makes any difference whether the action is in personam or in rem, though the defendants appear to attach importance to this point.

A point is taken that the amount of oil in dispute in this case is so small in relation to the total amount of oil which is known to exist in the plaintiffs' concession that this court ought not to allow itself to be used to decide what is a fictitious or at any rate no more than a test action. In *Kroch* v. *Rossell* [35] the Court of Appeal did indeed refuse to allow service out of the jurisdiction where it was satisfied in a libel action that the libels would have practically no circulation in England, but only on the Continent, and where the plaintiff had stated that he had no occupation, reputation or associations in England. They came to the conclusion that there was no question of substance to be decided. But here surely the true comparison to be made is not between the oil in the *Rose Mary* and that still under the ground in Persia: it is between the oil in the *Rose Mary* and any other oil from the plaintiffs' concession which has been sent out of Persia since its nationalization.

Again, I think that the defendant's argument must fail that the plaintiffs should have exhausted the resources of the courts of Persia before bringing this action in Aden. For the only action which they could have brought in Persia would have had to be quite different to that which they could bring in Aden. Nor is it possible to see how any action in Persia could have any chance of success. The Persian courts could say naught save that what had been done had been done in accordance with the Oil Nationalization Law. The defendants made no suggestion that the plaintiffs could have successfully pleaded that this law was invalid as being ultra vires or contrary to the Constitution.

This would appear to be a convenient point to refer to one of the pleaded defences of the third defendant that the cause of action in this case did not arise in Aden and this court has no jurisdiction. I do not know where else it did arise. The action is in detinue, and the action arises where the detention and refusal to hand over takes place. It is true that the nationalization took place in Persia. But the refusal to hand over the oil took place in Aden. The plea cannot succeed.

The next argument advanced by the defendants is that by

[35] (1937) 1 All E.R. 725.

reason of what has been referred to in this trial as the "Middleton "letter" the plaintiffs are estopped from denying the validity of the Oil Nationalization Law. The letter was written on August 3, 1951, by G. H. Middleton, H.M. Chargé d'Affaires at Teheran, to the Persian Minister of Foreign Affairs. It is not disputed by the plaintiffs that he had power to bind them by what he wrote. The material part of the letter is paragraph 3, which reads as follows: "His Majesty's Government recognize "on their own behalf and on that of the company, the principle "of the nationalization of the oil industry in Iran."

The letter was in reply to a communication known as the "Harriman formula," and the meaning of the words "the "principle of nationalization" was set out in paragraph 3 thereof which reads as follows: "By the principle of nationalization is "meant the proposal which was approved by the Special Oil "Committee of the Majlis and was confirmed by the law of "Esfand 29, 1329 (March 20, 1951) the text of which proposal "is quoted hereunder. "In the name of the prosperity of the "Iranian nation and with a view to helping secure world peace "we the undersigned propose that the oil industry of Iran be "declared as nationalized throughout all the regions of the "country without exception, that is to say, all operations for "exploration, extraction and exploitation shall be in the hands "of the Government."

It seems to me that there is a complete answer to the letter. I cannot see that a recognition that the Government should in future explore, extract and exploit the oil of the country can be stretched to mean that they were willing to be expropriated without compensation. If this had been meant, different words would surely have been used. On this finding it is unnecessary to discuss whether or not the letter, if made during active but abortive negotiations to find a settlement, was written for the sole purpose of finding a settlement and would be privileged and not binding as regards any admissions if the negotiations failed.

Finally the third defendants have pleaded in paragraph 3 of their defence: "The said cargo of oil therefore was the property "of the Imperial Iranian Government and these defendants "bought the same for valuable consideration in good faith "through the medium of E. P. I. M. (Ente Petrolifero Italia "Medoriente) and are therefore the rightful and legal owners of "the cargo in question." This defence must fail on more than one ground. Presumably the defendants wish to derive an advantage from section 23 of the Aden Sale of Goods Ordinance, cap. 121, which is a little different from the English Sale of Goods Act. The section reads as follows: "Subject to the pro-"visions of this Ordinance and of any other law for the time "being in force, where goods are sold by a person who is not the "owner thereof and who does not sell them under the authority "or with the consent of the owner, the buyer acquires no better "title to the goods than the seller had, unless the owner of the

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"goods is by his conduct precluded from denying the seller's "authority to sell: Provided that, where a mercantile agent is, "with the consent of the owner, in possession of the goods or of "a document of title to the goods, any sale made by him, when "acting in the ordinary course of business of a mercantile agent, "shall be as valid as if he were expressly authorized by the owner "of the goods to make the same; provided that the buyer acts in "good faith and has not at the time of the contract of sale notice "that the seller has not authority to sell."

Now, even if it is accepted that E. P. I. M. are mercantile agents within the meaning of the Ordinance, they were certainly not in possession of the goods with the consent of the owner as is required by the section. If this difficulty could be surmounted a second one arises. One Arnet, who bought the oil for the Bubenberg company, has not appeared on their behalf to say that he bought the oil innocently. In view of the evidence concerning the plaintiffs' warnings throughout the world and the existence of the interim injunction of the Court of International Justice this is not surprising, and the presumption seems the other way. It seems clear that these defendants must be defeated by the proviso of section 23 "provided that the buyer acts in good faith "and has not at the time of the contract of sale noticed that the "seller has not authority to sell."

I therefore find that the plaintiffs are entitled to succeed in this action, and that the cargo of oil must be returned to them. A decree will issue against all three defendants to this effect as each has or had a measure of control over the cargo.

*Judgment for plaintiffs.*

Solicitors: *Linklaters & Paines and William A. Crump & Son for the plaintiffs.*

R. P. C.

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1952
*Dec.* 17.

Willmer J.

## *PRACTICE NOTE (EVIDENCE: SHIP'S LOG)

*Evidence—Shipping—Collision—Log-book—Admissibility in evidence—Evidence Act*, 1938 (1 & 2 *Geo.* 6, *c.* 28).

In examination-in-chief a ship's officer in a collision case gave evidence that the entries in the deck movement book and the deck scrap log-book were in his handwriting, and his counsel thereupon applied for and obtained leave from the court to put in these documents as evidence under the Evidence Act, 1938.

R. P. C.

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[PRIVY COUNCIL.]

* JOHN OJOBO AGBEYEGBE . . . APPELLANT; J. C.†

AND

FESTUS MAKENE IKOMI AND ANOTHER . RESPONDENTS.

1953
Jan. 12.

ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL.

*West Africa—Immovable property—Sale by auction—Action to set aside sale—Case struck out—Application to re-list—Discretion—Relevant factors—Inadequate explanation of undue delay—Position of bona fide purchaser for value—"Balance of justice."*

At a public auction sale on May 27, 1938, held pursuant to leave of the court to issue execution against land belonging to the appellant judgment debtor, the land was purchased, subject to the approval of the Governor, by the respondent. A claim by the appellant, brought within the statutory period of 21 days, to set aside the sale, was struck out by the court on July 7, 1938, on the application of the respondent, who contended that inasmuch as the Governor had not at that date approved the purchase, there had been no sale. No further proceedings were taken by the appellant until, on September 15, 1947, he moved the Supreme Court of Nigeria to re-list the suit which had been struck out on July 7, 1938. As reasons for the delay the appellant gave the death of his legal advisers, his own illness and the difficulties of ascertaining his true position in the matter. The respondent, during his occupation following the approval of the purchase by the Governor, was alleged to have removed some of the buildings on the land and rebuilt others.

The judge of the Supreme Court granted leave to re-list the suit, and on the hearing of the action found that the sale was irregular and null by reason of inadequate compliance with the court's directions relating to advertising the auction sale, and that the appellant had sustained substantial injury by reason of the irregularity. An appeal by the respondent to the West African Court of Appeal was allowed on the ground that in the exercise of his discretion the trial judge did not appear to have taken into consideration all the relevant circumstances, including such questions as to the extent of the delay in making the application to re-list the case, the reasons for the delay, the nature of the claim and the effect of granting leave on the rights of the respondent. On appeal by the appellant:—

*Held*, that the length of the delay, the inadequacy of the explanation of the delay, and the consequences of setting aside the sale of land as against a bona fide purchaser for value who had been in occupation of the land during the whole period of the nine years and had apparently altered the buildings thereon caused a "balance of justice" in favour of the respondent within the meaning of the dictum of Lord Blackburn in *Erlanger* v. *New Sombrero Phosphate Company* (1878) 3 App.Cas. 1218, at p. 1279, and the case ought not to have been re-listed, and having been re-listed ought to have been dismissed.

Judgment of the West African Court of Appeal affirmed.

† *Present*: LORD PORTER, LORD OAKSEY and LORD ASQUITH OF BISHOPSTONE.

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APPEAL (No. 3 of 1951) from a judgment of the West African Court of Appeal at Lagos, Nigeria (November 26, 1948), setting aside a judgment of the Supreme Court of Nigeria (April 2, 1948) whereby the Supreme Court had declared that a sale of the appellant's property in the Warri Township made by the deputy sheriff on May 27, 1938, was a nullity.

The following introductory statement is taken from the judgment of the Judicial Committee. The principal issue in this appeal was whether the trial judge was right in allowing the appellant's action to set aside the aforesaid sale, which had been struck out in 1938, to be re-listed nine years later, and in deciding that the sale should be set aside or whether, as was held by the West African Court of Appeal, the judge failed to exercise his discretion judicially when he allowed the action to be re-listed, and decided that the sale should be set aside.

Section 46 of the Sheriffs and Enforcement of Judgments and Orders Ordinance (cap. 205 of the Laws of Nigeria, 1948) is as follows: "At any time within 21 days from the date of the sale "of any immovable property, application may be made to the "court to set aside the sale on the ground of any material "irregularity in the conduct of the sale, but no sale shall be set "aside on the ground of such irregularity unless the applicant "shall prove to the satisfaction of the court that he has sustained "substantial injury by reason of such irregularity."

The facts were as follows. In November, 1937, the second respondent (Amarah) brought an action against the appellant in the Warri High Court of the Protectorate of Nigeria (Warri Judicial Division) at Warri, claiming £330 for building materials and damages. Judgment was entered in his favour for £212. On December 30, 1937, the assistant judge at Warri (Jackson J.) made an order giving leave for the issue and execution of a writ of fi. fa. to issue against the appellant in respect of the land in question. The judge ordered that the sale of the judgment debtor's interest in the land should be conducted by public auction under the personal direction of the deputy sheriff and that before the auction the sale and a description of the land so put up for auction should be published in three consecutive publications in the Nigeria Gazette.

On April 1, 1938, a letter was sent on behalf of the sheriff to the Chief Secretary to the Government, Lagos, asking that the notice of that sale should be published in three consecutive publications of the Nigeria Gazette. Two only of such publications were made. The sale of the land was held by public auction at the Police Office on May 27, when it was purchased by the first respondent (Festus Makene Ikomi) for £680.

On May 31, 1938, the appellant's solicitor applied in the High Court (Warri Judicial Division) for a civil summons to set aside the aforesaid sale. The summons was issued on June 8, 1938, impleading the first respondent as second defendant and the second respondent as first defendant. On July 7, 1938, the claim

to set aside the sale came before the High Court. The judge's note was as follows:—

"Claim to set aside a sale.

"No appearance by or for plaintiff.

"Second defendant in person—says he has briefed Wright.

"First defendant not served—no appearance.

"Letter from Alakija and Alakija asking for pleadings—presumably for plaintiff.

"Telegram from Vincent for plaintiff asking for pleadings and adjournment.

"Wright informs court that there has not yet been any sale.

"Second defendant bought subject to the approval of the Governor and that approval has not yet been given, so there has been no sale.

"Applies for case to be struck out. Order 18, rule 1.

"ORDER: The case is struck out with costs to second defendant assessed at five guineas.

"(Sgd.) DONALD KINGDON.
"Chief Judge."

On August 16, 1938, the Acting Resident, Warri Province, approved the first respondent as purchaser pursuant to section 11 of the Crown Lands Ordinance. On August 22, 1938, the assistant judge in the High Court of the Warri Judicial Division (Pearson A.J.) issued a certificate that the first respondent had been declared the purchaser of the right, title and interest of the appellant in the land.

No further proceedings were taken by the appellant until on September 15, 1947, the appellant moved the Supreme Court of Nigeria in the Warri Judicial Division at Warri to re-list the suit which had been struck out on July 7, 1938. The motion was supported by an affidavit dated July 19, 1947, which included the following paragraphs:—

"6. That late lawyer Alakija and Alakija and lawyer Olatunde Vincent whom I engaged for pleading and adjournment of the case. I come from Lagos in March, 1942, and I investigated from the records to know what happened before the case was struck out. I got the copies of the judgment of the case. . . .

"9. That my delay to bring up the case was due to all the documents about the case with lawyer Alakija. I got only few of the documents."

On the hearing of the motion both the appellant and the respondents appeared in person, and no note of any argument appeared to have been made. The judge of the Supreme Court (Rhodes J.) granted leave to re-list the suit.

At the hearing of the suit on December 18, 1947, the appellant deposed (inter alia) that there were only two publications made in the Nigeria Gazette and not three, and that he had had offers of £2,000 made to him for the purchase of the land but "they were waiting for the completion of the Gazette Notices."

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He also stated that the respondent during his occupation had removed some of the buildings on the land and rebuilt others. Rhodes J., in giving judgment, did not comment on the nine years' delay which had elapsed between the sale and the application to have the case re-listed, or on the reasons given by the appellant to excuse the delay, but found that owing to the fact that only two notices of the sale had been given the sale was irregular and null, and he stated that he was satisfied from the evidence that the appellant had sustained substantial injury by reason of the irregularity.

On appeal by the respondent to the West African Court of Appeal, the appeal was allowed, the court (Sir John Verity C.J., Sir Henry Blackall P. and Lewey J.) being of opinion that in the exercise of his discretion the trial judge did not appear to have taken into consideration all the relevant circumstances, including such questions as to the extent of the delay in making the application to re-list the case, the reasons for the delay, the nature of the claim and the effect of granting leave on the rights of the respondent.

The appellant appealed.

1952. December 3, 4, 8 and 9. *Cope Morgan Q.C.* and *F. H. Collier* for the appellant.

*R. Millner* and *T. O. Kellock* for the first respondent.

A number of authorities were cited in argument.

1953. January 12. The judgment of their Lordships was delivered by LORD OAKSEY, who stated the facts set out above and continued:—Their Lordships are in agreement with the West African Court of Appeal in thinking that the trial judge did not exercise his discretion judicially on these matters.

A number of technical points have been argued on both sides before their Lordships. It has been argued for the appellant that the respondent ought to have appealed against the order to re-list and that the laches was not taken as a formal point at the earliest possible moment. The parties, however, were not legally represented at the hearing to re-list, no note was taken of their arguments at that stage, the question of delay was put in the forefront of the cross-examination of the respondent at the hearing and counsel for the appellant before their Lordships recognized that the delay which had occurred was the real difficulty which he had to face.

In cases of laches the law was stated by Lord Blackburn in *Erlanger* v. *New Sombrero Phosphate Company*[1]: "In *Lindsay Petroleum Company* v. *Hurd*[2] it is said: 'The doctrine of laches in courts of equity is not an arbitrary or a technical doctrine. Where it would be *practically unjust* to give a

[1] (1878) 3 App.Cas. 1218, 1279. [2] (1874) L.R. 5 P.C. 221, 239.

" ' remedy, either because the party has, by his conduct done " ' that which might fairly be regarded as equivalent to a waiver " ' of it, or where, by his conduct and neglect he has, though " ' perhaps not waiving that remedy, yet put the other party in " ' a situation in which it would not be reasonable to place him " ' if the remedy were afterwards to be asserted, in either of " ' these cases lapse of time and delay are most material. But " ' in every case if an argument against relief, which otherwise " ' would be just, is founded upon mere delay, that delay of " ' course not amounting to a bar by any statute of limitations, " ' the validity of that defence must be tried upon principles " ' substantially equitable. Two circumstances always important " ' in such cases are the length of the delay and the nature of " ' the acts done during the interval, which might affect either " ' party and cause a balance of justice or injustice in taking the " ' one course or the other, so far as relates to the remedy.' I " have looked in vain for any authority which gives a more " distinct and definite rule than this; and I think, from the " nature of the inquiry, it must always be a question of more " or less, depending on the degree of diligence which might " reasonably be required, and the degree of change which has " occurred, whether the balance of justice or injustice is in " favour of granting the remedy or withholding it. The deter- " mination of such a question must largely depend on the turn " of mind of those who have to decide, and must therefore be " subject to uncertainty; but that, I think, is inherent in the " nature of the inquiry."

The length of the delay and the nature of the acts done during the interval in the present case, in their Lordships' opinion, cause a balance of justice in favour of the respondent, who had been in possession of the land for nine years at the time of the trial.

Reliance was placed on behalf of the appellant on *Weld* v. *Petre* [3] and *Clifford* v. *Clifford*,[4] but in their Lordships' view these cases are not in point in the present case. *Weld* v. *Petre* [3] was a case of a mortgage, and it was expressly stated by Russell J. that delay in exercising the rights of a mortgagee stood upon an entirely different footing from delays in cases such as the present, where the court is asked to re-open a matter which has been already decided. *Clifford* v. *Clifford* [4] was a case of nullity of marriage, and in such a case it is obvious that there may be circumstances which induce the delay which have no resemblance to the facts of the present case. In no other case to which their Lordships' attention has been drawn has there been anything like a delay of nine years, and having regard to the length of the delay, the inadequacy of the explanation of the delay and the consequences of setting aside the sale of land as against a bona fide purchaser for value who had been

[3] [1929] 1 Ch. 33; 44 T.L.R. 739. [4] [1948] P. 187; 64 T.L.R. 209; [1948] 1 All E.R. 394.

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in occupation of the land during the whole period and had apparently altered the buildings thereon, their Lordships are of opinion that the case ought not to have been re-listed, and having been re-listed ought to have been dismissed.

Their Lordships will therefore humbly advise Her Majesty that this appeal ought to be dismissed. The appellant must pay the costs of the appeal.

Solicitors: *Rexworthy, Bonser & Wadkin; A. L. Bryden & Williams.*

C. C.

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[QUEEN'S BENCH DIVISION.]

1953
*Jan.* 14.

## * CLARKE *v.* CHERRY.

Lord Goddard C.J., Croom-Johnson and Pearson JJ.

*Road Traffic—Goods vehicle—"C" licence—Van used by window-cleaner for carriage of buckets, cloths and leathers—"Goods" vehicle" used for carriage of goods—"Goods"—Road and Rail Traffic Act,* 1933 (23 & 24 *Geo.* 5, *c.* 53), *ss.* 1 (1), 36 (1).

A window-cleaner owned a motor-van which he used for carrying buckets, cloths and wash-leathers in connexion with his business. He was not in possession of a "C" licence in respect of the van.

*Held,* that buckets, cloths and wash-leathers were "goods" within section 36 (1) of the Road and Rail Traffic Act, 1933, and that therefore the van required a licence under section 1 (1) of the Act for their carriage.

CASE STATED.

At a court of summary jurisdiction sitting at Sleaford, an information was preferred by the appellant, Cecil Clarke, under section 1 of the Road and Rail Traffic Act, 1933, charging the respondent, Arthur Herbert Ernest Cherry, with having, on May 27, 1952, at Martin, Lincolnshire, unlawfully used a goods vehicle, namely, a Jowett motor-van, for the carriage of goods for or in connexion with his trade or business otherwise than under a licence granted under Part I of the Act.

The respondent, who was a window-cleaner, had adapted the motor-van to carry ladders, and also used it for carrying buckets, cloths and wash-leathers. The respondent was not in possession of a "C" licence in respect of the van.

The appellant contended that the van was a goods vehicle as defined by section 1 (2) of the Act, and that it was being used for or in connexion with a trade or business. The justices, being of opinion that the articles carried were solely and exclusively the tools of the respondent's trade and not goods carried for sale, held that the van was not being used for the carriage of goods and dismissed the information.

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*G. R. Swanwick*, for the appellant, referred to no cases. The respondent did not appear and was not represented.

LORD GODDARD C.J. I am not surprised that the justices tried to find a way to avoid a conviction in a case of this sort, but they cannot do it by reading into the statute words which are not there. The Road and Rail Traffic Act, 1933, s. 1, does not say anything about the goods carried being goods for sale. On the other hand, section 36 (1) provides: "'Goods' includes goods "or burden of any description." They would, therefore, include buckets, cloths and wash-leathers. Section 1 provides: "(1) "Subject to the provisions of this Part of this Act, no person "shall use a goods vehicle on a road for the carriage of goods— "(*a*) for hire or reward; or (*b*) for or in connexion with any trade "or business carried on by him, except under a licence. (2) In "this Part of this Act the expression 'goods vehicle' means a "motor vehicle constructed or adapted for use for the carriage "of goods . . ." Therefore, the respondent required a "C" licence which would entitle him to carry goods for or in connexion with his trade or business.

The case must go back to the justices with an intimation that an offence within section 1 (1) of the Act has been committed, but it is open to them to give a conditional discharge to the respondent if they think it right to do so.

CROOM-JOHNSON J. I agree, and for the same reasons.

PEARSON J. I agree.

*Case remitted.*

Solicitors: *Cunliffe & Airy.*

J. D. P.

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[PRIVY COUNCIL.]

* LETCHUMANAN CHETTIAR . . . APPELLANT:

AND

SADAYAPPA CHETTIAR . . . . RESPONDENT.

J. C.†

1953

*Jan.* 12.

ON APPEAL FROM THE COURT OF APPEAL, SUPREME COURT OF THE FEDERATION OF MALAYA.

*Malaya — Pre-occupation capital debt — Repayment — Whether prior demand by creditor—Onus of proof—Wrong direction—No substantial injustice—No ground for new trial—Debtor and Creditor (Occupation Period) Ordinance, No.* 42 *of* 1948, *s.* 4 (2) (*b*) (*ii*).

Section 4 (2) of the Debtor and Creditor (Occupation Period) Ordinance, 1948, of the Federation of Malaya provided, inter alia, that in any case where payment was made in occupation currency

† *Present*: LORD NORMAND, LORD COHEN, SIR JOHN BEAUMONT.

after December 31, 1943, of a pre-occupational capital debt which "if due was not demanded by the creditor," such payment should be revalued in accordance with the scale set out in the schedule to the Ordinance.

The trial judge held that under section 4 (2) the onus was on the respondent, on a claim for revaluation by the appellant, to prove that before repayment of a pre-occupational capital debt paid by the respondent in occupation currency to the appellant after December 31, 1943, there had been a demand for payment by the appellant. The trial judge held that the respondent, who had called only one witness, had failed to prove that any demand had in fact been made. The appellant had called no evidence. On appeal by the respondent, the Court of Appeal held that the onus of proving no demand was on the appellant, and that in the circumstances the proper course was not to order a new trial, but to enter judgment for the respondent.

On appeal by the appellant it was contended that in view of the wrong direction on onus by the trial judge the appellant had at the trial probably, or possibly, refrained from calling a witness whom he might have called, and in that way had suffered injustice in consequence of the judge's wrong direction:—

*Held*, that the Court of Appeal were right in their view as to the onus; that an erroneous direction on onus was ground for granting a new trial if the error had led to substantial injustice, but that the appellant had failed to show with any probability that injustice or prejudice had resulted from the trial judge's erroneous ruling on onus.

*Doe* d. *Bather* v. *R. Brayne* (1848) 5 C.B. 655, and *Brandford* v. *Freeman* (1850) 5 Ex. 734, applied.

Judgment of the Court of Appeal, Supreme Court of the Federation of Malaya, affirmed.

APPEAL (No. 45 of 1951) from a judgment of the Court of Appeal of the Supreme Court of the Federation of Malaya (May 29, 1951) reversing a judgment of Abbott J. sitting as judge of first instance in the High Court at Malacca (October 6, 1950).

The following introductory statement is taken from the judgment of the Judicial Committee. The questions at issue were concerned with the application of certain provisions of the Debtor and Creditor (Occupation Period) Ordinance, No. 42 of 1948 of the Federation of Malaya, which came into effect on October 1, 1948, and was designed to regulate the relationship of debtor and creditor as regarded debts incurred before and during the enemy occupation of the territory of the Federation. The period of occupation as defined by the Ordinance was from February 15, 1942, to September 5, 1945 (section 2 (1)).

In that period the Japanese issued a new dollar currency, referred to in the Ordinance as "occupation currency," which circulated freely throughout the Federation side by side with the existing Malayan currency. Occupation currency was used to meet and discharge liabilities and debts, but in the latter part of the occupation period it depreciated severely in terms of Malayan dollars and finally became valueless. It was to remedy injustices suffered by creditors who were repaid in depreciated occupation currency that the Ordinance was made.

The relevant provisions of the Ordinance were:—"Section "4 (1) Subject to the provisions of subsection (2) of this section, "where any payment was made during the occupation period "in Malayan currency or occupation currency by a debtor or "by his agent . . . to a creditor, or to his agent . . . and such "payment was made in respect of a pre-occupation debt, such "payment shall be a valid discharge of such pre-occupation debt "to the extent of the face value of such payment.

"(2) In any case . . . (*b*) Where such payment was made "after December 31, 1943, in occupation currency in respect of "a pre-occupation capital debt, exceeding 250 dollars in amount, "which . . . (ii) if due, was not demanded by the creditor or "by his agent on his behalf and was not payable within the "occupation period under a time essence contract . . . such "payment shall be revalued in accordance with the scale set "out in the schedule to this Ordinance and shall be a valid "discharge of such debt only to the extent of such revaluation." "Pre-occupation capital debt" was defined as meaning any pre-occupation debt other than a sum accruing due after the commencement of the occupation period in respect of rent or interest (section 4 (3)), and "pre-occupation debt" was defined as a debt payable by virtue of an obligation incurred prior to the commencement of the occupation period and accruing due at any time (section 2 (1)). There was a provision by which, for the purposes of the Ordinance, any person who had authority to act as agent for another immediately prior to the commencement of the occupation period was deemed, subject to certain safeguards, to have been the agent of his former principal to the extent that he continued, during the occupation period and while his former principal was absent, to act on behalf of his former principal in any matter which would have been within the scope of his former authority (section 2 (2)). There were also provisions enabling the creditor whose debt had been secured by a charge over property to have the property charged with the revalued balance of the debt and interest (section 11).

The facts were simple. In October, 1941, the appellant advanced 26,000 dollars to the respondent, secured by a mortgage. The debt was a pre-occupation capital debt. On July 16, 1943, the respondent paid to the appellant the sum of 10,000 dollars, and on September 25, 1944, a further sum of 16,000 dollars together with all interest accrued due. Those payments were in occupation currency. The mortgaged land was accordingly released from the mortgage and reconveyed by the appellant to the respondent.

The appellant's contention was that the payment of 16,000 dollars made on September 25, 1944, being a payment in occupation currency made after December 31, 1943, had not been demanded, though it was due, by him or his agent on his behalf, and should therefore be revalued under section 4 (2). By the application of the schedule to the Ordinance the sum

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of 16,000 dollars would then fall to be revalued at 1,142.86 dollars, with the result that of the capital sum of 26,000 dollars only 11,142.86 dollars would have been repaid, leaving an unpaid balance of 14,857.14 dollars.

The appellant, after giving notice to the respondent to reinstate the mortgage under section 11 (3) of the Ordinance, and after the refusal of the respondent to comply, instituted proceedings pursuant to section 11 (5) of the Ordinance by an originating summons dated December 30, 1949, claiming a declaration that the lands originally mortgaged were charged with the capital sum of 14,857.14 dollars with interest. The summons was supported by an affidavit of December 30, 1949, by one Karuppiah, who affirmed: "1. I am the attorney of the ". . . plaintiff." In the second and third paragraphs of the affidavit the history of the transaction was narrated. In paragraph 4 it was said, "My principal the plaintiff nor any other "person on his behalf demand payment of the principal sum "due under the said mortgage." It would be observed that the affidavit did not state that Karuppiah was the appellant's attorney when or before the repayments were made. An affidavit in answer was made on August 7, 1950, by Ramalingam Pillay, who deposed that he had been the respondent's attorney during the occupation period and that demands for repayment of the debt had been made verbally by the appellant's *then* attorney down to September, 1944. The implication was that Karuppiah had not been the appellant's attorney in the period down to September, 1944. No application was made to the court in order that either Karuppiah's or Ramalingam Pillay's evidence should be tested by cross-examination.

The case came before Abbott J. on October 6, 1950. It appeared from the formal order made by the court that the affidavit of Karuppiah was read in court but that the affidavit of Ramalingam Pillay was not read, and there was nothing in the record to show that Abbott J. regarded either affidavit as of any importance. At the outset of the hearing the appellant's advocate submitted that the issue was one of "demand" (that was, whether repayment had been demanded by the appellant before it was made) and that it was for the respondent to prove it. The respondent's advocate agreed, and the court accepted the view that the onus was on the respondent to show that a demand had been made. The respondent then adduced a witness named Murugappan. He deposed that he was the respondent's attorney and that he knew the appellant's attorney, who was then in court. He said that in the occupation period he was in Malacca, but that Ramalingam was then the respondent's attorney. He also said that the appellant's attorney was not then Karuppiah. As to the demand for repayment, he said that in the occupation period Ramalingam and he lived in the same house and shared a room, and that the appellant's attorney came several times to their house and demanded payment in his hearing. He was

cross-examined to credibility, and in answer to one question he said that all the other people who were present when the demands were made were now in India. The appellant's advocate at the end of Murugappan's evidence said that he would call no evidence.

The judgment of Abbott J. was very brief. He said, "The "evidence called upon the part of the defendant has failed to "satisfy me that any demand was in fact made. There must, "therefore, be judgment for the plaintiff with costs."

The respondent appealed, and in the Court of Appeal the judgment was given by Foster-Sutton C.J., with whom Taylor and Wilson JJ. concurred. The question mainly argued was that of onus and the learned Chief Justice held that the onus of proving no demand rested on the appellant, and in the result it was held that the proper course was not to grant a new trial, but to enter judgment for the respondent.

The appellant appealed.

1952. December 9. *H. J. Phillimore Q.C.* for the appellant. *C. Harvey Q.C.* and *Gwyn Morris* for the respondent.

The following cases were cited in argument: *Abdul Hameed Mohamed Ibrahim & Co.* v. *A. M. S. Nainam Sahib & Co.*[1]; *Official Assignee of the Estate of Cheah Soo Tuan* v. *Khoo Saw Cheow*[2]; *Quilter* v. *Mapleson*[3]; *Sanders* v. *Sanders*[4]; *Doe* d. *Bather* v. *Brayne*,[5] and *Brandford* v. *Freeman*.[6]

1953. January 12. The judgment of their Lordships was delivered by Lord NORMAND, who stated the facts set out above and continued: Their Lordships have not the smallest doubt that the opinion of the Court of Appeal on the question of onus is the correct view, for it was the appellant who relied on the terms of the Ordinance and it was therefore for him to bring himself within them. The judgment of the Chief Justice on this point is not now seriously challenged. It is not necessary to say more on this aspect of the case, but it does appear from the judgment that in at least one case decided by the Court of Appeal after the date of the judgment of Abbott J. in this case, the same question had arisen, and it is not unlikely that, as the appellant's counsel suggested, the practice in the courts of first instance had been proceeding on an erroneous view on the question of onus.

The Chief Justice then dealt with an argument that Karuppiah's affidavit was inadmissible under Order 36, r. 3, of the Rules of the Supreme Court, Straits Settlements, because it contained statements which the deponent was not able by his own knowledge to prove. On this the Chief Justice held that since the affidavit had not been objected to at the trial the complaint came too late; but he held that the affidavit had little

[1] [1951] 2 M.L.R. 71.
[2] [1931] A.C. 67, 69.
[3] (1882) 9 Q.B.D. 672, 675.
[4] (1881) 19 Ch.D. 373, 379.
[5] (1848) 5 C.B. 655, 670.
[6] (1850) 5 Ex. 734.

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evidentiary value in discharging the onus of proof. Their Lordships find it unnecessary to consider this matter further, for it was not argued to their Lordships that if the onus was on the appellant it had been discharged, or that the Court of Appeal should have given judgment for the appellant.

The true issue in the appeal is the last point dealt with by the Chief Justice, whether in the circumstances a new trial should be ordered. He held that the proper course was not to order a new trial but to enter judgment for the respondent. The reason given by him is that the appellant knew what the issue was from the affidavit of Karuppiah, and that there was no suggestion that he had been surprised. He cited a well-known passage from the speech of Lord Chelmsford in *Shedden* v. *Patrick and Attorney-General*[1]: "It is an invariable rule in all the courts, "and one founded upon the clearest principles of reason and "justice, that if evidence which either was in the possession of "parties at the time of a trial, or by proper diligence might have "been obtained, is either not produced, or has not been procured, "and the case is decided adversely to the side to which the "evidence was available, no opportunity for producing that "evidence ought to be given by the granting a new trial."

In the argument which the appellant's counsel addressed to their Lordships there was no challenge of the principle enunciated by Lord Chelmsford, and no contention that the appellant had been surprised. What was said was that the trial judge had decided the case on an erroneous view of the onus which had been accepted by him before any oral evidence was led, and that in consequence of the wrong direction upon onus the appellant had at the trial probably, or possibly, refrained from calling a witness whom he might have called, and that in this way the appellant had suffered injustice in consequence of the judge's wrong direction.

An erroneous direction on onus is ground for granting a new trial if the error has led to substantial injustice. That is the result of two decisions in the middle of last century cited by the appellant's counsel (*Doe* d. *Bather* v. *Brayne*,[2] *Brandford* v. *Freeman*[3]), in which the effect of an erroneous ruling as to the right to begin was the point under consideration. The rule established by these and other cases is repeated in Ord. 39, r. 6, of the Rules of the Supreme Court in England. There was some doubt whether it formed part of the law of Malaya. Their Lordships were not referred to any Malayan Ordinance or order or printed rule excluding it, and they will assume in favour of the appellant that it prevails in the courts of Malaya (Ordinance No. 43 of 1948, section 36 (2)). But it is necessary that the appellant should show that the condition on which the right to a new trial depends has been fulfilled. That condition is clearly

[1] (1869) L.R. 1 Sc. & Div. 470, 545.
[2] (1848) 5 C.B. 655.
[3] (1850) 5 Ex. 734.

stated by Pollock C.B. and by Parke B. in *Brandford* v. *Freeman*.[3] Pollock C.B. in that case cited from his own judgment in *Edwards* v. *Matthews*,[4] a passage in which he said[5] "that the "plaintiff or defendant having been called on to begin, when "proof of the issue lay on his adversary, is not a sufficient ground "for a new trial, unless it is manifest that the course of justice "has been thereby interfered with, and some substantial injury "effected." Parke B. said,[6] "This court has settled, that when "there has been a mere error with respect to the order of "beginning, as deduced from the pleadings, no new trial ought "to be granted; but that it is otherwise if the error has led to "substantial injustice." In *Sanders* v. *Sanders*,[7] Jessel M.R., dealing with an application to bring forward fresh evidence before the Court of Appeal, said[8]: "The application is for an indulgence. "He might have adduced the evidence in the court below. That "he might have shaped his case better in the court below is no "ground for leave to adduce fresh evidence before the Court "of Appeal. As it has often been said, nothing is more dangerous "than to allow fresh oral evidence to be introduced after a case "has been discussed in court. The exact point on which evidence "is wanted having thus been discovered, to allow fresh evidence "to be introduced at that stage would offer a strong temptation "to perjury." These considerations apply with at least equal force when the application is for a new trial.

Their Lordships must therefore consider whether the appellant has succeeded in making out a case of manifest injustice. He can do this by satisfying the Board that there is a strong probability that he has been prejudiced by the error of the trial judge in throwing the onus on his opponent. In considering this question their Lordships are not disposed to attach importance to the fact that at the trial the appellant's advocate himself appears to have taken the initiative in inducing the error, or to the fact that the respondent's advocate agreed that the onus lay on him and then changed his attitude in the Court of Appeal. The question where the onus lies is a question of law, and an admission of law may be subsequently withdrawn. There is also some reason for thinking that the two advocates were only stating to the trial judge what at the time was held by the courts of first instance to be the correct rule.

What is said is that at the moment when the respondent's only witness left the witness box, the appellant's counsel had to make up his mind whether he would adduce any evidence either to establish his own case or to rebut the respondent's case. He had in the appellant's attorney Karuppiah a witness present and available whom he might have called and who might have said that he was attorney for the appellant in the occupation period. Such evidence, if believed, would have given value to his own

[3] (1850) 5 Ex. 734.
[4] (1847) 4 D. & L. 721.
[5] 5 Ex. 734, 736.
[6] Ibid. 736.
[7] (1881) 19 Ch.D. 373.
[8] Ibid. 380.

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affidavit and would also have discredited the evidence for the respondent. It must, it was urged, be assumed that Karrupiah could have given this evidence, for to suppose otherwise would be to assume that his affidavit was put forward dishonestly and for the purpose of deceiving the court, and that was not a permissible assumption.

Ingenious as the argument is, their Lordships are unable to give their assent to it. It is all speculation and, if there were substance in it, it ought to have been developed in the Court of Appeal. It is going too far when it is said that an advocate did not adduce evidence which would have been so important to his case merely because he had in his favour a ruling on onus and because he had formed a low opinion of his adversary's evidence and believed that the judge would reject it. It is at least as probable that the appellant's advocate did not call Karuppiah because he feared that his evidence would not help or might even harm his case. But this is also a speculation. Their Lordships do not choose between the various possible explanations of the course taken by the advocate, and they certainly make no reflection whatever on his conduct of the case. Their opinion is that the appellant has failed to show with any probability that injustice or prejudice resulted from the ruling on onus.

Their Lordships will therefore humbly advise Her Majesty that the appeal should be dismissed. The appellant must pay the costs of the appeal.

Solicitors: *Bulcraig & Davis; Lawrance, Messer & Co.*

C. C.

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[CHANCERY DIVISION.]

1953
*Jan.* 21.
Roxburgh J.

* *In re* BATES, DECD. BATES *v.* RODWAY AND OTHERS.

[1952 B. No. 1222.]

*Family Provision—Estate under* £2,000*—Capital payments—Method of computation—Inheritance (Family Provision) Act,* 1938 (1 *&* 2 *Geo.* 6, *c.* 45), *s.* 1 (3), (4).

The plaintiff, whose husband made no provision for her in his will, applied to the court under the Inheritance (Family Provision) Act, 1938, for an order for her maintenance out of the testator's net estate. She had left the testator because of his cruelty.

The estate was under £2,000 in value, and the court was asked to order a capital payment of one-half of the capital under section 1 (4), or, alternatively, to order the maximum amount allowed by the Act under subsection (3) of section 1 plus supplementary payments of capital under subsection (4):—

*Held*, (1) that, even if the court had jurisdiction, it would not in the exercise of its discretion order payment of one-half of the

capital in the present case, but that the plaintiff was entitled to one-half of the income under subsection (3).

(2) The court had no jurisdiction to order further payments out of capital under subsection (4).

*Semble*, that where a capital payment was made under that subsection, the amount of capital which could be awarded was, as laid down in *In re Catmull* [1943] Ch. 262; 59 T.L.R. 319; [1943] 2 All E.R. 115, no more than the capitalized value of the maximum amount of income which could be awarded under subsection (3), and not, as suggested in *In re Vrint* [1940] Ch. 920; 56 T.L.R. 953; [1940] 3 All E.R. 470, half of the capital.

ADJOURNED SUMMONS.

Thomas Bates was married to the plaintiff on April 2, 1938. He made his will on July 27, 1951. He appointed the first defendant as his sole executor, and after making certain specific bequests he gave his residuary estate equally between two named charities.

In clause 5 of his will, the testator stated: "I desire to state "that the reason I have given my wife no benefit under this my "will is that she deserted me over six years ago and I have not "seen her since and the reason I have given my sons no bene-"fit . . . (other than as contained in clause 2 hereof) is that they "have had no communication with me for several years." The sons referred to were sons by a former marriage, and not by the testator's marriage with the plaintiff.

The evidence of the plaintiff was that she left the testator because he treated her with great cruelty. Her evidence was corroborated by her stepson, and was not contradicted.

The plaintiff applied to the court under the Inheritance (Family Provision) Act, 1938, for an order for her maintenance out of the testator's net estate. It was contended on her behalf that this case was one in which the maximum amount allowed under the Act should be ordered; and further that the estate being under £2,000, she should receive a capital payment under subsection (4) of section 1 of the Act.†

*W. A. Bagnall* for the plaintiff.

*I. J. Lindner* for the executor.

*L. H. L. Cohen* for one of the charities interested under the will.

† Inheritance (Family Provision) Act, 1938, s. 1 (3): "The amount of "the annual income which may be "made applicable for the maintenance "of a testator's dependants . . . shall "in no case be such as to render them "entitled under the testator's will as "varied by the order or orders to "more than the following fraction of "the annual income of his net estate, "that is to say:— . . . (*b*) if the tes-"tator . . . leaves a wife or husband "and no other dependant, one-half."

(4) "Where the value of the tes-"tator's net estate does not exceed "two thousand pounds, the court shall "have power to make an order pro-"viding for maintenance, in whole "or in part, by way of a payment of "capital, so however that the court, "in determining the amount of the "provision, shall give effect to the "principle of the last preceding sub-"section."

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BATES, DECD., *In re.* BATES *v.* RODWAY.

The cases referred to in argument are referred to in the judgment.

ROXBURGH J. having stated the facts continued:—It is plain that the testator so treated his wife that she had very good reason for leaving the matrimonial home.

The residuary legatees, who are charities, have very properly left the matter to me, not wishing to submit arguments against provision being made for her. As it has been left to me in that way, I need not give reasons for my conclusion that, in the circumstances of this case, I ought (subject to something which I shall say later) to award her the maximum permissible amount of one-half of the annual income of the net estate, which may be treated as £28 per annum, during her widowhood.

Matters of general interest now arise. Mr. Bagnall for the plaintiff is not content with that amount. The estate is under £2,000, and subsection (4) of section 1 of the Act is, therefore, brought into operation.

[His Lordship read the subsection.]

This difficult subsection has been twice considered in these courts. The first occasion was in *In re Vrint*,[1] in which Bennett J. said[2]: "The amount available in the circumstances of such a "case as this, where a testator leaves a wife and no other depen- "dant, is either one-half of the income or where, as in this case, "the testator's net estate does not exceed £2,000, one-half of "the capital."

That was a passing observation by Bennett J. It was not of any particular moment in the view which he took of the case before him. The point was not argued, and I can hardly think that he was consciously construing this difficult subsection by those random words, "one-half of the capital."

It may be, however, that I should have felt that I ought to give more weight to them than I do, if the matter had not been the subject-matter of a contrary decision of Uthwatt J. in *In re Catmull*.[3] There the point which arises under subsection (4), namely, whether the court can give one-half of the capital or whether it is limited to the capitalized value of the amount which could otherwise be given under subsection (3), was argued by counsel on both sides and decided by the judge. Mr. Myles, in his submission, said[4]: "The court has a discretion under sub- "section (4) to make a larger provision than it could under "subsection (3)." Mr. Astell Burt submitted[4]: "In making "an order for a capital payment, under section 1 (4), the "court cannot award more than the capitalized value of the "maximum amount of income which it would order under sub- "section (3)." The issue being thus joined, Uthwatt J. dealt at considerable length with the question. I shall not read the whole

[1] [1940] Ch. 920; 56 T.L.R. 953; [1940] 3 All E.R. 470.
[2] [1940] Ch. 920, 926.
[3] [1943] Ch. 262; 59 T.L.R. 319; [1943] 2 All E.R. 115.
[4] [1943] Ch. 262, 264.

passage, which is a long one,[5] but he came to the conclusion that the subsection was limited to the capitalized value of the provision which would otherwise be made under subsection (3).

Mr. Bagnall has submitted that that decision was obiter, and that I need not and ought not to follow it. I do not think that it was obiter, though I have not (for reasons which will appear in a moment) troubled counsel to look into the authorities on what is and what is not obiter, and therefore what I am saying may perhaps prove not to be right; I should myself, however, have hardly thought that it was obiter. Uthwatt J., having to exercise a discretion or not, first discussed and decided the area within which his discretion was to operate; and then, as a matter of discretion, he decided not to exercise it. It is because he did not exercise it that Mr. Bagnall says that his decision on the point is obiter, but I doubt that. The first thing that he had to do, in order to be in a proper position either to exercise or not to exercise his discretion, was to find out the area within which his discretion operated; and therefore (though I have not gone far into that question) I do not feel at all inclined to the view that it was obiter.

If I were driven to make up my mind on this point, I should decide that I was bound to follow *In re Catmull.*[6] I think that the point is difficult; but, in the view that I take of the circumstances of the present case, I need not pursue this question any further. Mr. Bagnall has asked me, first of all, to order an immediate lump sum payment to his client of one-half of the capital, without conditions. That I should not do in the exercise of my discretion, if I had jurisdiction to do it.

The next thing which he asked me to do was to order that she should receive one-half of the net income plus supplementary payments out of capital. That I plainly have no jurisdiction to do as that would certainly be violating the principle of subsection (3) of section 1, because it would in principle be giving her more than half the annual income.

Lastly, he asked me to give her the capitalized value of her widowhood interest. That I have jurisdiction to do—it is in accordance with the decision of Uthwatt J. in *In re Catmull* [6]—but I do not think that in this case it is expedient to do so.

It is for those reasons that I do not need finally to decide whether I am bound by *In re Catmull*,[6] though it appears to me that I am. The plaintiff will accordingly have £28 per annum, that is, half the net income during widowhood; it will be payable quarterly and run from the death of the testator.

*Order accordingly.*

Solicitors: *Theodore Goddard & Co. for Laurence Williams & Co., Bristol; Robins, Hay & Waters; G. & G. Keith.*

I. G. R. M.

[5] Ibid. 266, 267, 268.

[6] [1943] Ch. 262.

[QUEEN'S BENCH DIVISION.]

1952
*Dec.* 9,
10, 12.

McNair J.

* BRITISH ELECTRICAL AND ASSOCIATED INDUSTRIES (CARDIFF) LD. *v.* PATLEY PRESSINGS LD., REID BROS. (GLASGOW) LD., THIRD PARTY, DOUGLAS SCOTT LD., FOURTH PARTY.

[1951 B. 1639.]

*Contract—Uncertainty—Agreement "subject to force majeure conditions"—Variety of force majeure conditions in trade—Conditions applicable not agreed—No consensus ad idem—Agreement not enforceable—Sale of Goods—String contract—Repudiation by first and second sellers—Sub-buyer's acceptance of second seller's repudiation—Second seller's subsequent acceptance of first seller's repudiation—Damages.*

The terms of a contract note in relation to a sale of steel contained the following clause: "Subject to force majeure conditions that the government restricts the export of the material at the time of delivery." There was a variety of force majeure conditions in the trade, and no evidence that any particular ones had been agreed on. The buyers relied on that note as evidencing a contract:—

*Held*, that the buyers were unable to prove a contract (1), applying *G. Scammell and Nephew Ld.* v. *Ouston* [1941] A.C. 251; 57 T.L.R. 280; [1941] 1 All E.R. 14, because the words of the force majeure clause in the note were too obscure to be capable of any definite or precise meaning; and (2) because "conditions" in the phrase "force majeure conditions" meant "clauses" or "stipulations" and not "contingencies" or "circumstances," and that, it not being agreed which conditions applied, there was no consensus ad idem, and therefore no completed contract, on the principle of *Love & Stewart Ld.* v. *S. Instone & Co. Ld.* (1917) 33 T.L.R. 475, and *Bishop & Baxter Ld.* v. *Anglo-Eastern Trading and Industrial Co. Ld.* [1944] K.B. 12; 60 T.L.R. 37; [1943] 2 All E.R. 598; although (3), had the word "conditions" in the clause meant "contingencies" or "circumstances," it would not have been too vague to have contractual effect.

Where A agrees to sell goods to B who agrees to sell them to C, and A refuses to give delivery to B, and B refuses to give delivery to C, who accepts that refusal as a repudiation, A may be held liable for B's breach of his obligations to C, notwithstanding that B only accepted A's refusal as a repudiation after C accepted B's refusal as a repudiation.

*Howard* v. *Pickford Tool Co.* [1951] 1 K.B. 417 considered.

ACTION.

The plaintiffs, the British Electrical and Associated Industries (Cardiff) Ld., claimed damages from the defendants, Patley Pressings Ld., for repudiation of an agreement to sell to them some 200 tons of mild steel angles. They also claimed a declaration that they were entitled to be indemnified by the defendants, whom they alleged entered into the agreement of sale with knowledge that the plaintiffs intended to re-sell at a profit to an

American firm, against any claim which might be made against them by their sub-buyers by reason of their inability to deliver under a similar agreement to sell through the defendants defaulting in their agreement.

The defendants, in turn, brought in as third parties Reid Brothers (Glasgow) Ld., from whom they had purchased on similar terms, claiming against them a declaration of indemnity in respect of damages which they might be held liable to pay to the plaintiffs, and also damages in their own right. The third parties brought in as fourth parties, Douglas Scott & Sons Ld., from whom they had purchased, again on similar terms, claiming against them an indemnity in respect of any damages which they might be held liable to pay, and also damages.

By paragraph 1 of their statement of claim against the defendants the plaintiffs alleged: "By an agreement made orally "between the plaintiffs and the defendants on or about December "11, 1950, or alternatively by a contract in writing signed on "behalf of the defendants dated December 11, 1950, and a letter "from the plaintiffs to the defendants dated December 12, 1950, "the defendants agreed to sell to the plaintiffs 200 tons of mild "steel angles at the price of £32 15s. per ton F.O.B. London/ "Liverpool and to deliver the same in mid-March, 1951."

The two documents relied upon by the plaintiffs as constituting the agreement in writing were, first, a contract note dated December 11, 1950, signed by the director of the defendants, which was in the following terms:

"We confirm having sold you the following material:

"*Description*, mild steel angles." [The specification was then set out];

"*Quantity*, 200 tons; *price*, £32 15s. per ton, F.O.B. London/ "Liverpool; *delivery*, in mid-March;

"*Terms*, nett cash against wharfingers' receipt and weigh- "bridge ticket;

"*Conditions*, prime quality bars to B.S.S. 15 specification. "Bundled in one ton lots and subject to force majeure conditions "that the government restricts the export of the material at the "time of delivery."

The second document was a letter dated December 12 from the plaintiffs to the defendants accepting the offer made in the following terms: "We received your contract No. 1634A dated "December 11, according to which we have bought from you the "following materials." The terms as set out by the plaintiffs were substantially the same as those set out in the contract note.

In answer to the plaintiffs' claim the defendants alleged that the clause, "subject to force majeure conditions that the govern- "ment restricts the export of material at the time of delivery," were so uncertain as to render the contract unenforceable, since there was, in connexion with the trade, a variety of force majeure conditions and no agreement had been reached between the parties as to which of such conditions should apply.

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In the correspondence between the third parties and the defendants, and the fourth parties and the third parties, the suppliers stated in each case that they confirmed the orders given "subject to the appropriate Ministry of Supply orders . . . and "the materials will be charged at the prices ruling under such "orders at the date of dispatch." The fourth parties, and in turn the third parties, refused to deliver the goods ordered except at a price above the contract price. That refusal was accepted by the defendants in a letter of March 9, 1951, as a repudiation by the third parties. As between the third and fourth parties the refusal by the fourth parties to deliver was not accepted by the third parties as a repudiation by the fourth parties until July 5, 1951. It was accordingly contended by the fourth parties that, in those circumstances, they could not be liable for the third parties' breach of their contractual obligations to the defendants, since the final breach between the third parties and the defendants occurred on March 9, 1951, and could not, therefore, have been caused by the fourth parties' breach on July 5.

*Philip Goodenday* for the plaintiffs.
*Montague Waters* for the defendants.
*Lord Hailsham* for the third parties.
*J. F. Donaldson* for the fourth parties.

The following cases were cited in argument:—*Lebeaupin* v. *R. Crispin & Co.*[1]; *Bishop & Baxter Ltd.* v. *Anglo-Eastern Trading and Industrial Co. Ltd.*[2]; *Love & Stewart Ltd.* v. *S. Instone & Co. Ltd.*[3]; *Trans Trust S.P.R.L.* v. *Danubian Trading Co. Ltd.*[4]; *T. D. Bailey, Son & Co.* v. *Ross T. Smyth & Co. Ltd.*[5]; *Howard* v. *Pickford Tool Co.*[6]; *G. Scammell & Nephew Ltd.* v. *Ouston*[7]; *Zinc Corporation* v. *Hirsch*[8]; *Podar Trading Co. Ltd., Bombay* v. *Francois Tagher, Barcelona.*[9]

December 12, 1952. MCNAIR J., after stating the facts, said that, in his opinion, the contract note of December 11, 1950, and the plaintiffs' letter of acceptance of the following day did not purport to be an offer and acceptance constituting a written contract, but merely purported to confirm an oral contract which had been already made between the plaintiffs and the defendants. [His lordship continued:] Accepting for a moment that the contract note constitutes an admission by the defendants of the terms of the oral agreement, the first question which I have to

[1] [1920] 2 K.B. 714; 36 T.L.R. 739.
[2] [1944] K.B. 12; 60 T.L.R. 37; [1943] 2 All E.R. 598.
[3] (1917) 33 T.L.R. 475.
[4] [1952] 2 Q.B. 297; [1952] 1 T.L.R. 1066; [1952] 1 All E.R. 970.
[5] 45 Com.Cas. 292; 56 T.L.R. 825; [1940] 3 All E.R. 60.
[6] [1951] 1 K.B. 417.
[7] [1941] A.C. 251; 57 T.L.R. 280; [1941] 1 All E.R. 14.
[8] [1916] 1 K.B. 541; 32 T.L.R. 232.
[9] [1949] 2 K.B. 277; 65 T.L.R 433; [1949] 2 All E.R. 62.

determine is whether or not the words "subject to force majeure "conditions, that the government restricts the export of material "at the time of delivery," are words which prevent the court from holding that any enforceable contract was made. In my judgment, they are.

In the first place, I consider that, whether the word "condi- "tions" means "stipulations" or "clauses" on the one hand, or "contingencies" or "circumstances" on the other hand, the whole sentence is so vague and uncertain as to be incapable of any precise meaning and so brings the case within the principles stated in the House of Lords in *G. Scammell & Nephew Ld.* v. *Ouston*.[1] The passages which, in my judgment, are particularly relevant on this matter occur in the speech of Lord Maugham, where he said[2]: "In order to constitute a valid contract the "parties must so express themselves that their meaning can be "determined with a reasonable degree of certainty," and in the speech of Lord Wright,[3] where he said that the first ground on which the court ought to hold on the facts of that case that there was no contract was "that the language used was so "obscure and so incapable of any definite or precise meaning that "the court is unable to attribute to the parties any particular "contractual intention."

In the second place, however, I consider that the word "conditions" in this context, as a matter of construction, quite clearly means "clauses" or "stipulations" and not "contingencies" or "circumstances." If "conditions" means "contingencies" or "circumstances" the word adds nothing to the phrase "force majeure." Furthermore, such a construction would involve giving a different meaning to the word "conditions" where it appears in the phrase under construction from that which it bears in the sidenote to that particular paragraph. If, accordingly, as I hold, the word "conditions" means "clauses" or "stipulations," then, there being evidence given in the action before me that there was in the trade a variety of force majeure conditions, this case falls quite plainly within the line of authority of such cases as *Love & Stewart Ld.* v. *S. Instone & Co. Ld.*,[4] in which the House of Lords had to consider the effect of a contract containing the words "subject to strike and lock-out clauses," and within the principle stated in *G. Scammell & Nephew Ld.* v. *Ouston*,[5] to which I have already referred (where the phrase was "on "hire-purchase terms"), and *Bishop & Baxter Ld.* v. *Anglo-Eastern Trading and Industrial Co. Ld.*,[6] where the Court of Appeal, in considering a purported agreement (which contained the phrase "subject to war clause") held that, as the war clause

[1] [1941] A.C. 251; 57 T.L.R. 280; [1941] 1 All E.R. 14.
[2] [1941] A.C. 251, 255.
[3] Ibid. 268.
[4] (1917) 33 T.L.R. 475.
[5] [1941] A.C. 251; 57 T.L.R. 280; [1941] 1 All E.R. 14.
[6] [1944] K.B. 12; 60 T.L.R. 37; [1943] 2 All E.R. 598.

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took many forms, and as there was no evidence that the parties had any particular form of clause in mind, there was no consensus ad idem and, therefore, no completed contract.

Those cases seem to me to establish that, notwithstanding that the parties may have thought and acted on the basis that a contract existed between them, no consensus ad idem will be held to exist where there still remains to be negotiated and agreed the exact form of the clauses or conditions referred to by the parties. So far, I have considered the matter solely on the basis of this contract note; but the matter was made even clearer by the evidence given on behalf of the defendants by their director, which established to my satisfaction that in the negotiations the parties must be taken to have used the term "conditions" in the sense which I have indicated.

Accordingly, the plaintiffs' claim against the defendants breaks down in limine on account of their failure to prove any concluded contract. If I had been satisfied that the parties had reached contractual certainty in the terms pleaded and, furthermore, that there was a sufficient note or memorandum of their agreement to satisfy section 4 of the Sale of Goods Act, 1893, I should have had no hesitation at all in holding (1) that the defendants knew that the plaintiffs required the goods and entered into the agreement for the purpose of re-selling at a profit, and (2) that the defendants, by refusing to deliver the goods of the description called for by the contract, except against payment of an increased price, repudiated their contractual obligations, which repudiation the plaintiffs, by the issue of the writ herein on April 5, 1951, treated as a final breach entitling them to damages. I would have assessed those damages at the sum of £250, being the difference between the contract price of £32 15s. per ton and the market price of £34 per ton (for which the plaintiffs contended, and which was agreed between these parties for this purpose).

On the other hand, I should not, as at present advised, have allowed the plaintiffs' claim for a declaration of indemnity as prayed for, and this for two reasons: first, because I am not satisfied that the plaintiffs' liability, if any, under their sub-sale to their American buyers arose from the defendants' default and, secondly, because I think that the decision of the Court of Appeal in *Trans Trust S.P.R.L.* v. *Danubian Trading Co., Ld.*[7] would have precluded me from making the declaration in the form asked for. I confess humbly, with respect, to some difficulty in understanding fully the limitations imposed by that judgment upon a judge of first instance in making declarations of this nature which, so far as my experience goes, have been granted more or less as a matter of form in the case of this sort of contract; but the Court of Appeal have taken the view that, at any rate on the facts of the *Trans Trust* case,[7] which, on this

[7] [1952] 2 Q.B. 297; [1952] 1 T.L.R. 1066; [1952] 1 All E.R. 970.

point, seem to me to be indistinguishable from the facts of this case, it is undesirable that a declaration for an indemnity should be granted. I would accordingly have followed that decision had it become necessary.

I next turn to the claim as between the defendants and the third parties. The conclusion which I have reached in the proceedings between the plaintiffs and the defendants disposes of the claim for an indemnity in the third party action; but there remains to be considered the claim for damages. For the reasons which I stated earlier, I am of opinion that the words " subject to force majeure conditions " (which appear in a context similar to that already considered in the documents alleged to constitute a contract between these parties) preclude me from holding that any completed consensus ad idem was reached, on the ground that, in this phrase, " conditions " means " clauses " or " stipulations " and not " contingencies " or " circumstances." Had I been of the opinion that the words had either of the latter meanings (*i.e.*, meant either " contingencies " or " cir- " cumstances ") I should not have acceded to Lord Hailsham's submission that, on that hypothesis, the phrase was too vague to have contractual effect. Though many cases have been cited to me in which obvious difficulty has been experienced in construing the phrase " force majeure " (see in particular *Lebeaupin* v. *Richard Crispin and Co.*[8]) in none of those cases was it considered that the phrase was too vague for construction. Nor would I have accepted the further submission that the phrase was too vague in the sense that it did not state the legal consequences which would follow on proof of force majeure, *i.e.*, whether there should be cancellation or dissolution. I am quite satisfied that an agreement for sale which was otherwise precise and contained the phrase " subject to force majeure " would be a valid and enforceable contract.

[His lordship then referred to the relevant correspondence and said that had it not been for the decision at which he had arrived as to the meaning of force majeure conditions in the contracts he should have held that there was a firm contract between the defendants and the third parties, which had been repudiated by the third parties on March 9, and he should have assessed the damages accordingly at the sum of £400 in the case of the defendants and the third parties. Continuing, his lordship said:] Now, as between the third parties and fourth parties, the contractual documents which are material are, so far as is material, identical with those passing between the defendants and the third parties. For the reasons indicated above, I hold that no contract was established between these parties by reason of the use of the phrase " subject to force " majeure conditions "; but if I be wrong on this I should have held that there was a firm contract at £31 5s. per ton (subject

[8] [1920] 2 K.B. 714; 36 T.L.R. 739.

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to variation by the Ministry of Supply or by reason of Ministry of Supply orders, which in fact were non-existent) and that no fixed delivery date was agreed on.

On the above hypothesis, the question whether there was default by the sellers and the question of damages payable by the fourth parties do not fall to be determined on precisely the same lines as in the previous instance, since it is quite clear that, though the third parties in my view wrongfully insisted on an unauthorized price increase as early as February 23, and thereafter attempted to pass on successive increases of price and never departed from that attitude, the third parties, who were taking rather the same view as the fourth parties of this matter, never in fact accepted that conduct by the fourth parties as a repudiation of their contract until July 5, 1951, when the fourth party notice in these proceedings was issued. In the first place, it appears that at that date there was a final contractual default by the fourth parties which would have entitled the third parties to a claim for damages, but it was argued by Mr. Donaldson on behalf of the fourth parties that in any event the fourth parties could not be held liable for the third parties' breach of their contractual obligations towards the defendants since, as between these parties, the final breach occurred on March 9, and, so it was argued, could not have been caused by the fourth parties' breach on July 5.

Now, this argument, though ingenious and at first sight attractive, is, in my judgment, wholly fallacious and is based on a misreading of the judgment of the Court of Appeal in *Howard* v. *Pickford Tool Co.*[9] Particular reliance was placed on the language of Asquith L.J., who said, "An unaccepted repudiation is a thing writ in water and of no value to anybody: it confers no legal rights of any sort or kind," and that observation no doubt was perfectly accurate in relation to the subject-matter which the Court of Appeal was then considering; but here it seems to me that it would be wholly artificial and entirely wrong to say that the breach by the third parties in failing to make delivery, which was accepted as a final breach on March 9, was not caused by the wrongful act of the fourth parties, then still subsisting and never withdrawn, in refusing to make delivery except at the increased price. But looking at it from the point of view of common sense, and, I believe, also from the point of view of sound law, the third parties' breach would, on the hypothesis stated, have been quite clearly proved to have been caused by the wrongful act of the fourth parties. However, that matter does not arise necessarily for my decision.

As regards damages, had it been necessary for me to make any assessment as between the third parties and fourth parties, I should have held that the market price at the date of the

[9] [1951] 1 K.B. 417, 421.

accepted breach, namely, July 5, 1951, was not less than £39 5s. 0d. per ton.

The result of that is that each of the proceedings along the line fails.

*Judgment for the defendants against the plaintiffs; for the third parties against the defendants; and for the fourth parties against the third parties.*

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Solicitors: *Alexander Fine & Co.; Sylvester, Amiel & Co.; Berrymans, for Borland, King, and Stewart, Glasgow; Ernest W. Long & Co.*

P. B. D.

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[QUEEN'S BENCH DIVISION.]

## * DAWSON *v.* EUXINE SHIPPING CO. LD.

1953 *Jan.* 14, 15.

McNair J.

*Shipping—Dock—Gangway leading from ship to wharf—Duty to provide "safe means of access"—Whether heads of gangway must be safe—Meaning—Docks Regulations,* 1934 (*S.R. & O.* 1934, *No.* 279), *reg.* 9.

Regulation 9 of the Docks Regulations, 1934, provides: "If a "ship is lying at a wharf . . . for the purpose of loading . . . "there shall be safe means of access for the use of persons employed "at such times as they have to pass from the ship to the shore or "from the shore to the ship as follows:—(*a*) Where reasonably "practicable the ship's accommodation ladder or a gangway or a "similar construction not less than twenty-two inches wide, "properly secured, and fenced throughout on each side to a clear "height of two feet nine inches by means of upper and lower rails, "taut ropes or chains or by other equally safe means, . . . (*b*) In "other cases a ladder of sound material and adequate length which "shall be properly secured to prevent slipping. . . ."

Regulation 9 imposes an obligation on shipowners to provide a "safe means of access" and paragraphs (*a*) and (*b*) after the words "as follows" are not words of limitation, but words which prescribe what has to be done in addition to providing a safe means of access. A shipowner would not, therefore, escape a charge of breach of statutory duty merely by showing that he had provided a gangway which satisfied paragraph (*a*) of the regulation, but where the plaintiff, who was injured by falling on a gangway, had not established, as he had contended, that the treads on the gangway,—which otherwise satisfied paragraph (*a*)—were in an unsafe condition, the gangway did provide a safe means of access within the meaning of the regulation.

ACTION.

The plaintiff, Francis Dawson, who was a licensed lighterman in the Port of London and a freeman of the river, employed by Silvertown Services Ltd., was on February 22, 1951, proceeding

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[Reported by Miss C. J. ELLIS, Barrister-at-Law.]

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down the gangway of the *s.s. Henzee*, then loading at Symonds Wharf, having marshalled barges bringing up cargo. The gangway ran from the deck of Symonds Wharf to the ship's rail at an angle of 45 degrees. The plaintiff slipped at the top of the gangway, suffering injuries. He tore the supraspinatus tendon of his right shoulder, and was unable to do any work at all from February 23 until October 1, 1951, and was rendered incapable ever thereafter of performing his work as a lighterman.

The plaintiff brought this action against the Euxine Shipping Co. Ld., as owners of the *s.s. Henzee*, claiming damages in respect of those injuries (1) on the ground that the defendants were in breach of regulation 9 of the Docks Regulations, 1934; and (2) alleging breach of the common law duty owed by the defendants, as occupiers of the *s.s. Henzee*, to him as invitee. The plaintiff contended that the treads of the gangway were in an unsafe condition.

The defendants denied liability and pleaded that there had been no breach by them of either their statutory or common law duty to the plaintiff.

*W. G. Wingate* for the plaintiff.

*Montague Berryman Q.C.* and *Peter Dow* for the defendants.

The following cases were cited in argument: *Kininmonth* v. *William France, Fenwick & Co. Ld.*[1]; *Harvey* v. *Royal Mail Lines Ld.*[2]; *London Graving Dock Co. Ld.* v. *Horton.*[3]

It was conceded that the plaintiff was a " person employed " within the meaning of the regulations.

MCNAIR J. said, in the course of his judgment:—The first question is whether there has been a breach of regulation 9 of the Docks Regulations. [His Lordship read the regulation and continued:] The gangway in question was one which, by reason of its dimensions, satisfied paragraph (*a*). The gangway was 24 feet long; it was two feet six inches wide, and there were across the floor of the gangway cross-treads 12 inches apart and composed of battens which were said to be of hardwood one and a quarter inches square. Along either side of this gangway there were iron stanchions some three feet apart, and through a ring at the top of those iron stanchions there ran a rope, and through rings half way down there ran a second rope. That gangway, by reason of those dimensions, as I have said, satisfied paragraph (*a*) of regulation 9.

The first submission for the defendants was that by satisfying paragraph (*a*) they had wholly satisfied the obligation imposed

[1] (1949) 65 T.L.R. 285; 82 Ll.L. Rep. 768.

[2] (1941) 65 T.L.R. 286n.; 82 Ll. L.Rep. 778n.

[3] [1951] A.C. 737; [1951] 1 T.L.R. 949; [1951] 2 All E.R. 1.

on them by regulation 9. It seems to me that that submission is not well founded. The obligation imposed by paragraph 9 is that "there shall be safe means of access." True that is followed by the words "as follows," and then there are set out paragraphs (*a*) and (*b*); but I think, applying a reasonable construction to it, that those words are not words of limitation, but are words which prescribe what has to be done in addition to the provision of a safe means of access. In other words, where reasonably practicable, a ship's accommodation ladder or a gangway of the dimensions set out must be provided, and, where that is not reasonably practicable, that is, "in other cases," a ladder of sound material and adequate length must be provided. But, whichever of those paragraphs is applicable, the means of access must, to satisfy the regulation, be safe within the meaning of the regulation.

I think that that construction follows from the ordinary reading of the words, and it conforms with the whole scheme of these regulations and similar regulations made under the Act. Of course, when considering whether a means of access is safe, one has to have regard to the persons for whose protection the provision is made.

Accordingly, in my judgment, the defendants do not escape the charge of breach of statutory duty merely by proof that they had provided a gangway which satisfied paragraph (*a*) of regulation 9.

The main issue in the case, however, is whether or not the treads of that gangway were at the material time in a safe condition. [His Lordship considered the evidence on that matter and continued:] In the result I have come to a clear conclusion that this gangway did provide a safe means of access within the meaning of paragraph 9 of the Docks Regulations. I am not saying that the treads were as new, but the gangway with the treads in the condition in which they were was a safe means of access for the persons for whom the regulations are made, namely, for persons who are employed in the processes of loading and unloading.

That conclusion also disposes of the claim based on common law, because the obligation under the Factories Acts, as I see it, is a higher obligation than that imposed at common law, on the construction which I have placed upon the regulation.

[His Lordship then considered the question of damages, and said that had he found in the plaintiff's favour he would have assessed them at £3,000.]

*Judgment for the defendants.*

Solicitors: *Pattinson & Brewer; Botterell & Roche.*

[QUEEN'S BENCH DIVISION.]

1953
*Jan.* 19.

## * CARNILL *v.* EDWARDS AND OTHERS.

Lord Goddard C.J., Croom-Johnson and Pearson JJ.

*Vagrancy—Common prostitute—Indecent act in parked motor car—Whether an offence—Vagrancy Act*, 1824 (5 *Geo.* 4, *c.* 83), *s.* 3.

A prostitute who behaves in an indecent manner in a motor car parked in a public highway is not "wandering in the public streets "or public highways," and accordingly does not commit an offence under section 3 of the Vagrancy Act, 1824.

*Semble*, if a passer-by can see her so behave, she commits a common law misdemeanour.

CASE STATED by Sheffield justices.

The appellant prosecutor, a superintendent of police, preferred four informations against two women and a man. Each woman was charged for that she "being a common prostitute, wandering "in the public highway did behave in an indecent manner in a "public highway called Claywheels Lane, there situate; con-"trary to section 3 of the Vagrancy Act, 1824."[1] The man was charged in connexion with each woman that he "unlawfully did "aid, abet, counsel or procure . . . a common prostitute in the "commission of an act of indecency in Claywheels Lane, a public "highway; contrary to section 5 of the Summary Jurisdiction "Act, 1848."[2]

At the hearing of the informations the following facts were proved or admitted:—The women were common prostitutes. On the evening of April 23, 1952, the two women got into the man's motor car in a street in the centre of Sheffield and were driven by him to Claywheels Lane, in the suburbs. The man parked the car on waste land about six yards from the lane. Acts of indecency took place in the car, but were not observable except by a person who shone a torch on to the car, as did the police officer.

The justices were of the opinion that under the circumstances of the case the prostitutes could not be held to be wandering in a specific street within the meaning of section 3 of the Vagrancy Act, 1824, and they dismissed the informations.

*G. F. Leslie* for the prosecutor.

*J. R. Cumming-Bruce* for the defendants.

[1] Vagrancy Act, 1824, s. 3: ". . . "every common prostitute wander-"ing in the public streets or public "highways . . . and behaving in a "riotous or indecent manner . . . shall "be deemed an idle and disorderly "person within the . . . meaning of "this Act; and it shall be lawful for "any justice of the peace to commit "such offender . . . to the house of "correction, there to be kept . . . for "any time not exceeding one calendar "month."

[2] Summary Jurisdiction Act, 1848, s. 5: "Every person who shall aid, "abet, counsel, or procure the com-"mission of any offence which is ". . . punishable on summary con-"viction, shall be liable to be pro-"ceeded against and convicted for "the same, . . . and shall be liable "on conviction to the same . . . "punishment as such principal offen-"der is . . . by law liable. . . ."

[Reported by Miss C. J. ELLIS, Barrister-at-Law.]

No cases were cited in argument.

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CARNILL v. EDWARDS.

LORD GODDARD C.J. This is a case stated by justices for the city of Sheffield, before whom three people, two prostitutes and a man, were charged under the Vagrancy Act. The two women were charged that each "being a common prostitute, wandering "in the public highway did behave in an indecent manner in a "public highway called Claywheels Lane, there situate." They were charged with wandering in Claywheels Lane and committing an indecent act, and the man was charged with aiding and abetting.

The facts stated show that this man was driving in a motor car and that he picked up these two prostitutes. He drove them out to Claywheels Lane, on the outskirts of Sheffield, and some actual acts of indecency took place in the motor car. It might be a very good thing, perhaps, as one knows that in these days, certainly in Hyde Park, women get into motor cars and commit acts of indecency, if that itself was made an offence. It could be made an offence for a prostitute to accept the invitation of a man to get into a motor car and, in the case of a man, to invite her. It could also be made an offence to commit indecent acts in a motor car even though the woman were not a common prostitute. Of course, if an indecent act is committed in a car standing on the highway in such a way that it can be seen by a passer-by, that is probably a common law misdemeanour, but we are not concerned with that; and we must not strain the law merely because these two women are common prostitutes or because there is a very laudable desire, no doubt, to clean up the city of Sheffield.

I think that the justices came to a proper decision. I cannot see how it can be said that, if a woman accepts an invitation and gets into a motor car, when they get to their destination the woman can be said to be wandering in the street. She is not wandering in the street; she is sitting in the motor car. The justices seem to have dismissed this case properly, but I am not sure that I follow their grounds. Their finding was: "We "being of opinion that under the circumstances of the case "the prostitutes could not be held to be wandering in a specific "street within the meaning of section 3 of the Vagrancy Act, "1824, dismissed the said informations." If they had said: "We "were of opinion that the prostitutes could not be said to be "wandering in Claywheels Lane," I quite agree, because they were not; they were sitting in a motor car in Claywheels Lane. My only doubt is whether the justices thought that a woman must wander in a specific street, but I do not think that they did, because the section talks about a common prostitute "wandering "in the public streets or highways," but it does not matter whether she wanders up and down one street or more than one. What I think the justices meant to find, and what commends

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itself to the court, is that in the case of the specific street mentioned in the informations, they were not wandering at all.

For these reasons we think that the justices came to a correct determination in point of law and the appeal must be dismissed with costs.

CROOM-JOHNSON J. I think that the justices have arrived at the right conclusion for the wrong reasons.

PEARSON J. I agree.

*Appeal dismissed.*

Solicitors: *Sharpe, Pritchard & Co., for John Heys, Town Clerk, Sheffield; Jackson & Jackson, for Irwin Mitchell & Co., Sheffield.*

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[COURT OF APPEAL.]

C. A.

1953
*Jan.* 12, 13.

## * RUSHTON *v.* NATIONAL COAL BOARD.

[1950 R. No. 1794.]

Singleton, Birkett and Romer L.JJ.

*Damages—Personal injuries—Loss of arm—Loss of amenities of life not measurable in money—Impossibility of standardizing damages—Guidance from awards in previous cases.*

The plaintiff, while working in a coal mine, sustained severe injuries and the loss of an arm through the defendant employers' breach of statutory duty. The defendants awarded him a permanent pension, and provided him with alternative employment, with the result that his actual loss of earnings was relatively small. The trial judge, who, on the plaintiff's claim for damages, expressed the opinion that the loss of amenities of life resulting from the injuries could not really be compensated by money, assessed damages at £10,000. On appeal by the defendants against the amount of damages:—

*Held*, reducing the damages awarded to £7,000, that in assessing damages for personal injuries in cases where the loss of amenities of life is such that money cannot be any true compensation, although the courts cannot apply any uniform standard, they will have regard to and be guided by the general principles which have been applied in decisions in comparable cases.

APPEAL from Byrne J.

On April 18, 1950, the plaintiff, James Rushton, then aged 36, who was employed by the defendants, the National Coal Board, at Cronton Colliery, Lancashire, tripped and fell over a sleeper, and his gloved right hand was caught up in the moving part of an overhead conveyor belt. His right arm with part of the scapula and muscles was torn from his body. In the result he became a one-armed man, and his injury was such that it was impossible to fix an artificial limb as there were no muscles to

which to fasten it; he would always have to wear a bandage or pad over the injured part, and would require help in putting it on. He also suffered pain in the phantom limb. The plaintiff also suffered fractures of ribs which caused a pneumothorax followed by pneumonia, and though an X-ray examination showed no disease of the chest, the plaintiff had a cough, and one doctor who gave evidence at the trial said that there was a condition of chronic bronchitis.

The plaintiff was discharged after three weeks in hospital, and after about 11 weeks the defendants offered him work as a clerk at the colliery at a wage about the same as his pre-accident wage in the mine, and about 19s. less than the wage he would have been earning as a labourer in the mine at the date of the trial, namely, £7 5s. The defendants also awarded him a permanent pension of £120 a year. After 14 months as a clerk, however, the plaintiff set up a duplicating business of his own, though at the trial it was stated that the clerical position remained open to him.

Before the accident, the plaintiff had intended to make commercial art his main occupation, but after six years in the forces he had had some domestic trouble and had gone to work as a loader in the mine.

The plaintiff brought an action against the defendants claiming damages for negligence and breach of statutory duty under section 55 of the Coal Mines Act, 1911. On June 27, 1952, Byrne J. gave judgment in his favour, holding that the defendants were in breach of the statutory duty which they owed to him. In assessing damages he said that money could not compensate for the plaintiff's loss of enjoyment or the curtailment of his ability to earn his living as a commercial artist, and taking into account the pension of £120 and the amount the plaintiff was then earning and might earn in the future, he awarded £10,000 damages, including agreed special damages of £83 14s. 4d.

The defendants appealed only against the amount of damages awarded.

*Gerald Gardiner Q.C.* and *H. S. L. Rigg* for the National Coal Board.

*E. Wooll Q.C.* and *A. D. Pappworth* for the plaintiff.

The following cases were cited in argument: *Heaps* v. *Perrite Ltd.*[1]; *Billingham* v. *Hughes*[2]; *Barcock* v. *Brighton Corporation*[3]; *Bird* v. *Cocking & Sons Ltd.*[4]; and *McCarthy* v. *Coldair Ltd.*[5]

SINGLETON L.J. stated the facts and continued: It is true, as Mr. Wooll put it, that a man who has been injured is not

[1] [1937] 2 All E.R. 60.
[2] [1949] 1 K.B. 643; 65 T.L.R. 246; [1949] 1 All E.R. 684.
[3] [1949] 1 K.B. 339; 65 T.L.R. 90; [1949] 1 All E.R. 251.
[4] [1951] 2 T.L.R. 1260.
[5] [1951] 2 T.L.R. 1226.

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bound to take every offer of work made to him; but this man after the accident had accepted work as a clerk, and as a clerk did earn, and could have continued to earn, as a clerk, wages almost as high as he was earning at the date of the accident; so that the loss of earnings was only a small part of the loss in this case. The out-of-pocket loss at the date of the trial was only some £83, and that was included in the general award of £10,000 damages.

When damages have to be assessed in a case of this kind there are many elements for consideration: the pain and suffering undergone and which may occur in the future; the loss of some of the amenities of life; the fact that a man with an injury of this kind will always require some measure of help, even though he may be able to earn considerable money. These are some of the matters which have to be taken into consideration, and another is the fact that his earnings will probably be less than they were before.

Mr. Gerald Gardiner directed our attention to a number of cases which have been decided in the courts recently, and submitted that, however one looked at this case, the award of £10,000 by way of damages was too high and was completely out of line with the decisions of this court and of judges of the Queen's Bench Division recently.

Mr. Wooll rightly pointed out that the circumstances of two different cases were not alike, and that little help was to be gained from looking at what a particular judge gave or what this court awarded in the case of a different injury or an injury of a different kind, and that, however much one tried, it was impossible to standardize damages. There is foundation for Mr. Wooll's remark that it is impossible to standardize damages.

I think myself that the matter was perhaps best put by Birkett L.J. in *Bird* v. *Cocking & Sons Ld.*[1] When the appeal to this court has been against the assessment of damages, we have been reminded time and again that we ought to interfere if the damages were so low that it could be said that there was a wholly erroneous estimate of damages; and, on the other hand, we have been reminded that we ought to interfere if the damages were inordinately high.

Birkett L.J. in *Bird* v. *Cocking & Sons Ld.*[2] said: "The assessment of damages in cases of personal injuries is, perhaps, one of the most difficult tasks which a judge has to perform, and certainly the task is no lighter when the appellate court is asked to reconsider the assessment made by a judge in the court below. The task is so difficult because the elements which must be considered in forming the assessment in any given case vary so infinitely from other cases that there can be no fixed and unalterable standard for assessing the amounts for those particular elements. Although there is no fixed and

[1] [1951] 2 T.L.R. 1260. [2] Ibid. 1263.

" unalterable standard, the courts have been making these assess-
" ments over many years, and I think that they do form some
" guide to the kind of figure which is appropriate to the facts
" of any particular case, it being for the judge, or for the appellate
" court if they are reviewing the matter, to consider the special
" facts in each case; for I agree with Mr. Veale that one case
" cannot really be compared with another. The only thing that
" can be done is to show how other cases may be a guide, and
" when, therefore, a particular matter comes for review one of
" the questions is, how does this accord with the general run
" of assessments made over the years in comparable cases ?
" Judging by that test the sum which Streatfeild J. awarded
" was quite at variance and was, indeed, much too high."

That passage expresses everything that I would say on the two views put before us in this court as to the use of other cases. It is impossible to standardize damages, but it is the duty of this court, so far as it can, when there is an appeal in this class of case, to see that the general principles are followed so far as possible, so that there may be, again, so far as is possible, the same approach in the cases of all litigants who suffer from personal injuries and for all defendants. More than that the court cannot do; and with that in mind I come back to the facts in this case.

[His Lordship reviewed the injuries sustained by the plaintiff and continued:] Bearing all those things in mind and giving full effect to them, I have reached the conclusion that the sum of £10,000 is much too high; and that it is the duty of this court to reduce it. Applying such tests as have been put to this court, and bearing in mind decisions in earlier cases and the special facts of this case, I cannot bring myself to say that the damages ought to have been more than £7,000.

I would accordingly order that the damages awarded to the plaintiff be reduced from the sum of £10,000 to the sum of £7,000, and I would allow the appeal to that extent.

BIRKETT L.J. I am of the same opinion. This case affords another illustration of the difficulties which attend the assessment of damages where personal injuries are concerned, and the only question in this court has been this difficult question of damages. The House of Lords have used the phrase " a wholly " erroneous estimate of the damage " as one of the grounds on which an appellate court could interfere (*Davies* v. *Powell Duffryn Associated Collieries Ltd.*).[3] A phrase used by Lord Simon in a recent case (*Nance* v. *British Columbia Electric Railway Co. Ltd.*)[4] was that an appellate court could interfere if " the amount awarded is either so inordinately low or so inordi-
" nately high that it must be a wholly erroneous estimate of the

[3] [1942] A.C. 601, 617; 58 T.L.R. 240; [1942] 1 All E.R. 657.

[4] [1951] A.C. 601, 613; [1951] 2 T.L.R. 137; [1951] 2 All E.R. 448.

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"damage," and MacKinnon L.J. in another case (*Greenfield* v. *London & North Eastern Ry. Co.*)[5] spoke of damages being so excessive as to be unreasonable.

How those actual tests are to be applied is always a matter of some difficulty, because I can conceive that anyone hearing the history of this dreadful accident might say that no money could compensate the plaintiff, and that whatever sum a judge awarded could not be inordinately high. Indeed, Byrne J., at the conclusion of his judgment, said: "... this is a case in which "money cannot really compensate at all for the loss of enjoy- "ment or the curtailment of his ability to do what he would like "to do in the way of earning a living, and clearly it must be a "case in which the damages are substantial."

If money is no compensation, then £5,000, £10,000, £15,000 or £20,000 become meaningless, but the courts have been compelled by the logic of circumstances to decree that in cases of personal injury the only thing open to the court is to make an award of damages in money. That being so, I still think that it is a most useful thing to look at comparable cases to see what other minds have done, and so to gather the general consensus of opinion as to the amount which a man in a certain state of society ought to be awarded.

Here, as my Lord has pointed out, and, indeed, as Mr. Wooll, who treated this matter so frankly, said, the financial element is the least of all, as indeed it is; and he said that this sum can be justified on the award for loss of amenities, namely, the position of a man who can no longer conduct his life as he would wish to do; a man who in certain matters must always be dependent upon others, and who quite manifestly cannot do the things that he would like to do, such as running, playing cricket or football and taking part in athletic exercises. Mr. Wooll said that disregarding or treating the financial side as a minor matter, the sum could be justified because of the loss of amenities and the pain and suffering endured and still to be endured.

Having given this case anxious consideration, I have come to the same conclusion as my Lord. If one were freely to say, "Money can be no compensation," then awarding £10,000, £15,000 or £20,000 would be one thing; but this court, while it regards the decisions of the past, must also have regard to the future, and the effect that its decisions might possibly have in that direction; and taking all these matters into consideration, looking at the past cases, the general standard, and the particular facts in this case, I concur in the opinion that this sum is too high, and should be reduced to £7,000.

ROMER L.J. I also agree. The principle has been adopted (and it is the only possible principle which can be adopted) of trying to compensate a man in the plight in which this plaintiff

[5] [1944] 2 All E.R. 438, 440.

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finds himself by awarding what may fairly be described as notional or theoretical compensation to take the place of that which is not possible, namely, actual compensation. In the application of that principle the court should plainly, so far as possible, apply it with some degree of uniformity. One can only say "so far as possible," because nothing in the nature of any rigid classification can be achieved when one is dealing, not with fact, but with theory; and the only way, so far as I can see, in which one can achieve anything approaching a uniform standard, is by considering cases which have come before courts in the past and seeing what amounts were awarded in circumstances so far as may be comparable with the case which the court has to decide.

In the light of the guide afforded by the authorities to which we have been referred, it does seem to me that the £10,000 awarded in the present case is out of line with the standard which has in general been adopted in the past, and deviates from that standard to such a degree that I agree that the award cannot be sustained, and that £7,000 is the sum which should be awarded, and which would be in conformity with the trend of previous decisions. I therefore agree with the order which has been proposed.

*Appeal allowed.*
*Award of damages reduced from £10,000 to £7,000.*

Solicitors: *R. S. S. Allen for C. R. Hodgson, Manchester; Mawby, Barrie & Letts for Silverman & Livermore, Liverpool.*

M. M, H.

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[QUEEN'S BENCH DIVISION.]

* BOWERS AND ANOTHER *v.* SMITH. EVANS AND ANOTHER *v.* SAME. FLACK AND ANOTHER *v.* SAME.

1953
*Jan.* 21.
Lord Goddard C.J., Croom-Johnson and Pearson JJ.

*Children and Young Persons — Need of care and protection — Moral delinquency—Issue of lack of proper parental care and guardianship —Parents unaware of boys' conduct—No evidence against parents— Children and Young Persons Act*, 1933 (23 *Geo.* 5, *c.* 12), *ss.* 61, 62.

Three boys under 17 years of age, whose parents had permitted them to play football, had intercourse with a young woman in one another's presence in a latrine on a football field. Two of the boys had had intercourse with her on previous occasions, but there was no evidence that the parents of any of the boys were aware of her existence or of the likelihood of her presence, or of the presence of any other undesirable female on the football field. Complaints were preferred against the boys and their parents under section 62 of the Children and Young Persons Act, 1933, alleging that the

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boys, being young persons under 17 years of age, were in need of care and protection by reason of exposure to moral danger through their parents not exercising proper care and guardianship. The justices considered that the parents could not have given any or adequate instructions to the boys in standards of morality and behaviour and matters of sex as shown by the boys' conduct, and they held the complaints proved, and in each case made an order under section 62 (1) (*d*) placing the boy on probation, and a further order under section 62 (1) (*c*) that the parent should enter into a recognizance to exercise proper care and guardianship. On appeal by the boys and the parents:—

*Held*, that, although in some cases there might be such a persistent course of conduct by a young person that the only reasonable inference was that there was a lack of parental care and guardianship, there was no evidence before the justices from which such an inference could be drawn. The boys' conduct had for the first time been brought to their parents' attention, and the mere fact that the boys, unknown to their parents, had had intercourse with the young woman in question, irrespective of whether or not the boys had committed a crime, did not justify the conclusion that their parents were to blame, nor was such conduct, whether or not the parents had instructed the boys in matters of sex, necessarily due to lack of proper care and guardianship. The orders, accordingly, in respect of the boys as well as the parents, were set aside.

THREE CASES STATED by Gloucestershire justices sitting at Cheltenham.

Complaints were preferred against three boys and a parent of each under section 62 of the Children and Young Persons Act, 1933,[1] alleging in each case that the boy being a young person under the age of 17 years was in need of care and protection by reason of exposure to moral danger through his parents not exercising proper care and guardianship.

At the hearing of the complaints the following facts were proved or admitted:—On June 11, 1952, all three boys, then aged 16 years nine months, 16 years three months and 15 years three months respectively, committed indecent conduct by having, or in the case of one of the boys attempting to have, sexual intercourse with a girl, then aged 17 years and two months, in a latrine in a football field in the presence of each other. Two of the boys, with other youths, propelled the girl across the field against her will for that purpose, and she was not a consenting party to the indecent conduct. There were

[1] Children and Young Persons Act, 1933, s. 61: "(1) For the purposes of this Act a child or young person in need of care or protection means a person who is—(*a*) a child or young person who, having . . . a parent or guardian . . . not exercising proper care and guardianship, is either falling into bad associations, or exposed to moral danger, or beyond control; . . ."

S. 62: "(1) If a juvenile court is satisfied that any person brought before the court . . . is a child or young person in need of care or protection, the court may either—. . . (*c*) order his parent or guardian to enter into a recognisance to exercise proper care and guardianship; or (*d*) . . . in addition to making an order under . . . the last . . . paragraphs, make an order placing him for a specified period, not exceeding three years, under the supervision of a probation officer, . . ."

about 30 other boys aged between eight and 16 years in the field at the time, and the latrine was a makeshift corrugated iron structure affording little privacy. Two of the boys had known the girl for some time and had had intercourse with her on previous occasions, but none of them had had intercourse with any other woman. There was no evidence that the boys' parents knew of the existence of the young woman or had been warned in any way of the likelihood of her presence, or of the presence of any other undesirable female at or in the vicinity of the football field, or that they were aware, or should have been aware, that the giving of permission to their sons to play football at the place in question involved any likelihood that they would come into contact with any undesirable member of the opposite sex. There was no evidence that any of the parents had ever attracted the attention of the police by conduct involving a breach of the law or a neglect of the duties of a good citizen. There was no evidence either that the parents had, or that they had not, given any or adequate sexual instruction to the boys.

On behalf of the parents it was contended that the words "not exercising proper care and guardianship" in section 61 (1) of the Act included in their connotation an element of wilfulness on the part of the parent; that there was no evidence that the parents, on the occasions in question, failed to exercise proper care and guardianship, or, if the boys had been exposed to moral danger, that that was "through" the parent "not exercising "proper care and guardianship." Each of the parents stated that had he, or she, been aware of the possibility of moral danger to their respective sons from the girl in question they would have immediately taken energetic steps to deal with the situation. As to the boys, it was contended that, for the case to come within the provisions of sections 61 and 62 of the Act, the young person must be in need of care and protection at the time when brought before the court, and that even if they had been in need of care and protection at the time of the events complained of, they were not in such need when brought before the court, since now that their parents were aware of the existence of the young girl they would take steps to avoid their being exposed to moral danger; that, since the court possessed no inherent jurisdiction, any order purporting to be made under section 62 would be in excess of jurisdiction unless the justices were first satisfied that the facts brought the case within the terms of section 61, and that no such facts had been admitted or proved.

On behalf of the complainant it was contended that the facts proved showed that the boys were in need of care and protection by reason of exposure to moral danger through their parents not exercising proper care and guardianship.

The justices were of opinion that the parents could not have given any or adequate instruction to the boys in standards of morality and behaviour and matters of sex, as shown by the

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boys' conduct; and they held that it had been proved in each case that the boy was in need of care and protection by reason of exposure to moral danger through his parent not exercising proper care and guardianship, and in each case they made an order under section 62 (1) (*d*) placing the boy (with his consent) under the supervision of a probation officer for a period of two years, and made a further order under section 62 (1) (*c*) that the parent should enter into a recognizance in the sum of £5 to exercise proper care and guardianship.

The parents and the boys appealed.

*S. H. Noakes* for the parents and the boys.
*Geoffrey Smallwood* for the complainant.

No cases were cited in argument.

LORD GODDARD C.J. These three cases are stated by justices for the County of Gloucester sitting at Cheltenham, before whom the appellants, three boys and their parents, were brought, under section 62 of the Children and Young Persons Act, 1933.

Section 61 (1) of the Act of 1933 provides: "For the purposes "of this Act a child or young person in need of care or protection "means a person who is—(*a*) a child or young person who, "having no parent or guardian or a parent or guardian unfit to "exercise care and guardianship or not exercising proper care "and guardianship, is either falling into bad associations, or "exposed to moral danger, or beyond control." If the justices find that, they can, under section 62, do a variety of things, including what they did in this case, that is, put the young persons under the supervision of a probation officer. With regard to the parents, section 62 (1) provides that if the court "is "satisfied that any person brought before the court under this "section by a local authority, constable, or authorized person, "is a child or young person in need of care or protection, the "court may either—(*a*) order him to be sent to an approved "school; or (*b*) commit him to the care of any fit person, whether "a relative or not, who is willing to undertake the care of him; "or (*c*) order his parent or guardian to enter into a recognizance "to exercise proper care and guardianship."

The case raises the question whether in the particular circumstances the justices had power to make the order that they did make. The boys were brought before the court because a very nasty and disgusting state of affairs had come to the notice of the police. [His lordship referred to the facts and continued:] That was, of course, conduct of the most reprehensible character and deserving of some condign punishment, which one may hope that the parents will administer, but it is quite another thing to say that because these boys committed an offence of that sort, they did it because their parents had not exercised proper care and control over them. All that the parents had done was to send

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the boys to play football. [His lordship referred to the justices' findings and continued:] Of course, with regard to sexual instruction, parents are entitled to hold different views, and some consider that it is not desirable to give sexual instruction to boys at this age. Can it be said on those findings that there was any evidence before the court that the parents had not exercised proper care and guardianship? If boys are found to be repeatedly committing criminal or disgraceful acts, the court may well be justified in drawing the inference that parental discipline is wanting, and it ought not to be difficult to give some evidence from which the court can infer that, but to say that the fact that three young adolescents who have just come to puberty—I dare say sexually excited, and rather tempted—have had intercourse with a disreputable girl shows that the parents have been guilty of not exercising proper care and attention, seems to me to be going a great deal too far.

The conclusion of the justices was: "We being of opinion "that the parent of the defendant could not have given any or "adequate instruction to the defendant in standards of morality "and behaviour and matters of sex as shown by his conduct in," and then they set out the filthy matters in which these boys had indulged. It is surely a very serious thing to say, even if it happens on two or three occasions with the same girl and the parents know nothing about it, that because young adolescents commit some sexual misbehaviour—whether it amounts to a crime or not is immaterial for this purpose—that is due to neglect on the part of their parents. I do not think that the section was ever meant to apply to cases like this. Of course, if evidence is given that a girl or a boy is being kept in a house where the mother is permitting prostitutes to assemble, or is housing them, or if the mother herself is a prostitute, or is obviously living a loose life, it is very proper that the children should be removed. But I fail to see that there is anything in the evidence which justified the conclusion at which the justices arrived, namely, that because the boys had been guilty of the conduct described and it had for the first time been brought to the attention of the parents, the parents were to blame. Nor, because the justices thought that the parents could not have given them sexual instruction, could it be said that they had not exercised proper care and guardianship. One knows that young adolescents among themselves, at schools and other places—many of them in all walks of life—commit indecent acts, and parents no doubt correct them if they know of it, but those things as a rule are done in strict secrecy. Although these acts against this girl were done in the presence of several other boys on a football field, which in one way makes the boys' behaviour all the more reprehensible, there is not the least suggestion that the parents had any idea of it at all. No one would say that it was in any way wrong to let the boys go to the field to play football. I cannot agree that merely because it is found that two of these boys had sexual intercourse

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with this girl on two or three occasions that that justified the justices in coming to the conclusion that the parents had not exercised proper care and attention.

Accordingly, these three appeals must be allowed and the orders in respect of the boys as well as of the parents must be set aside.

CROOM-JOHNSON J. Sections 61 and 62 of the Children and Young Persons Act, 1933, contain, in my judgment, most valuable provisions for the protection of young people and for bringing them up in the right way. It is because of that that I have approached this case with a good deal of anxiety, looking to see whether the express provisions of beneficent sections are likely to be spoiled by any observations which I may make on the decision of this case. But it must be remembered at the same time that, although not in respect of a criminal offence, the fact that some order may be made with regard to children of apparently quite respectable citizens makes it incumbent on the tribunal which has to deal with the matter to proceed with a high degree of caution. No one seems to have thought of the possibility in this case that adequate instruction may have been given by the parents and, as not infrequently happens with regard to parental advice, that the young people in question did not choose to take advantage of it or, perhaps, took no notice of it.

No doubt there are cases in which the justices may, from a persistent course of conduct by the young person, come to the conclusion that the only reasonable inference is that there must have been something lacking at home and neglect by the parents to discharge their duties. In those cases justices no doubt proceed most carefully and with due regard to the express provisions of the statute. In the present case it seems to me that there is no material from which the justices could draw that inference, if that is what they did, and I am not sure they did. When invited to draw an inference against a parent because of something his child has done, I venture to suggest that the justices should proceed with considerable caution.

I agree with what my Lord has said, and I think that in the present case, although no doubt with the best of motives and with every intention to preserve the character of these young persons for the future and prevent this sort of thing happening again, the justices have erred. I concur in the suggestion that these appeals should be allowed and the orders set aside.

PEARSON J. I agree with the judgments which have been delivered and I concur in the orders to be made.

*Noakes* applied for an order under section 39 of the Children and Young Persons Act, 1933, that the names and addresses of the boys should not be published in a newspaper.

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BOWERS v. SMITH. EVANS v. SAME. FLACK v. SAME.

LORD GODDARD C.J. In this sort of case we shall certainly not make any such order. The public may just as well know the shocking conduct of which these boys were guilty.

*Appeals allowed.*

Solicitors: *Gibson & Weldon for A. Mason Amery & Co., Cheltenham; Field, Roscoe & Co. for Guy H. Davis, Gloucester.*

J. F. L.

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[CHANCERY DIVISION.]

1953
*Jan.* 22, 23.

Vaisey J.

* *In re* COHEN, DECD. NATIONAL PROVINCIAL BANK LD. *v.* KATZ.

[1950. C. 3865.]

*Husband and Wife—Possession—Presumption of ownership—Death of husband followed by that of wife—Matrimonial home at all times the property of the wife—Discovery in matrimonial home after the death of wife of hidden bundles of banknotes—No evidence of ownership or of circumstances as to hiding of notes—Whether husband's or wife's estate entitled.*

A gown manufacturer with a business in the East end of London lived for a number of years with his wife in a flat at Brighton, which was the property of the wife. The husband died in May, 1948; the wife in the following August. Both left wills, of which the plaintiffs were executors and trustees.

After the wife's death, quantities of banknotes and coin, amounting to some £5,944, were discovered in the flat; these were hidden in a number of unlikely and unsuitable places: inside a radiogram, under a kitchen cabinet, etc. There was no evidence as to the ownership of the money, or as to when, by whom, or for what reason it had been secreted.

On the hearing of a summons taken out for the determination of the question whether the money belonged to the husband's estate, or to the wife's, or to both estates, and if the latter in what proportions:—

*Held*, that in the absence of any reliable evidence of ownership, recourse must be had to the legal presumption that the owner of land is prima facie the owner of chattels found on the land, so that the wife's estate was entitled to the money.

*South Staffordshire Water Co.* v. *Sharman* [1896] 2 Q.B. 44; 12 T.L.R. 402, and *Johnson* v. *Pickering* [1907] 2 K.B. 437; 23 T.L.R. 579, applied.

*Semble*, that if (as was the most likely guess that could be made on the available evidence) the money was secreted as a "nest-egg" against an emergency, the principle of equality in matrimonial financial transactions laid down in *Jones* v. *Maynard* [1951] Ch. 572; [1952] 1 T.L.R. 700; [1951] 1 All E.R. 802, and *Rimmer* v. *Rimmer* [1952] 2 T.L.R. 767; [1952] 2 All E.R. 863; [1952] W.N. 511, should be applied only to the extent that the

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money should be considered as subject to an equal and severable joint tenancy in the joint lifetime of the spouses; while after the death of one it would remain for the sole benefit of the survivor; in which event also the wife's estate was wholly entitled.

ADJOURNED SUMMONS.

Max Cohen, a gown manufacturer carrying on business in the East End of London, and his wife Rebecca, lived at all material times in a flat at Brighton, which was the property of the wife. Both were almost illiterate, but the husband's business was highly successful. Both died in 1948, the husband in April, and the wife in August; both left wills, of which the plaintiffs were executors and trustees.

After the death of the wife it was discovered that banknotes and coin to the value of £5,944 13s. 6d. had been hidden in the flat. Bundles of notes were found in a number of peculiar and unlikely places, such as a space behind a water tank on the landing; a locked tin box behind a wardrobe; underneath a kitchen cabinet; and in a trunk containing female clothing. There was no evidence as to the origin of the money, or as to when, or by whom, or for what purpose the notes had been secreted in this way. It had, however, been ascertained, and was stated in affidavits, that the husband had, over a number of years, withdrawn many thousands of pounds from his business; and that the wife, about a year before her death, had withdrawn some £1,500 from a bank deposit account.

After the death of the wife a number of questions arising out of the two wills fell to be decided; Wynn-Parry J., who heard the summons, gave certain directions now immaterial, and ordered an inquiry in chambers as to the question whether the notes and coin discovered in the flat belonged to the estate of the testator or to that of the testatrix, or partly to one estate and partly to the other, and if so, in what proportions. At the conclusion of the inquiry the master found himself quite unable to answer the question, owing to the lack of definite evidence, and concluded his certificate by leaving the question for the court.

*B. S. Tatham* for the trustees.

*Hubert A. Rose*, *L. H. L. Cohen* (*Cozens-Hardy Horne* with him) and *G. A. Rink* for various beneficiaries under the two wills.

In addition to the cases cited in the judgment, the following were referred to in argument: *Sandeman & Sons* v. *Tyzack and Branfoot S.S. Co. Ld.*[1]; *French* v. *Gething*[2]; and *Hannah* v. *Peel.*[3]

VAISEY J. [after stating the facts:] I venture to describe this couple as having had some of the characteristics usually

[1] [1913] A.C. 680; 29 T.L.R. 694.
[2] [1922] 1 K.B. 236; 38 T.L.R. 77.
[3] [1945] K.B. 509; 61 T.L.R 502; [1945] 2 All E.R. 288.

associated with magpies. They hid their money all over the flat in unsuitable situations, and, in all, a sum of £5,994 13s. 6d. was found hidden there.

The neighbours who were living on other floors of the same building disclaimed any knowledge of what was happening. Whether the husband and wife were none too sure of the solvency of banks, or of the Post Office; what they were doing, whether they were keeping it where they did because it seemed to be the safest place to keep it; whether it was money which represented the proceeds of the sale of some property; how long they had had it; where it came from; why they hid it; what they were doing with it and what their purpose was, nobody seems to have any idea; and we are left with the bare fact that on the death of Rebecca Cohen all this money was hidden away in most unsuitable situations in the flat in which the parties had resided.

It is the kind of human story which invites speculation; and I could, I think, make some fairly ingenious guesses as to what might be the explanation of it all; but there is no kind of real certitude in the matter. There are certain circumstantial details about the hiding; for instance, some of the notes were wrapped in black cotton material similar to that used in the loud-speaker of the radiogram. Apparently the notes, after they were discovered, were paid into a bank or otherwise disposed of without careful inspection, but from the evidence, so far as it goes, it would seem they were ordinary, fairly dirty notes; the sort of collection of notes which might have been made from time to time.

I have looked at the affidavits which were before the master to see if I could find anything more in them than he was able to find, but I have come to much the same conclusion that he did, which is that there is really nothing to throw any light on the mystery, for a mystery it is.

Now, with the conflicting claims of the beneficiaries under the two wills, I have somehow or other to decide to which estate this money belongs. Nobody can say that it is res nullius, an expression used in *Sinclair* v. *Brougham* [1]; it must belong to someone; and as I cannot hold that it is res nullius it is obvious that no claimants other than the beneficiaries of the two estates could be heard to assert any right to this money.

First of all, as a question of fact, there is not the slightest indication to whom this money belonged. There is no suggestion that the husband and wife, who, as I was told, were living together in perfect amity, ever made any agreement about it between themselves. Not only is there no kind of evidence as to the source of this money, but there is none as to what was the purpose of the owner of it in depositing it in this extraordinary way in various places in the common conjugal dwelling.

Sometimes the only way out of a difficulty of this kind is to

[1] [1914] A.C. 398; 30 T.L.R. 315.

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treat the claimants as entitled in equal shares, and that is a solution which has been adopted on many occasions by the court; but there is one material fact to which I must now refer, which is this: this house, No. 19 Montpelier Villas, was the freehold property of the wife; that is to say, the legal estate was in her. Whether she held as nominee or trustee for her husband, whether they had made any arrangement as between themselves for a tenancy or anything of that kind, I do not know; but the fact is that she was the legal owner of the house in which they lived and in which this money was found.

There is a consistent line of authority which shows that there is a legal presumption that the owner of land is the owner of chattels found on the land; and for that the authority is *South Staffordshire Water Company* v. *Sharman*.[2] The headnote is as follows: "The possessor of land is generally entitled, as against "the finder, to chattels found on the land. The defendant, while "cleaning out, under the plaintiffs' orders, a pool of water on "their land,"—that is the well known Minster Pool at Lichfield —"found two rings. He declined to deliver them to the plain- "tiffs, but failed to discover the real owner. In an action of "detinue:—*Held*, that the plaintiffs were entitled to the rings." The judgment of Lord Russell of Killowen C.J. concludes with these words[3]: "the general principle seems to me to be that "where a person has possession of house or land, with a manifest "intention to exercise control over it and the things which may "be upon or in it, then, if something is found on that land, "whether by an employee of the owner or by a stranger, the "presumption is that the possession of that thing is in the owner "of the locus in quo."

A further authority dealing with the point is *Johnson* v. *Pickering*,[4] in which this passage occurs in the judgment of Lawrance J.[5]: "The tendency of modern authorities is to make "an intention to possess the test, in the absence of more direct "evidence, of actual possession." Then *South Staffordshire Water Company* v. *Sharman*[6] was cited, and I think cited with approval.

The questions of possession, of what amounts to possession, from what possession may be inferred, and when possession can be deemed to indicate ownership, are questions as to which there is much authority and may be much controversy. Certain principles are laid down, for instance, in *Mason* v. *Lickbarrow*,[7] which contains a passage[8] where it is said: "Possession of "goods is prima facie evidence of title; but that possession may "be precarious, as of a deposit; it may be criminal, as of a thing

[2] [1896] 2 Q.B. 44; 12 T.L.R. 402.
[3] [1896] 2 Q.B. 44, 47.
[4] [1907] 2 K.B. 437; 23 T.L.R. 579.
[5] [1907] 2 K.B. 437, 444.
[6] [1896] 2 Q.B. 44; 12 T.L.R. 402.
[7] (1790) 1 H.Bl. 357.
[8] Ibid. 360.

"stolen; it may be qualified, as of things in the custody of a "servant, carrier, or a factor. Mere possession without a just "title gives no property, and the person to whom such possession "is transferred by delivery must take his hazard of the title of "his author."

The question of possession of property as between husband and wife has been adverted to and decided in many cases, especially, of course, since the passing of the Married Women's Property Act, 1882 (see *Ramsay* v. *Margrett* [9] and *Youngs* v. *Youngs* [10]).

The possession being ambiguous in one sense, because the husband and wife were both living in the house, it may be, of course, that these notes were put there between the death of the husband and that of the wife; but that does not seem at all likely; and assuming that they were placed there during the joint lives, then one may say that the possession of them as goods in the house is entirely ambiguous. Nobody can say, as between the husband and wife, to which of them the lawful possession must be attributed; and it is suggested and submitted that the principle which I have indicated, which depends, I think, largely upon the authority of the *South Staffordshire* case,[11] strange though it may appear and slight as may be the straw which has to be grasped by the swimmer in this sea of ambiguity, must determine the issue in this matter, as there is nothing better to depend on.

I adopt this principle with reluctance, because it seems to me to be a somewhat inhuman way of approaching the problem; but I cannot bring myself to believe that there is any solution which I could accept as so likely, probable, or convincing that it could override what has been laid down to be a principle of law to resort to if there is nothing else to guide one. On the whole, it seems to me that I must follow that case, and hold that the money belonged to the wife. As I have said, we know nothing of the facts; but, in any case, the notes were in the flat when the wife died; and if they were placed there in the husband's lifetime then they were placed by one of two spouses on and in property which belonged to one of them; and I think that I must decide that these notes and coin were the property not of the husband but of the wife.

I have said that I regard this as rather an inhuman approach to the matter, and if I could have decided the case on a ground a little (if I may say so) more picturesque than one which depends on the ownership of the legal estate in the premises, I should have been very glad to do so. It was suggested that useful guidance was afforded by a recent decision of my own,

[9] [1894] 2 Q.B. 18; 10 T.L.R. 355.

[10] [1940] 1 K.B. 760; [1940] 1 All E.R. 349.

[11] [1896] 2 Q.B. 44; 12 T.L.R. 402.

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*Jones* v. *Maynard*,[12] approved in the Court of Appeal in *Rimmer* v. *Rimmer*,[13] a case which was also helpful.

In the former case I came to the conclusion (which I cite without hesitation because my decision was later approved) that where a husband and wife have what is called a "joint purse," and the purposes for which the joint purse was formed come to an end, the proper way for a court of equity to deal with the money is not to investigate the precise sources out of which the fund was built up, but to assume that the intention was an equal division of what was left. I am bound to say that the analogy of that case does not seem to be applicable to the present facts, because I am rather disposed to think, if speculation be possible, that the most likely history of this deposit was that the husband and wife put the notes aside with a view to providing for the survivor of them. I am not suggesting that there was any intention to conceal assets from the Revenue authorities, but it may well be that during the perilous times of the war it was thought advisable to have a large sum of cash at hand in case the husband, in particular, should meet with sudden death, leaving the wife to maintain herself; and, of course, the same point would arise if the survivor were the husband.

I should rather suppose that, in such a case, the presumption would be not for a division but for an equality of ownership, in this sense: that the nest-egg (if it may be so described) was intended to remain intact for the benefit of the survivor after the death of one of the spouses; and applying *Jones* v. *Maynard*,[14] so far as it ought to be applied, I should be disposed to think that if the principle of equality applied, it only applied to this extent—that, while the ownership of the fund might be presumed to be one of equality between the spouses, their interest in it was probably that of a severable joint tenancy, so that if they wanted to divide up the fund in their joint lifetimes they could have done so, but if they did not desire so to divide it then the fund would remain for the benefit of the survivor. As I have said, I do not like to suggest that there was any intention here of concealment of assets from the notice of the Revenue authorities; but I should have drawn the deduction that this fund was intended to remain for the benefit of the survivor of the two, without any right of participation in it after death by that one of them who should happen first to die.

If that is the view—and I must say that I only put it as an alternative to the main point on which I have decided the case, unsatisfactory though that point is—the result would be exactly the same. The wife having survived, if the arrangement was as I have described it, she would be entitled to the fund as survivor. However, I base my decision primarily on the point

[12] [1951] Ch. 572; [1951] 1 T.L.R. 700; [1951] 1 All E.R. 802.

[13] [1952] 2 T.L.R. 767; [1952] 2 All E.R. 863; [1952] W.N. 511.

[14] [1951] Ch. 572; [1951] 1 T.L.R. 700; [1951] 1 All E.R. 802.

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which I mentioned first; but in case I am held to be wrong in a higher court, I should desire to add as an alternative reason for deciding in favour of the estate of the wife rather than that of the husband, that if it were possible now to draw a deduction from one's knowledge of human nature and one's fancy in drawing pictures from very inadequate material, I should hold that this was a fund intended to be divisible, if desired, during the joint lives of the spouses, but intended otherwise to enure for the benefit of the survivor. On that view, also, the wife's estate would be entitled to my judgment.

In answer to the question raised by the summons, which was in these terms, whether, having regard to the master's certificate, the executors may deal with the notes and coin on the footing either that the whole was the property of the testator or that the whole was the property of the testatrix, or that the notes and coin belonged to both, I will declare that the whole was the property of the testatrix; and I will so declare not merely having regard to the certificate of the master, but to the evidence filed on this question which is mentioned in that certificate.

*Declaration accordingly.*

Solicitors: *Haslewood, Hare & Co., for Bosley & Co., Brighton; Teff & Teff; T. V. Edwards & Co.; Gilbert Samuel & Co.*

F. R. D.

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[QUEEN'S BENCH DIVISION.]

## * HAINES *v.* ROBERTS.

1953
*Jan.* 26.

Lord Goddard C.J., Croom-Johnson and Pearson JJ.

*Road Traffic—Drunk in charge of motor-cycle—Intention of friends to prevent defendant riding—Road Traffic Act*, 1930 (20 & 21 *Geo.* 5, *c.* 43), *s.* 15.

The defendant was found by the police in an intoxicated condition in the rear yard of a motor garage within about five feet of a motor-cycle. The defendant was charged with being in charge of the motor-cycle when under the influence of drink. The justices found that his presence near the motor-cycle was involuntary, as he was brought there by friends to get water, and that the friends intended and would have been able to stop him from riding the cycle. The justices were not satisfied that he really intended to ride it, and found him not guilty. The prosecutor appealed:—

*Held*, allowing the appeal, that on the facts the defendant was in charge of the motor-cycle, since he had not given it into somebody else's charge.

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[Reported by Miss C. J. ELLIS, Barrister-at-Law.]

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HAINES v. ROBERTS.

CASE STATED by Monmouthshire justices.

The prosecutor, John Haines, preferred an information before the justices sitting at Abergavenny against Haydn George Roberts, alleging that he, on July 18, 1952, at Abergavenny was under the influence of drink to such an extent as to be incapable of having proper control of a motor-cycle of which he was in charge, contrary to section 15 of the Road Traffic Act, 1930.

At the hearing of the information the following facts were proved or admitted. On the evening of July 18, 1952, the defendant rode to Abergavenny and left his motor-cycle in the rear yard of a garage belonging to a motor company, which was a public place, and then went drinking. At about 10 p.m. some friends met him and asked him how he was going to get home; he told them that he was waiting for some other friends and wanted a drink. They took him to the rear yard of the garage, where there was a water tap, and after he had taken a drink they doused his head under the tap. The defendant then went to sleep until about 11.30 p.m. While he was asleep his friends tried to make some arrangements, of which the defendant was unaware, for another person to ride the cycle home and tell the defendant's father to come and fetch him. At 11.55 p.m., before the arrangements were completed, the police came along and found the defendant swaying backwards and forwards, clinging to an upright steel standard in the rear yard of the garage about five feet from his cycle. They saw the defendant's friends but did not have any conversation with them. The defendant was asked by the police if the motor-cycle was his, and he replied: "That is my bike, you leave it alone." He was also asked if he intended to ride the cycle in his condition, and he said, "If I "want to ride that bike I will ride it and no one in town will stop "me." The police assisted the defendant to the police station, where he was examined by the police surgeon, and was later charged under caution and he replied: "I was not in charge of "any bloody bike." The defendant's friends intended to look after him from shortly after 10 p.m. Having tried without success to sober him up, they intended to prevent him from riding his motor-cycle home. If other arrangements failed they were going to walk him home.

The justices found that the defendant was under the influence of drink to such an extent as to be incapable of having proper control over a motor-vehicle. After considering a number of Scottish decisions, the justices came to the conclusion that the defendant had not been a free agent because (1) his presence near the motor-cycle was involuntary as he was brought there by his friends to get water, and (2) the defendant's friends intended, and would have been able, to stop the defendant from riding or attempting to ride his cycle. They also were not satisfied that the defendant really intended to ride his motor-cycle, and considered that his remarks in that connexion were in the nature of defiance

of authority and drunken bravado. They accordingly found the defendant not guilty.

The prosecutor appealed.

*Arthur G. Davies* for the prosecutor.
*James Campbell* for the defendant.

The following Scottish decisions were cited in argument:—*Crichton* v. *Burrell* [1]; *Dean* v. *Wishart* [2]; *Adair* v. *M'Kenna*.[3]

LORD GODDARD C.J. stated the facts and continued: How can it be said under those circumstances that the defendant was not in charge of the motor-cycle? He had not put it into anybody else's charge. It may be that, if a man goes to a public house and leaves his car outside or in the car park and, getting drunk, asks a friend to look after the car for him or to take it home, he has put it in charge of somebody else; but if he has not put it in charge of somebody else he is in charge until he does. His car is out on the road or in the car park—it matters not which—and he is in charge. Some day, perhaps, the question will arise whether, if the car is in a car park where there is an attendant, the attendant is in charge. Whether he will be in charge will no doubt be a question of fact.

The justices gave a great deal of attention to this case and had certain Scottish decisions cited to them. They have also been cited to us but, of course, are not binding on us, and I think that some of those cited are clearly distinguishable. But here it is clear that the defendant was in charge of the cycle, and until he had given it into somebody else's charge he remained in charge. He was not charged with driving while under the influence of drink.

Under these circumstances the case must go back to the justices with an intimation that the offence was proved.

CROOM-JOHNSON J. I am of the same opinion and for the same reasons.

PEARSON J. I agree.

*Appeal allowed.*

Solicitors: *Torr & Co. for H. J. P. Candler, Abergavenny; Gibson & Weldon for Everett & Tomlin, Pontypool.*

[1] 1951 S.C. 107; 1951 S.L.T. 365.
[2] 1952 S.C.(J.) 9; 1952 S.L.T. 86.
[3] 1951 S.L.T.(Sh.Ct.) 40.

1953
*Jan.* 16, 21,
22, 23.

Upjohn J.

[CHANCERY DIVISION.]

# * LONDON AND COUNTRY COMMERCIAL PROPERTIES INVESTMENTS LD. *v.* ATTORNEY-GENERAL.

[1952 L. No. 1726.]

*Company—Borrowing—Purchase of land in consideration of issue of shares and debenture stock—Whether Treasury sanction necessary—Borrowing (Control and Guarantees) Act,* 1946 (9 *&* 10 *Geo.* 6, *c.* 58), *s.* 4 (2)—*Control of Borrowing Order,* 1947 (*S.R. & O.* 1947, *No.* 945), *art.* 2 (1) (*b*).

The plaintiff company proposed to carry out a transaction whereby certain freehold and leasehold properties were to be purchased from L. Ld. in consideration of the issue to L. Ld. of 400,000 ordinary shares of £1 each fully paid and £750,000 debenture stock of the plaintiff company, the stock being redeemable at the latest in 1980, with provision for redemption at an earlier date.

The plaintiff company took out a summons for the determination of the question whether it was entitled, without the consent of the Treasury, to issue the shares and stock in question, without contravening any provision of the Borrowing (Control and Guarantees) Act, 1946,[1] or the Control of Borrowing Order, 1947.[2]

[1] Borrowing (Control and Guarantees) Act, 1946, s. 1: "(1) The "Treasury may make orders for "regulating . . . all or any of the "following transactions . . . (*a*) the "borrowing of money in Great "Britain where the aggregate of the "amount of money borrowed under "the transaction and of any other "amounts so borrowed by the same "person in the previous 12 months "(including any period before the "passing of this Act) exceeds ten "thousand pounds; (*b*) the raising of "money in Great Britain by the "issue, whether in Great Britain or "elsewhere, by any body corporate, "of any shares in that body corporate; (*c*) the issue for any purposes—(i) by any body corporate of "any shares in or debentures or other "securities of that body corporate. ". . . (3) The provisions of the "Schedule to this Act (which relate "to enforcement and penalties) shall "have effect in relation to orders "made under this section but the "rights of the persons concerned in "any transaction shall not be affected "by the fact that the transaction was "in contravention of any such "orders."

S. 4: "(1) In this Act, unless the "context otherwise requires, the "following expressions have the "meanings hereby assigned to them, "that is to say: . . . 'security' includes shares, bonds, notes, debentures, debenture stock and units "under a unit trust scheme; 'share' "includes stock and any perpetual "debenture or perpetual debenture "stock."

Subs. (2): "Any reference in this "Act to the borrowing of money—"(*a*) includes a reference to the "making of any arrangement by "which a sum which would otherwise be payable at any date is payable at a later date, and includes in "particular the making of any "arrangement by which the whole or "any part of the price of any property is allowed to remain unpaid "either for a fixed period or indefinitely, but (*b*) does not include a "reference to the acceptance by a "person carrying on a banking undertaking of moneys to be placed to "the credit of a current or deposit "account."

Schedule, para. 1: "Any person "who contravenes any provision of "any order made under this Act shall

[Reported by J. A. GRIFFITHS, Esq., Barrister-at-Law.]

*Held*, (1) that for such a transaction to come within the Act or the order, it must fall within the definition of "borrowing of "money" contained in section 4 (2) of the Act and in article 2 of the order, and must be a contract of sale and purchase for cash in which there was an arrangement whereby the cash was to remain unpaid; (2) that the transaction in question was for a consideration which consisted of the issue of shares and debentures, and that no money or cash was being allowed to remain unpaid; and (3) that, as the Act plainly drew a distinction between the issue of securities and the borrowing of money, the proposed arrangement was not a transaction whereby the price of any property was allowed to remain unpaid within the meaning of article 2 (1) (*b*) of the order; with the consequence that the proposed transactions did not require Treasury sanction.

"be liable—(*a*) on summary conviction to imprisonment for not more "than three months or to a fine not "exceeding five hundred pounds or to "both such imprisonment and such "fine; or (*b*) on conviction on indictment to imprisonment for not more "than two years or to a fine not exceeding whichever is the highest of "the following amounts—(i) five "hundred pounds; or (ii) the amount "of any money borrowed or raised by "the transaction in question; or "(iii) the nominal or market value, "whichever is the greater, of any "securities to the issue, sale or other "disposal of which (whether actual or "projected) the transaction in question relates, or to both such imprisonment and such fine."

Para. 3: "(1) No proceedings for "an offence under this Act shall be "instituted in England except by or "with the consent of the Director of "Public Prosecutions. . . . (4) Where "an offence under this Act has been "committed by a body corporate "(other than a local authority), every "person who at the time of the commission of the offence was a director, general manager, secretary or "other similar officer of the body corporate, or was purporting to act in "any such capacity shall be deemed "to be guilty of that offence, unless "he proves that the offence was committed without his consent or connivance and that he exercised all "such diligence to prevent the commission of the offence as he ought "to have exercised having regard to "the nature of his functions in that "capacity and to all the circumstances."

[2] Control of Borrowing Order, 1947, art. 1: "(1) Subject to the "exemptions contained in Part II of "this Order, a person shall not, without the consent of the Treasury, "borrow money in Great Britain "where the aggregate of the amount "of money borrowed and of any "other amounts borrowed in Great "Britain by that person in the "previous twelve months (including "any period before the coming into "force of this Order) exceeds ten "thousand pounds."

Art. 2: "(1) In this order refer"ences to the borrowing of money "include . . . (*b*) references to the "making of any arrangement by "which the price of any property "except—(i) the price of goods sold "by a person in the ordinary course "of his business, and (ii) the price "of any undertaking under a sale "thereof to a private company, is "allowed to remain unpaid either for "a fixed period or indefinitely but "charged on the property, but do not "include references to the making of "any other arrangement by which a "sum which would otherwise be payable at any date is payable at a "later date; and references to loans "shall be construed accordingly."

Art. 8: "(1) Subject to the pro"visions of this article, the consent of "the Treasury shall not be required "to the carrying out by any such "person as is mentioned in any of "the provisions of Part I of this "Order of any transaction mentioned "in that provision if the amount involved in the transaction together "with the amount involved in all "previous transactions by the same "person in the previous 12 months, ". . . does not exceed fifty thousand "pounds. . . . (5) In this article, the "expression 'the amount involved' "means—(*a*) in relation to the "borrowing of money, the amount of "money to be borrowed; . . . (*d*) in "relation to an arrangement for the "postponement of payment of any "money, the amount the payment of "which is to be postponed."

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ORIGINATING SUMMONS.

The plaintiff company, London and Country Commercial Property Investments Ld. [" the property company "] proposed to issue shares and debenture stock, as a consideration for the purchase of certain freehold and leasehold properties. The proposed transaction was authorized by a special resolution of the company passed on November 22, 1951, and was contained in a draft agreement and a draft trust deed.

The agreement was made between Littlewoods Mail Order Stores Ld. [" Littlewoods "] of the first part, the property company of the second part, the Alliance Assurance Company Ld. [" the trustee company "] of the third part, and the companies whose names and addresses of whose registered offices were set forth in the first and second columns respectively of the first schedule [" the purchasing companies "] of the several other parts.

By clause 1: " Littlewoods hereby agree to sell and the " property company hereby agrees to purchase for the considera- " tion mentioned in clause 2 hereof " certain freehold and leasehold properties which were described in the second schedule to the agreement.

By clause 2: " The consideration for the said sale shall be the " issue by the property company to Littlewoods or its nominee " or nominees of (a) 400,000 ordinary shares of £1 each in the " capital of the property company credited as fully paid up and " (b) £750,000 debenture stock of the property company referred " to in clause 3 hereof to be created and issued as fully paid by " the property company."

By clause 3: " The property company will create £750,000 " debenture stock to be called the £750,000 5 per cent. Debenture " Stock 1962/80 (and hereinafter called ' the stock ') and shall " constitute and secure the stock by a trust deed in the form of " the draft trust deed expressed to be made between the property " company of the one part and the trustee company of the other " part a copy of which is attached hereto."

By clause 5: " Immediately upon completion of the transfer " of the said freehold and leasehold properties to the property " company the property company shall let and Littlewoods shall " take all the said properties respectively for a term of 99 years " commencing on the date of completion and at a rent contained in a draft lease attached to the agreement.

By clause 6: " Littlewoods hereby agrees to sell and each of " the purchasing companies hereby agrees to buy at par on the " completion of the said sale and execution of the said lease the " amount of stock set opposite its respective name in the third " column of the first schedule hereto."

By clause 7: " The sale and purchase hereby agreed to be " made of the said properties the sale of the stock and all other " transactions hereby provided for shall be completed and effected " on or before the day of , 1953, at the office of

" when the consideration aforesaid consisting of shares " and debenture stock of the property company shall be satisfied " and when Littlewoods and all other necessary parties (if any) " shall at the expense of the property company execute and do " all such assurances and things as may be reasonably required " by the property company for vesting the said properties in it " or its nominees. . . ."

By clause 2 of the trust deed: " As and when the stock or " any part thereof ought to be redeemed or satisfied in accordance " with the conditions endorsed on the stock certificates as set out " in the first schedule hereto or on such earlier date as the " security hereby constituted becomes enforceable as hereinafter " provided the property company [' the company '] will pay to " the trustee company [' the trustees '] the principal amount of " the stock which ought to be redeemed or satisfied together with " such premium thereon (if any) as may be payable in accordance " with the said conditions and will in the meantime and until all " the stock shall have been redeemed or satisfied pay to the " trustees interest on the stock for the time being outstanding " at the rate of 5 per cent. per annum half-yearly on June 30, " and December 31, in each year the first of such payments to " be made on the day of next and to amount to " £ (subject to deduction of income tax) per £100 of stock " provided that every payment to the stockholders on account of " principal premium or interest held by them respectively shall " be a satisfaction pro tanto of the covenant by the company in " this clause contained."

By clause 3: " The stock may be issued to such persons at " such times and on such terms and either at par or a discount " as the company may think fit."

Clause 4 provided for the issue of the stock certificates which were to be in the form set out in the first schedule.

By clauses 6 and 7 the company mortgaged and created a floating charge on the freehold and leasehold properties the subject-matter of the transaction to the trustees as security for the issue of the stock.

There then followed in subsequent clauses the usual provisions enabling the trustees to realise the properties after the security became enforceable and to hold the proceeds of realisation on trust, after payment of costs and other proper expenses, for the holders of the debenture stock.

The form of the stock certificate was set out in the first schedule to the deed. It provided that interest was payable at the rate of 5 per cent. per annum and the conditions endorsed thereon provided that the stock was to be redeemed at par together with accrued interest in 1980; but subject to the provision that the company should establish a cumulative sinking fund for the redemption of 1 per cent. of the stock outstanding at any moment and that the sinking fund was to be used each year either to purchase the stock at or under par in the market or to

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redeem the stock by annual drawings. There followed a power whereby at any time on or after January 1, 1962, the company might redeem the stock at 101 per cent.

By clause 20 (b) of the second schedule to the deed a meeting of the stockholders was empowered by extraordinary resolution to sanction the exchange of the stock for the conversion of the stock into shares, stock, debentures, debenture stock or other obligations or securities of the company or any other company formed or to be formed.

The plaintiff company took out the present summons for the determination of the question whether it was entitled, without the consent of the Treasury, to issue 400,000 ordinary shares of £1 each and £750,000 debenture stock of the company (such stock to be constituted secured by and redeemable in accordance with the provisions contained in the draft of the trust deed) by way of consideration for the acquisition by the company of certain freehold and leasehold properties without contravening any provision of the Borrowing (Control and Guarantees) Act, 1946, or the Control of Borrowing Order, 1947.

*J. B. Lindon Q.C.* and *K. B. Suenson-Taylor* for the plaintiffs.
*Denys Buckley* for the defendant.

The following cases were cited in argument in addition to those referred to in the judgment: *Port of London Authority* v. *Inland Revenue Commissioners* [3]; *Yorkshire Railway Wagon Co.* v. *Maclure* [4]; *Attorney-General* v. *Sillem* [5]; *Dickenson* v. *Fletcher* [6]; *Dean* v. *Hiesler* [7]; *Thairlwall* v. *Great Northern Railway* [8]; *Pearce* v. *Davis* [9]; *Felix Hadley & Co.* v. *Hadley* [10]; *Yangtsze Insurance Association* v. *Indemnity Marine Assurance Co.* [11]

UPJOHN J. [after stating the facts:] This is a summons under Order 54A seeking a construction of the Borrowing (Control and Guarantees) Act, 1946, and the Control of Borrowing Order, 1947, which was made under the powers conferred upon the Treasury by the Act. The Act and the order provide that certain financial transactions can only be carried out with Treasury approval, and the question which I have to consider is whether a proposed transaction requires Treasury approval upon the true construction of the Act and the order.

In a case where Treasury approval is required and is not given, serious penalties are imposed by the Act; large fines may be imposed, and upon indictment imprisonment up to a

[3] [1922] K.B. 599; 39 T.L.R. 498; affirmed [1923] A.C. 507.
[4] (1882) 21 Ch.D. 309.
[5] (1863) 2 H. & C. 431.
[6] (1873) L.R. 9 C.P. 1, 7.
[7] [1942] 2 All E.R. 340.
[8] [1910] 2 K.B. 509; 26 T.L.R. 555.
[9] (1834) 1 Mood. & R. 365.
[10] [1898] 2 Ch. 680.
[11] [1908] 2 K.B. 504; 24 T.L.R. 687.

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maximum of two years may be inflicted upon the offender; but it is expressly provided that the legal rights of the parties under any prohibited transaction are not to be affected. I therefore had serious doubts whether this court ought to exercise the powers which it undoubtedly has under Order 54A to make a declaration as to the rights of the parties, for that is a matter which must ultimately be tested in the criminal courts.

However, the Attorney-General, through Mr. Buckley, has said that this is a point of general importance, and that he has no objection to my determining the matter, and that he thought that such determination would be of assistance. In those circumstances, although the parties must recognize that my decision will not be binding on any criminal court, I think it right to entertain this application.

The proposed transaction is quite simple, and although there are necessarily a number of blanks in the proposed agreement, I think that the right course is for me to treat it as though it were an actual agreement and to consider whether, on the footing that it is an actual agreement, it infringes the provisions of the Act and the order.

[His Lordship referred to the draft agreement, and continued:] That, then, is the transaction. It is perfectly simple, providing for the purchase by the property company of certain freehold and leasehold properties in consideration of an issue of debenture stock and of shares which were to be issued as fully paid. I must, however, turn to the debenture trust deed for, as Mr. Buckley has rightly submitted, it is referred to, and, indeed, attached to the agreement, and therefore must be read as one with the agreement to see what is the true nature of the transaction between the parties.

[His Lordship referred to the draft trust deed, and continued:] So there was a perfectly simple transaction, a purchase of land, in consideration of the issue of debenture stock and fully paid-up shares, the debenture stock being redeemable at the latest in 1980, with provisions for redemption at an earlier date by purchase in the market, by drawings, or by a compulsory redemption at premium at any time after 1962.

That is the transaction which it is said infringes the provisions of the Borrowing (Control and Guarantees) Act, 1946, and the order made thereunder. I must therefore turn to the Act and consider its terms. Its title is: "An Act to provide for the "regulation of the borrowing and raising of money, the issue of "securities, and the circulation of offers of securities for sub-"scription, sale or exchange, to enable the Treasury to guarantee "loans in certain circumstances, and for purposes connected with "the matters aforesaid." [His Lordship read sections 1 (1), (3); 4 (1), (2); and paragraphs 1, 3 (1), (3) of the schedule to the Act, and continued:] The Treasury under the powers conferred under that Act made an order dated May 21, 1947, which came into operation on June 16, 1947. Part I is in these terms:

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the headnote is, "General extent of control." Under that, "Borrowing in Great Britain." [His Lordship referred to articles 1, 2, 8 of the order, and continued:] The correspondence, to which I need not refer in detail, makes it clear that the whole of the Treasury case upon this matter depends upon bringing the transaction within the extended definition of the borrowing of money contained in section 4 of the Act, and in article 2 of the order made thereunder. It is not suggested that the issue of securities infringes any part of the order. There was, of course, in the Act ample power given which would enable the Treasury to have prohibited in express terms the issue of securities upon a transaction such as this. It is equally clear and, indeed, it is not disputed, that in section 4 (2) of the Act there is no prohibition of the issue of securities in a transaction such as this.

Upon these relevant sections, therefore, there is this to be said: section 4 of the Act and article 2 of the order are in substantially similar terms, but there are two differences. In the Act there is a reference in section 4 (2) (*a*) to "the whole or "any part of the price of any property." In the order, in article 2 (1) (*b*) the reference is to "the price" without any qualifying words. The only other difference is that, although the power given by section 4 (2) (*a*) of the Act is in general terms, in the order prohibition is only against arrangements whereby the sum allowed to remain unpaid is charged on the property.

In construing these two provisions I must have in mind section 31 of the Interpretation Act, 1889, which provides that in an order made under powers conferred by an Act, the same words must have the same meanings unless a contrary intention appears.

The first question that I have to consider is what are the principles of construction which I must adopt in construing this Act and this order. On that question a number of authorities have been cited to me by the parties. First of all, I have to bear in mind that this is a penal statute. It indeed, I suppose, represents the high-water mark of the Parliamentary invasion of the traditional rights of the subjects of this realm. Not only does it impose upon offenders substantial penalties—no objection could be taken to that—but what is so serious from the point of view of the subject is, that where a body corporate has been found to be an offender, then every director, general manager, secretary or other similar officer of the body corporate, including a person who was purporting to act in those capacities, is deemed to be guilty unless he prove that the offence was committed without his consent or connivance, thereby reversing the usual and traditional rule of English law that a man is innocent until he is proved guilty. But not only that; for proof that he is innocent will not avail an accused person, because he must further show that he exercised all such diligence to prevent the commission of the offence as he ought to have exercised,

having regard to the nature of his functions in that capacity, and in all the circumstances. However, that is what Parliament has thought fit to enact, and I abide, of course, by it. Nevertheless it is what Mr. Lindon described as a highly penal statute.

In those circumstances, what are the canons of construction to be adopted? I do not propose to refer to the authorities at length. I think that the proper approach to the construction of such a statute as this is that I must construe it as I would any other instrument, that is to say, I must look at all the surrounding circumstances, I must look at the mischief intended to be remedied, I must above all give effect to the words that have been used in the section. That is plain from the decision in *Dyke* v. *Elliott*,[1] see, in particular, the judgment of James L.J., but if on construing the relevant sections of the Act and the order there appears any reasonable doubt or ambiguity, then being a penal statute I must apply the principles laid down succinctly by Lord Esher in *Tuck & Sons* v. *Priester*.[2] In the course of his judgment he said[3]: "But then comes the "question whether the plaintiffs are also entitled to recover "penalties under section 6. We must be very careful in "construing that section, because it imposes a penalty. If "there is a reasonable interpretation which will avoid the penalty "in any particular case we must adopt that construction. If "there are two reasonable constructions we must give the more "lenient one. That is the settled rule for the construction of "penal sections."

There is another principle which I must have in mind, and that is that a person is entitled so to order his affairs as to avoid the provisions of the order. This is a genuine transaction; there is nothing colourable about it. The question which I have to determine is whether upon the true construction of the Act and upon the true interpretation of the acts and deeds of the parties in their transaction, that transaction falls fairly and squarely within the provisions of the Act and the order. In *St. Aubyn* v. *Attorney-General*[4] Lord Simonds states it thus[5] (he was there considering a taxing Act, but his remarks apply, in my respectful view, a fortiori to a penal statute): "The question is "not at what transaction the section is, according to some alleged "general purpose, aimed but what transaction its language, "according to its natural meaning, fairly and squarely hits." I have to see whether, construing the Act and the order, and giving the words their natural meaning, the Act and the order fairly and squarely hits this transaction.

The case has rightly been elaborately argued before me, and I am indebted to counsel for their careful submissions and for

[1] (1872) L.R. 4 P.C. 184, 191.
[2] (1887) 19 Q.B.D. 629; 3 T.L.R. 826.
[3] Ibid. 638.
[4] [1952] A.C. 15; [1951] 2 All E.R. 473.
[5] [1952] A.C. 15, 32.

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their painstaking researches into the authorities. In a matter of this sort there has naturally been much reference to hypothetical cases, and I have been referred to a number of authorities dealing with those hypothetical cases. I think, however, that in a case of this nature that it is undesirable for me to go outside the particular transaction which I have to consider. The arguments, as I have stated, have been elaborate. I do not propose to review them, because, in my opinion, this case depends on a very few words in the Act and in the order.

I refer then once more to the Act, and in particular to section 4 (2): "Any reference in this Act to the borrowing of "money—(*a*) includes a reference to the making of any arrange- "ment by which a sum which would otherwise be payable at any "date is payable at a later date." It seems to me that what the Act is aiming at is the borrowing of further money in order to repay existing creditors. Of course, another way of dealing with the matter is to persuade existing creditors to permit repayment at a later date. Therefore, no borrowing in the sense in which that word is normally used is present there, but the Act plainly hits that sort of arrangement. The section continues: "and includes "in particular"—those words are important, because while I find it unnecessary to decide whether those words show that what follows falls within and is a particular example of what has gone before, at all events it does show that the Act is now about to deal with a case closely analogous to that which has gone before —"the making of any arrangement by which the whole or any "part of the price of any property is allowed to remain unpaid." Accordingly, what has to be found is an arrangement whereby the price of the property is allowed to remain unpaid.

It is conceded by Mr. Buckley that in an Act of this sort the reference to "price" is appropriate only to a cash or money consideration, using money in the strict sense of cash; it is not appropriate to describe some consideration other than cash. What do I have to find in order that the Act should cover the present transaction? I have to find a contract of sale and purchase for cash, and an arrangement by which that cash is to remain unpaid.

I do not think that I need refer in any detail to the order, because with the exceptions which I have just mentioned the words are exactly the same. I look then at the transaction. Is this a transaction which has a cash consideration which is allowed to remain unpaid? With all respect to the arguments of Mr. Buckley, I should have thought that this was quite plainly described in legal language as a transaction for a consideration which consisted in the issue of debentures. The Act plainly draws a distinction between issue of securities and the borrowing of money. The order makes the differences even plainer, as

appears from the various cross-headings to which I have referred. This can only be made a transaction for a cash consideration which is allowed to remain unpaid by saying that on looking at the transaction as a whole one finds that on the true construction of the deed a sum of cash is to be paid in the future, and that a consideration of £750,000 is to be allowed to remain unpaid until 1980, or such earlier time as the security is redeemed under the provisions to which I have referred.

In my opinion it would be putting a most strange and unnatural construction on the words of this section and the corresponding article of the order to say that they covered the present transaction. There is, in fact, no cash consideration here at all. No money is being allowed to remain unpaid. This is quite a different transaction. This is a transaction in consideration of the issue of a series of debenture stock secured by a debenture trust deed. Under the terms of that trust deed, moneys, of course, become payable from time to time to the holders from time to time of the stock certificates. How that can be said to be " allowing money to remain unpaid," when in effect all that is being considered is a section and regulation which extends the meaning of the word " borrowing," I do not understand. It would have been perfectly easy, as I have already pointed out, for the Treasury, by making appropriate orders, to have dealt with this type of transaction. They have not thought fit to do so, and in my judgment they can bring this transaction within the section and the regulation in question only by giving to that section and to that regulation a most strange and unnatural construction.

It follows, therefore, if the Treasury are wrong in that view, that this transaction does not infringe the Control of Borrowing Order. At the same time, I think, having regard to the facts to which I have already referred, that this is really a question for the criminal courts, and that in consequence the declaration ought to be very narrow. I therefore propose to declare that the proposed arrangement is not a transaction whereby the price of any property is allowed to remain unpaid within the meaning of article 2 (1) (*b*) of the Control of Borrowing Order, 1946.

*Declaration accordingly.*

Solicitors: *Linklaters & Paines; Treasury Solicitor.*

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*Jan.* 19, 20.

Somervell, Birkett and Romer L.JJ.

[COURT OF APPEAL.]

# * OSBORNE *v.* SNOOK.

[1952. H. No. 3293.]

*County Court—Jurisdiction—Landlord and tenant—Application for new tenancy—Required particulars not given—Leave to amend—County Court Rules,* 1936 (*as amended in* 1951), *Pt.* 2, *Ord.* 40A, *Form* 342A—*Leasehold Property* (*Temporary Provisions*) *Act,* 1951 (14 *&* 15 *Geo.* 6, *c.* 38), *s.* 10.

Compliance with the provisions relating to a tenancy set out in Form 342A, appended to Order 40A of Part 2 of the County Court Rules, 1936 (as amended in 1951), is not a condition precedent to the jurisdiction of the county court in an application by a tenant for a new tenancy under section 10 of the Leasehold Property (Temporary Provisions) Act, 1951, and if the circumstances justify it leave to amend the application should be granted.

APPEAL from Judge Armstrong, sitting at Poole County Court.

The applicant, Mrs. Madeline Marie Osborne, as the sole executrix of Annie Butler Harvey, deceased, whose lease of the Post Office at Upton, Poole, in the county of Dorset, was due to expire on September 29, 1952, applied to the county court judge on August 28, 1952, by originating application under section 10 of the Leasehold Property (Temporary Provisions) Act, 1951,[1] for the grant of a new tenancy of the shop and living accommodation. The application was opposed by the landlord, Mr. A. G. W. Snook, and on November 5 was dismissed by the judge on the ground that the particulars given in the application did not comply with Form 342A appended to Order 40A of Part 2 of the County Court Rules, 1936,[2] as amended in 1951, and the

[1] Leasehold Property (Temporary Provisions) Act, 1951, s. 10 (1): "The provisions of this part of this "Act shall have effect for enabling the "occupier of a shop under a tenancy "to which this section applies . . . to "apply to the court for, and subject "to the provisions of this Act to ob-"tain, the grant of a new tenancy "where apart from the next following "section the expiring tenancy would "come to an end immediately before "the date of the commencement of "this Act or within the period of two "years beginning with that date, and "would so come to an end by effluxion "of time or by the expiration of a "notice to quit. . . ."

Subs. (2) provides that the section applies to a tenancy which "(*a*) con-"sists of a shop, or (*b*) consists of a "shop and of living accommodation "occupied wholly or mainly by the "tenant or by a person who is em-"ployed by the tenant for the pur-"poses of the retail trade or business "carried on in the shop, . . ."

S. 11 (1) provides: "An application "under this part of this Act for the "grant of a new tenancy shall—(*a*) if "apart from this section the expiring "tenancy would expire by effluxion of "time, not be made later than one "month before the date on which that "tenancy would so expire."

[2] County Court Rules, 1936, Part 2, Ord. 40A, r. 2: "Proceedings in "a county court under this Act" [Leasehold Property (Temporary Provisions) Act, 1951] "shall be com-"menced by originating application "and the rules relating to originating "applications shall apply subject to "the modifications contained in this "Order . . . (7) the forms in the "appendix relating to proceedings "under this Act shall be used in the "cases to which they are applicable

application was therefore bad in form. The judge also refused to permit the applicant to amend the application.

The applicant appealed.

*E. S. Fay* and *P. Back*, for the applicant.
*J. T. Molony*, for the landlord.

The cases cited in argument were referred to in the judgments.

SOMERVELL L.J., having read the material sections of the Act and County Court Rules, continued: There had been negotiations between the parties before the alleged application, but they had not resulted in any agreement. The lease was due to expire on September 29, 1952, and the application was made on August 28. The question is whether that application was an application within the Act. It admittedly did not set out all the particulars as stated in Form 342A. It set out that the premises contained a shop and dwelling-house, but it did not set out, as required by paragraph (*h*) (i) and (ii) of the form, the extent of that living accommodation and whether "occupied by the "tenant or by a person employed by the tenant for the purposes "of the retail trade or business carried on in the shop." There was no suggestion here that the shop or the house was separate within the provisions to which I have referred, so I need not read the part of the form which relates to that. The application also did not state what is required by (*k*), the "period, rent and other "terms and conditions of the new tenancy for which you are "applying." Those are the two important matters, though there may have been other minor matters.

It was submitted in the court below, as is clear from the judge's note, that the application to amend should be rejected on the same ground that an application to amend is rejected where the Limitation Act, or the Public Authorities Protection Act applies. The judge was referred, as we were, to *Marshall* v. *London Passenger Transport Board*.[1] We were also referred to another case, where amendment was allowed, *Collins* v. *Hertfordshire County Council*.[2] In the former of those cases what it was sought to bring in by amendment was a claim based on a breach of statutory duty, whereas it appeared (though the actual words of the writ do not appear in the report) that the writ, which was,

"with such variations, if any, as may "be required."

Form 342A: "The following are the "particulars of the expiring tenancy "of the premises:—(*a*) address of "premises, (*b*) date of lease or agree-"ment for tenancy, (*c*) names of "parties to lease or agreement, (*d*) "term granted by lease or agreement, "(*e*) rent reserved by lease or agree-"ment, (*f*) date and mode of termina-"tion of tenancy, (*g*) nature of the "retail trade or business carried on in "the premises by the tenant, (*h*) if "the expiring tenancy includes living "accommodation, state, (i) the extent "of the accommodation, and (ii) "whether the accommodation is occu-"pied by the tenant or by a person "employed by the tenant for the pur-"poses of the retail trade or business "carried on in the shop; . . . , (*k*) state "period, rent and other terms and "conditions of the new tenancy for "which you are applying."

[1] [1936] 3 All E.R. 83.

[2] [1947] K.B. 598; 63 T.L.R. 317; [1947] 1 All E.R. 633.

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of course, issued in time, was for negligence at common law only. The court held that the amendment introduced a new case which, if set up in an action commenced at the date of the amendment, would have been barred by lapse of time, and the amendment must be disallowed. In *Collins* v. *Hertfordshire County Council* [2] the amendment was allowed on the ground that it was no more than an amendment of the particulars of the cause of action indorsed on the writ. That indicates the dividing line between those two cases.

We were also referred to the decision of Donovan J. in *British and Colonial Furniture Co. Ld.* v. *William McIlroy Ld.*[3] In that case a somewhat similar point was raised under section 4 (1) of the Landlord and Tenant Act, 1927, which provides: "The "tenant of a holding to which this part of this Act applies shall, "if a claim for the purpose is made in the prescribed manner" be entitled to certain things. Under section 25, "the expression "'prescribed' means prescribed by County Court Rules," or the High Court rules if there were High Court proceedings. The manner was prescribed by rules, but the application did not in an essential matter fulfil what was prescribed. Donovan J. decided that no application had been made in the prescribed manner and that the tenants were, therefore, debarred from proceeding with their claim. If I may say so, with respect, I follow that decision and agree with it, because the effect of the words used in that section seems to me to be that one must read into the section the actual form prescribed by the rules, and the Act is imperative that the application must be made within a certain time in that form and manner. There are no such words in this Act. I have come to the conclusion that the principle of *Marshall's* case [4] and the case to which I have just referred does not apply to this statute.

It was submitted on behalf of the landlord, as it was submitted to the county court judge and accepted by him, as I read his notes, that compliance with all the various matters set out in the form was a condition precedent to an application under the Act. I do not think that that is the proper construction of the Act, together with the rules made under it. The Act, of course, is the governing instrument, though it may be that questions might arise as to the limits of the rule-making power if the rules had purported to establish conditions precedent other than those which could be gathered from a perusal of the Act alone. In my opinion that question does not arise, because I find nothing in the rules which could be construed in that way. I think that under the Act there must be, not later than one month before the date on which the tenancy would expire, an application to the court which, in ordinary language, is an application for a new lease

[2] [1947] K.B. 598; 63 T.L.R. 317; [1947] 1 All E.R. 633.

[3] [1952] 1 K.B. 107; [1951] 2 T.L.R. 1163; [1952] 1 All E.R. 12.

[4] [1936] 3 All E.R. 83.

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under this Act. I think that the document which we have before us here comes within that description. I do not think that I need elaborate the matter, having indicated, as I have already, the matters which were omitted. So far as the omission with regard to the living accommodation is concerned, it may well be said that that is implied in the fact of making the application at all, because the Act does only apply where the premises contain both shop and living accommodation if the living accommodation is used in accordance with section 10 (2).

Cases were cited to us with regard to the general county court jurisdiction. In *Upton* v. *Farmer*[5] Slesser L.J. gave a dissentient opinion in the Divisional Court, on the lines that an amendment ought not to be allowed where the original form was defective, in that it did not state the amount of damages claimed, and the county court jurisdiction depended upon the amount of damages claimed. In *Legon* v. *Count*,[6] the other judgment in *Upton* v. *Farmer*, that of Scrutton L.J., was approved, and it was laid down that "where proceedings are brought in the county "court for damages and the plaintiff fails to specify the amount "of damages, the county court judge has power to allow the "plaintiff to amend by restricting his claim for damages to an "amount within the jurisdiction of the court." I am not saying that in any event the principle which appealed to Slesser L.J. in the *Upton* case would have applied to an application under this Act. I refer to it because it was referred to in argument, but I think that *Legon* v. *Count*[6] disposes of that argument if it could ever have been maintained.

The nearest analogy to the present case is, I think, to be found in *Hanily* v. *Minister of Local Government and Planning*,[7] which was concerned with provisions in the Acquisition of Land (Authorization Procedure) Act, 1946. I can summarize the relevant provisions. They provide that a person aggrieved by a compulsory purchase order, who desired to question its validity, could, within six weeks, make application to the court. An application was made to the court within the six weeks, but after that period had elapsed and before the notice of motion came on for hearing, the applicant applied for leave to amend her notice of motion by adding a further and separate reason as ground for that conclusion. Cohen L.J., with whose judgment Singleton L.J. agreed, said[8]: "It seems to me, therefore, that there is "nothing inconsistent with the provisions of the Act, in applying "to the full the power which the court has under R. S. C., Order "28, r. 1, to allow an amendment, provided, of course, that "the original notice of motion clearly raised the point that the "authorization was not empowered to be granted under the Act."

[5] (1930) 142 L.T. 526; 46 T.L.R. 252.
[6] [1945] K.B. 391; 61 T.L.R. 360; [1945] 1 All E.R. 710.
[7] [1951] 2 K.B. 917; [1951] 2 All E.R. 749.
[8] [1951] 2 K.B. 917, 922.

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Of course, the words there were different, and the subject-matter was different, but I have come to the conclusion that the original application here clearly raised the point that the applicant was applying for a new lease and was alleging that she was within the terms of the Act. Therefore, with respect, I reject the view which, I think, was taken by the county court judge, as indicated in his note, that this application was a nullity. I think that the view which I have formed is reinforced by the general nature and terms of the form. It contains in brackets indications of the matters which should be dealt with, rather than prescribing in a precise way the exact form that must be filed. Paragraph 7, which refers to the form, says: "The forms in the appendix "relating to proceedings under this Act shall be used in the cases "to which they are applicable with such variations, if any, as "may be required." Those words, I think, themselves indicate that the form is by way of guidance and by way of stating the type of matters which should be dealt with, rather than laying down the conditions precedent to a valid application.

That being so, the judge had, in my opinion, jurisdiction to consider, and should have considered, whether he should give leave to amend. In the written notes which were later submitted to him there are certainly one or two paragraphs which might be read as indicating that he did consider the matter from that aspect. They might be read as indicating that, considered from that aspect, he would not have allowed an amendment. I do not myself feel that it is satisfactory to treat the judge as having addressed his mind to the issue on that basis because, as appears from the note which he made at the time, he regarded himself as not having jurisdiction to do so.

I think, therefore, that it would be more satisfactory, and would probably save costs and time, if we addressed our minds in this court to the question whether, having regard to the circumstances, leave to amend ought to be given. I have come to the conclusion that leave to amend, subject to costs, ought to be given. I do not think that the details matter, but it was common ground that there had been negotiations for some time before the actual application was filed. The tenant had indicated that she would like a new lease at an increased rent, and I think that the landlord would have preferred to sell. There was an interview between the parties. The landlord would, on the fact of it, be familiar with the general nature of the premises of which he was the landlord. It was said that the failure to state the amount of the rent was a serious matter in that the landlord might be prepared to grant a lease for such a rent without incurring the costs of legal proceedings. It may be that that matter should be dealt with by an order as to costs but, in any event, although I do not think that the landlord was under a duty to make inquiries; he could, of course, have asked the applicant what rent she was prepared to pay, and the fact that he could so easily have done that makes it, I think, difficult for

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him to make much of that type of omission in considering whether leave to amend should be given. That the applicant should pay the costs was conceded, because she came to court with an application which was not in order and did not give the details as required by the rules and so had to seek leave to amend.

I would, myself, grant leave to amend within whatever time may be appropriate and have the matter remitted, so that it could be heard, subject to an order that the applicant should bear the costs of the proceedings. For these reasons I would allow the appeal.

BIRKETT L.J. I am of the same opinion. The central point of the case, of course, was subsection (1) of section 11 of the Act of 1951. "An application under this part of this Act for the "grant of a new tenancy shall—(*a*) if apart from this section the "expiring tenancy would expire by effluxion of time, not be made "later than one month before the date on which that tenancy "would so expire; . . ." Why I call it the central point of the case is because, as I read the judgment of the county court judge, that was the dominant point in his mind at all times. The ground which he gave in his own note for the refusal of the application was, "Application for new tenancy refused on ground "that no application for tenancy complying with Act has been "filed." When he came to deal in some detail with the matter he referred to the authorities to which my Lord has referred, which asserted the principle for which Mr. Miller, the solicitor on behalf of the landlord, contended, and said: "These two "authorities"—*Marshall's* case [9] and *Hanily's* case [10]—do, I "think, clearly establish the principle for which Mr. Miller "contends. It is this: if you get a period limited by statute, or "rules, duly made, limitations within which the defendant or "respondent is entitled to be protected, then no amendment "should be allowed in proceedings depriving him of that "limitation."

The view which the judge took, I think, of the powers to amend were governed by the views he had taken of that principle, because he said a little later: "Whether, indeed, there is power "to amend it does not seem to me to be material. It would be "wrong to allow an amendment after practically one month has "elapsed. Mr. Miller's suggestion is right and I refuse leave to "amend, and I am bound to hold that the application is bad in "form as it does not comply with the rules. The result is that I "have no power to grant a new tenancy and the application "fails."

The original application in this case was made on August 28, 1952. The lease expired on September 29, and so the application was just within the month prescribed by section 11. My Lord

[9] [1936] 3 All E.R. 83.
[10] [1951] 2 K.B. 917.

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has already expressed the view that this was a proper application, because it opens with these words: "Madeline Marie Osborne of "The Post Office, Upton, Poole in the county of Dorset, widow, "hereby applies to the court for the grant of a new tenancy "pursuant to the provisions of section 10 of the Leasehold "Property (Temporary Provisions) Act, 1951, as the occupier of "a shop under a tenancy to which that section applies. The "following are the particulars." Those particulars follow, in the main, the form 342A which is prescribed under the rules, namely, the address of the premises, the date of the lease, the names of the parties, the terms, the rent, the mode of termination. All those matters are set out. Oddly enough, the concluding matters in the form, as to the extent of the living accommodation, and things of that kind, are omitted.

The objection which was taken in the pleadings by the answer of the landlord was that: "The originating application does not "comply with the provision of the Leasehold Property (Tem- "porary Provisions) Act, 1951, or the rules thereunder." It is true that before the actual hearing by the county court judge an amendment had been made. That does not even now appear to be quite accurate or full. The judge took the view, after considering the matter with some care, that the question of amendment really did not arise because if it did there was no valid application before him. That must necessarily mean that he regarded the provisions of the rules, which had not, admittedly, been followed, as conditions precedent to the jurisdiction which he was to exercise. I share the view which my Lord has expressed, that that was a wrong view to take.

On the question of amendment, I would add this: under Order 15, r. 1 of the county court rules the directions with regard to amendment are set out: "The court may, at any time—(*a*) "amend any defects and errors in any proceedings whether the "defect or error is that of the party applying to amend or not; "and (*b*) add, strike out or substitute any person either as "plaintiff or defendant; and all such amendments as may be "necessary for the purpose of determining the real question in "controversy between the parties shall be made, if duly applied "for." In the note to that rule we had cited to us this passage: "An amendment should always be allowed if it can be made "without injustice to the other side, and there is no injustice if "the other side can be compensated by costs." Then there is a quotation from Bowen L.J.[11]: "I know of no kind of error or "mistake which, if not fraudulent or intended to overreach, a "court ought not to correct, if it can be done without injustice "to the other party, for the courts of justice do not exist for the "sake of discipline, but for the sake of deciding matters in "controversy, and amendments for this purpose ought not to be "regarded as matters of favour or of grace."

[11] (1884) 26 Ch.D. 700, 710.

The facts of this case, as we now know from the correspondence, which I understand was read to the county court judge, show that the negotiations, which continued for some time, were, in fact, opened by the landlord in June, 1952, when Messrs. Miller, acting for Mr. Snook, were suggesting that the property should be sold. The correspondence does not matter except to show that it was conducted on a very friendly and co-operative basis. For example, under the date of July 26, the solicitors for the applicant were writing: "Would your client "consider granting Miss Osborne a lease, perhaps at an increased "rent, to be negotiated, to run in reversion on the lease held by "the late Mrs. A. B. Harvey, which expires on September 29 "next? Our client would prefer to take up a new lease, if this "can be arranged, but if not she obviously will have to save the "position so far as she can by taking the steps open to her under "the Leasehold Property (Temporary Provisions) Act, 1951. "This she is reluctant to do if a more friendly course is open to "her, and perhaps you will take an early opportunity of seeing "your client and letting us know his views." In truth, as the correspondence discloses, the applicant and Mr. Snook, the landlord, actually met and discussed this matter between them. The correspondence, which continued right down to the end of August, ends on the note that the landlord is saying, "I would "like to sell," and the applicant is saying, "I would like a "lease." In those circumstances, of course, the question whether an amendment should be allowed assumes great importance, but I cannot for myself think that there is any element of any kind in this action which suggests that there would be an injustice, or anything approaching an injustice, by allowing the amendment which is sought to be made in this case.

For these reasons, I agree with the decision which already has been announced by my Lord.

ROMER L.J. I also agree. The main argument presented to us on behalf of the landlord was that there was no effective application before the judge at all, because the application which was in fact put in failed to conform with the requirements of the County Court Rules, 1936, under Order 40A. There is no doubt that the application did fail to conform with those rules in certain respects, but that failure, as I think, cannot have the effect of invalidating the application to such a degree that it must be regarded as not being an application at all. If that were the true view of the matter then, even if the application had been made some months before the date on which the lease expired, similarly the county court judge would have had no power to give leave to amend and would have had to dismiss it out of hand. I think that that would be a most regrettable result, and I do not think that it is the result which emerges from a consideration of the Act and the rules. One only arrives at that result, as has already been pointed out, if the true view of the matter is that compliance

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with the various requirements of the form in Order 40A amounts to a condition precedent which, unless performed, invalidates the application.

It is to be observed that in this form all kinds of things are provided for by way of particulars which should be given, many of them comparatively unimportant, many of them already known to the landlord. I cannot think that if the Rules Committee had intended that compliance with the form was to be treated as a condition precedent to an application they would have put into the form so many relatively unimportant matters of detail. It was admitted on behalf of the landlord that some of them were plainly unimportant, and it was said that if there was failure to comply with those that would not invalidate the application. On the other hand, it was argued that failure to comply with those which were of importance would invalidate the application. It seems to me that that is not a tenable way of approaching the matter, because either they are all of such importance as to invalidate the application if they are disregarded, or none of them are. The court can pick and choose between them. Although some of them are of importance, for reasons which my Lord has indicated, and such that the landlord should be acquainted with them as soon as possible, if they were intended to have the drastic effect which the argument for the landlord here would result in, I think that they would have been, in the first place, isolated from matters which were not important, and I think, also, that they would probably have appeared in the rules themselves and not been relegated to the form. Be that as it may, I agree with what my Lords have said, that they cannot have the treatment accorded to them which the landlord is contending for.

The landlord primarily relied on *British and Colonial Furniture Co. Ld.* v. *William McIlroy Ld.*,[12] but that seems to me to have been quite a different case. That was an application under the Landlord and Tenant Act, 1927, and the application there, by the very terms of the statute, could only be made if it was made in the prescribed manner. The application there was not made in the prescribed manner and, therefore, it was not an application of the kind which was required by the Act itself. Donovan J., with what reluctance I know not, said that he could not deal with it; it was not an application and, therefore, he could not entertain it and could not allow the amendment.

It was sought to say that this case was similar to *McIlroy's* case[12] by pointing to the word "duly" in section 12 of the Act of 1951. It was said that an application cannot be regarded as "duly" made under the Act unless it conforms to the form in the Order. I think that the word "duly" falls very far short of the words "in the prescribed manner" in the Act of 1927. I think that the word "duly" in section 12 is probably referable to the requirement in section 11 that the application was "not

[12] [1952] 1 K.B. 107.

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" to be made later than one month before the date on which that " tenancy would so expire "; and it may possibly incorporate or envisage other matters as well. But it does not seem to me that there is any reason to suppose that it was incorporating as a requirement the due observance in point of form of any rules which might be made in accordance with the Act. It appears to me, therefore, that the case of *McIlroy* [12] does not assist the landlord in this case, nor does it drive this court to what is clearly a somewhat unfortunate result, which was the result in *McIlroy's* case,[12] of defeating without hope of amendment an application which, although plainly directed to a certain jurisdiction and invoking that jurisdiction, did not comply in matters of form with the direction laid down or prescribed by the Act. I am glad that we are able to allow this matter to proceed, because it is never very satisfactory if an application is defeated, and irremedially defeated, merely because of failure in point of form to comply with certain requirements.

I agree with the conclusions which my Lord has indicated.

*Appeal allowed, with costs. Case remitted. Costs occasioned by amendment and of original hearing to be paid by applicant.*

Solicitors: *Church, Adams, Tatham & Co., for Trevanion & Curtis, Poole; Barnes & Butler, for J. W. Miller & Son, Poole.*

A. W. G.

[12] [1952] 1 K.B. 107.

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[COURT OF APPEAL.]

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*Jan.* 19.
Denning and Morris L.JJ.

## *COMMISSIONERS OF INLAND REVENUE *v.* PEARLBERG.

[1952 I. 2789.]

*Revenue—Income tax—Land and buildings (Schedule A)—Failure to appeal to Commissioners—Liability to tax absolute—Income Tax Act*, 1918 (8 & 9 *Geo.* 5, *c.* 40), *s.* 169—*Finance Act*, 1941 (4 & 5 *Geo.* 6, *c.* 30), *s.* 12, *Sch. I, para.* 5—*Finance Act*, 1942 (5 & 6 *Geo.* 6, *c.* 21), *Sch. X, para.* 6 (3).

An appeal against an assessment to income tax in respect of property chargeable under Sch. A of the Income Tax Act, 1918, can only be made in the manner provided in the Income Tax Acts, to the Commissioners for the General Purposes of Income Tax, with an appeal from their decision to the High Court on points of law by case stated. Where there has been no appeal to the Commissioners within the statutory period the liability to pay the tax as assessed is absolute and cannot afterwards be challenged in proceedings in the High Court.

Decision of Havers J. affirmed.

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COMMISSIONERS OF INLAND REVENUE v. PEARLBERG.

APPEAL from a judgment of Havers J.

From 1945 onwards the defendant, Harry Hyman Pearlberg, was notified of assessments made on him under rule 8 of No. VII of Sch. A of the Income Tax Act, 1918,[1] as the "landlord" of a number of small properties in the Manchester division. He did not appeal against those assessments within the period of 12 months allowed by paragraph 6 (3) of Sch. X of the Finance Act, 1942; nor did he pay the tax. As regards another group of properties, he was charged, under section 12 of the Finance Act, 1941, as being the landlord, a notice having been duly served on him under paragraph 1 of Sch. I to the Act of 1941. He did not appeal against that notice; nor did he pay the tax.

On May 22, 1952, the Inland Revenue Commissioners issued a writ claiming £438 7s. 0d. in respect of tax alleged to be due on the properties, and, then, for the first time, the defendant sought

[1] Income Tax Act, 1918, s. 169 (1): "Any tax charged under the provisions of this Act may be sued for and recovered, with full costs of suit, from the person charged therewith in the High Court as a debt due to the Crown, or by any other means whereby any debt of record or otherwise due to the Crown can, or may at any time, be sued for and recovered . . . ":

Sch. A, No. VII, r. 8: "The assessment and charge shall be made upon the landlord in respect of—

"(*a*) any dwelling-house in the occupation of a tenant which, with the buildings or offices belonging thereto, and the land occupied therewith, is of less annual value than ten pounds; and

"(*b*) any lands and tenements which are let for a period less than one year; and

"(*c*) any house or building let in different apartments or tenements, and occupied by two or more persons severally. . . .

"Provided that in each of the above cases in default of payment by the landlord, the tax may be levied upon the occupier or occupiers respectively."

Finance Act, 1941, s. 12 (1): "An assessment to income tax made under rule 8 of No. VII of Sch. A shall be valid as against all persons although not made on the person who should have been assessed and the tax under any assessment to income tax made under the said rule 8 may be recovered from the person who is the landlord of the land to which the assessment relates on the first day of January in the year of assessment for which the assessment was made."

Sch. 1, para. 1: "Legal proceedings shall not be instituted against a person as having been the landlord . . . (where he is not the person named in the assessment) until the expiration of 21 days from the service on him . . . of a notice in writing, . . . specifying the land and the amount of tax claimed and stating that it is intended to proceed against him for the recovery thereof as having been the landlord of that land on the first day of January in the year of assessment for which the assessment was made.

Para. 2: "Any person served with such a notice may appeal to the General Commissioners. . . ."

Para. 3: "Any such appeal . . . may be founded upon the contention that the appellant was not the landlord of the land on the said first day of January."

Para. 5: "Where no appeal is brought or is pending . . . it shall be conclusively presumed that the person on whom the notice was served was the landlord of the land on the said first day of January and that the amount of tax specified in the notice is due from him so far as it still remains unpaid; . . ."

Finance Act, 1942, Sch. 10, para. 6 (3): "The time within which notice of appeal may be given against any assessment under Schedule A or Schedule B shall, in the case of any person who has not been served with a notice of the assessment, be any time before the expiration of 12 months from the end of the year of assessment."

to contest the assessments and to adduce evidence in support of his defence that he was not chargeable to the tax. As regards the first group of properties, where the tax was chargeable on the landlord under rule 8 of No. VII of Sch. A, he said that he was not the "landlord," that he had never owned or been in receipt of the rents and profits from the properties, but that he was, and had been ever since November, 1943, an undischarged bankrupt. As regards the remainder of the properties, in respect of which he was charged under the Act of 1941, he denied that he had been at any time the owner, occupier or landlord of the properties.

Master Diamond ordered that the Commissioners be at liberty to sign final judgment against him for the amount indorsed on the writ, with interest, if any, and costs. Havers J. (sitting in chambers) confirmed that order.

The defendant appealed.

*Cyril King Q.C.* and *Desmond Miller* for the defendant.
*Sir Reginald Hills* for the Crown.

No cases were cited in argument.

DENNING L.J. stated the facts and continued: The issue which the defendant raises in his affidavits is that he is not rightly chargeable with tax, for one or other of the reasons he has mentioned. The whole question in the case is: is that an issue which he is allowed to have tried in these proceedings in the High Court? The correct answer has been, I think, given by Sir Reginald Hills, namely, that the right way for the defendant to have challenged any of these matters was by appeal to the Commissioners in the manner provided by the Income Tax Acts, and that, as he did not raise the matters by way of appeal, he is not allowed to raise them now. If we were to allow the defendant to raise these matters, it would mean that the High Court would become the tribunal to decide questions of fact and law on tax assessments, whereas they have been decided to the general satisfaction by the Commissioners for a great many years, with an appeal on points of law by case stated to the High Court. That is the proper remedy and not this. The provisions which exclude the defendant are these: so far as the first group of properties is concerned, once there is an assessment duly made, and not appealed from, then under section 169 of the Income Tax Act, 1918, the tax charged may be sued for and recovered from the person charged therewith in the High Court as a debt due to the Crown; so far as the second group of properties is concerned, there is a conclusive presumption against him under the Act of 1941. In my opinion, therefore, all issues on the merits of these cases, as to fact or law, should have been determined by appeal to the Commissioners and cannot be raised at this stage. If there has been no appeal to the Commissioners the debts become absolute and conclusive, and their legal effect cannot be denied. The

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position was the same in the old days of the Latin Information. I, myself, remember that Rowlatt J. in these matters refused to go into the merits. He always said to the debtor: "You ought "to have appealed to the Commissioners." So now, although since the Crown Proceedings Act, 1947, the procedure is different —by writ in the High Court—nevertheless, the assessment having been made, or the notice served, and no appeal made, the debt is absolute, and we have no alternative but to award judgment.

In my opinion the appeal should be dismissed.

MORRIS L.J. I agree.

*Appeal dismissed.*

Solicitors: *Warren & Warren; Solicitor of Inland Revenue.*

E. D.

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[QUEEN'S BENCH DIVISION.]

## * PRACTICE NOTE (CASE STATED).

1953
*Jan.* 16.
Lord Goddard C.J., Croom-Johnson and Pearson JJ.

*Practice and Procedure—Case stated by justices—Inclusion of relevant facts—Belated application for restatement of case.*

ON an appeal by case stated by justices to the Divisional Court it appeared that a charge preferred against the respondent was dismissed by the justices on July 7, 1952. On September 22, 1952, an application was made to the justices by the appellant to state a case and the clerk to the justices asked the prosecution to do so. The case was duly stated, but was not sent to the respondent for approval, though a copy was received by him on September 30, 1952. On the case coming on for hearing, objection was taken for the respondent that relevant facts were omitted from the case as stated.

In the course of a judgment allowing the appeal, LORD GODDARD C.J. said: I do not think that there was any obligation on the clerk to the justices to submit the draft of the case to the respondent for revision, although it is done in many cases. If the justices see, from the case, that the facts are properly and fully stated according to their findings, I do not think that any further revision of the case is necessary. If, however, a respondent is of opinion that some of the facts as found by the justices—not merely some facts which have been submitted to them as evidence—have been omitted from the case as stated by them, it is open to him to make an application to a Divisional Court, supported by an affidavit setting out the findings of fact which in his opinion have been omitted, for a restatement of the case. In such circumstances the court will then consider whether the

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case should be sent back to the justices for restatement, if the facts alleged to have been found by them and to have been omitted from the case as originally stated had, in fact, been found by them. In the present case, a copy of the case has been in the possession of the respondent and his advisers since September 30, 1952, but there has been no application supported by an affidavit alleging that any facts found by the justices have not been stated in the case. The Divisional Court are concerned, not with the evidence given in the case, but with the facts which the justices found, and unless the court are satisfied that the justices found, or must have found, certain facts which they have omitted from the case, they will not send it back for amendment. Since the case has been in the hands of the respondent's advisers for all these months, the court cannot now send it back for amendment on a mere statement made on behalf of the respondent that certain facts have been omitted. It was the respondent's duty to act promptly in the matter.

The court then heard, and allowed, the appeal.

P. B. D.

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[CHANCERY DIVISION.]

## * STEPHENSON BROTHERS LD. *v.* COMMISSIONERS OF CUSTOMS AND EXCISE.

1953 *Jan.* 28.

Roxburgh J.

[1952. S. 995.]

## * KING & JARRETT LD. *v.* SAME.

[1952. K. 291.]

*Revenue—Purchase tax—"Pictures"—Pictorial coupons given away with goods—Free gift for collection of series—Dual purpose—Not choses in action—Liability to tax—Finance Act,* 1948 (11 *&* 12 *Geo.* 6, *c.* 49), *8th Sch., group* 25.

Poster stamps were given away to the purchasers of certain goods. The stamps bore representations of characters from a well-known film, and were reproduced under a licence granted by the owners of the copyright in the film. Collection of a series of the stamps entitled a purchaser to a free gift.

The Commissioners of Customs and Excise alleged that the stamps were chargeable with purchase tax on the ground that they were "pictures . . . of a kind produced in quantity for general "sale . . ." within the meaning of group 25 in the Eighth Schedule to the Finance Act, 1948:—

*Held*, that the stamps were pictorial coupons, having a dual purpose, but that fact did not prevent them from being "pictures" within group 25, which they were found, as a fact, to be; accordingly they were liable to purchase tax.

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ACTIONS.

Stephenson Brothers Ld., plaintiffs in the first action, were manufacturers of furniture cream and floor polish. By a licence agreement dated October 27, 1950, Walt Disney Mickey Mouse Ld. authorized them, for a period of two years from October 1, 1950, to affix to certain goods sold by them poster stamps bearing pictorial representations of characters from the licensors' film "Cinderella." A substantial lump sum payment was made in consideration of the licence.

The licence so far as material recited: "Whereas (1) the "licensor by virtue of certain agreements between it and Walt "Disney productions an American corporation claims authority "to license within the territory hereinafter defined the use and "exploitation of the fanciful character or characters specified in "clause 1 of the schedule hereto as personified and represented "by Walt Disney for motion picture purposes (which character "or characters are hereinafter for convenience referred to as 'the "'fanciful character' and this collective description shall where "the context requires and admits be deemed to relate severally "to each fanciful character to which this licence relates) in "connexion with the manufacture and marketing of certain "classes of commodities and merchandise (2) The licensee "realizing the great value of the publicity and goodwill connected "with the fanciful character and the name 'Walt Disney' and "that it has established an identity for itself and for the products "bearing its name and/or design in the mind of the purchasing "public is desirous of obtaining authority within the territory "hereinafter defined to reproduce and/or associate the name of "the fanciful character together with the name 'Walt Disney' "and/or the name of the licensor in connexion with certain "merchandise of the licensee as hereinafter defined and the "licensor has agreed to permit such use upon the terms herein-"after contained." The operative part of the agreement provided: "the licensor authorizes the licensee to use and re-"produce the fanciful character and the name 'Walt Disney' "and/or the name of the licensor on upon and/or in connexion "with the sale of certain articles of merchandise as defined in ". . . the schedule hereto (which merchandise is hereinafter "for the purpose of this licence referred to as 'licensed articles') "and the licensor has or will supply to the licensee all necessary "typical representations of the fanciful character."

The expression "the fanciful character," was a collective description of characters from the Walt Disney motion picture production "Cinderella," the names of which were "Cinderella," "The Prince," "The King," "The Duke," "Fairy God-"mother," "Stepmother," "Drizella," "Anastasia," "Bruno," "Lucifer," "Gus," "Jaq" and "Lackey." The articles of merchandise referred to were "Furniture cream and floor polish "manufactured by the licensee affixed to which in a manner to "be approved by the licensor are printed representations of the

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"fanciful characters in four colour half tones in the form of "poster stamps of a size one and five-eighths inches deep by one "and three-sixteenths inches wide."

Clause 28 of the Schedule provided: "The licensee further "undertakes that premium material shall be supplied by the "licensee to purchasers of licensed articles in exchange for "licensed stamps in a manner to be approved by the licensor "and that such premium material shall consist exclusively of "a stereoscopic eye piece and a 'Magic Mirror Picture Book' "containing six scenes from the Disney film 'Cinderella' which "book shall be published and printed (by one of the licensees "of the licensor to be selected in agreement with the licensee "in a form and upon terms to be approved by the licensor) in "such manner that when viewed through a stereoscopic eye piece "such scenes will appear in stereoscopic relief."

Stephensons adopted three methods of obtaining the stamps.

The first was by an order in January, 1951, for the printing of 10,000,000 stamps by King & Jarrett Ld., the plaintiffs in the second action. King & Jarrett Ld. received this order through Barneys Ld., who acted as agents for Stephensons.

It was agreed that there was a sale of the 10,000,000 stamps by King & Jarrett Ld. to Barneys, and at that time, as between King & Jarrett Ld. and Barneys, they were nothing but pieces of paper containing pictorial representations.

A second order by Stephensons was made direct to King & Jarrett for 100,000 stamps, and in that order Barneys took no part. It was conceded that that transaction stood on the same footing as the first transaction.

The third method was that 500,000 stamps were printed by Stephenson Brothers themselves.

The stamps, apart from bearing pictorial figures described in the licence, bore a number prominently upon the face. The numbers ran from 1 to 12, and were less than half an inch high. On the back of each pictorial stamp was written: "'Wand' erful "book for you. Collect a set of these stamps numbered 1 to 12. "Send to Stephenson Brothers Ld., Bradford, with 1s. P.O. to "cover post and packing, any time before December 31, 1952, "for wonderful 'Magic Wand' Book, value 7s. 6d." This book was connected with the copyright characters which were the subject of the licence.

Folders, each containing a small number of the stamps, were attached to containers of floor polish and furniture cream by transparent tape. On the uppermost side of each folder was printed "Your Cinderella stamps are here." These goods were supplied by Stephensons to retailers who supplied them to the public generally.

The Commissioners of Customs and Excise notified Stephensons that purchase tax would be demanded on these poster stamps on the ground that they were "pictures" within the

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meaning of group 25 of the Eighth Schedule to the Finance Act, 1948.[1]

The plaintiffs in both actions asked for a declaration that the poster stamps were not goods chargeable with purchase tax.

*John Clements* for the plaintiffs in both actions.
*J. P. Ashworth* for the Commissioners of Customs and Excise.

Case referred to in argument: *Scott & Co.* v. *Solomon.*[2]

ROXBURGH J. having stated the facts continued: There are two questions here. The first question in order of logic—the other question only concerns the transaction in which Stephenson Brothers Ld. printed their own poster stamps—is whether these poster stamps are goods at all. I was, perhaps, responsible for starting a point which, on consideration, I think is not well-founded. The definition of "goods" in the Sale of Goods Act, 1893, is incorporated by section 41 (1) into the Finance (No. 2) Act, 1940. The material part of the definition of "goods" in section 62 of the Sale of Goods Act is "'Goods' include all "chattels personal other than things in action." As production of a set of 12 of these documents in the manner directed on the back entitled a person to the book valued at 7s. 6d., it at one time seemed to me that these might be choses in action, but I do not think that, on further consideration, that is a possible view. First, it cannot be put higher than this, that each stamp contains an offer of a contract and not more. That cannot constitute either a contract in writing or a memorandum of a contract in writing, and therefore the stamps cannot in my judgment be regarded as choses in action.

Secondly, each one of the stamps is sold separately; it is conceded that these documents are sold and I do not have to determine that point. One of them per se is nothing at all except an offer of a contract. A further stage is not reached even if the offer is accepted until one has 12 in a set. It is not easy to achieve. Mathematicians in court have calculated the chances; in other words, how many boxes on the average it would be necessary to buy in order to get a set. I am unable to embark upon such abstruse calculations, but I am satisfied that it would have to be a good many, certainly more than 12. I do not think, therefore, that these are choses in action. That point could only have applied to the poster stamps which Stephensons themselves printed, because as between King & Jarrett Ld. and Stephenson

[1] The Finance Act, 1948, Eighth Sch., group 25: "Pictures, prints, "engravings, photographs, figures, "busts, reliefs, vases, and similar "articles, of a kind produced in quan-"tity for general sale. . . ." Subsequent amendments to group 25 did not alter those words.

[2] [1905] 1 K.B. 577; 21 T.L.R. 230.

Brothers Ld. or Barneys they were obviously nothing in the nature of choses in action; they were merely bits of paper with something printed upon them.

I will now consider the main, and much the most difficult, point in the case. Are these poster stamps pictures of a kind produced in quantity for general sale? One thing is clear, they are not exclusively pictures; they operate as something more. But I do not think that that is in any way fatal to the Crown's case. If there is a dual purpose article, as I read the Finance Act, 1948, it would not cease to be a picture because it was also sold for some other purpose. On the other hand, I am satisfied that not every pictorial representation on a document or other article is necessarily a picture within this definition. Therefore, it is a very nice and narrow question. First, the nature of the article has to be tested at the moment when it is delivered to the retailer. That is the moment at which the tax becomes exigible, and it must be then that liability to tax falls to be determined, and it has to be decided then whether the article falls into some, and if so which, group. It is also true to say, however, that one must look forward and consider the article not in relation to the middleman, but in the hands of the ultimate consumer. That, I think, is indicated by the words "for general "sale," which I construe as meaning "for sale to the public "generally."

Group 25 must be considered (and for this purpose I have reached the same conclusion whichever particular version of the group happens to be in force at the particular time), at the moment when the goods are being delivered to the retailer in order to ascertain what this thing is, and having decided what it is, one has to determine whether it is of a kind produced in quantity for sale to the public generally. In this case no difficulty arises on those latter words, because this kind of thing is very common and has been so for many years. It is not seriously contested before me that these articles, whatever they may be (and that is the real difficulty) are not of a kind produced in quantity for general sale. In fact, Stephenson Brothers Ld. alone produced or caused to be produced several million.

The real question is: What was the article at the date when it was delivered to the retailer, or what would it be—this being an action for a declaration, which to some extent covers future questions—at the moment when it is delivered to the retailer?

It is always dangerous to try and put glosses on the words of an Act of Parliament, and I shall not try to do so. It is enough to say that one has to look at the substance of the question. Each stamp is an article with various features, and I must consider as a whole what it is. The fact that it contains a pictorial representation is not, in my judgment, decisive; there still remains the question: Is it properly to be described as a picture?

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The two strong points in Mr. Clements' case are these: He said first that the numbers on the stamps were wholly disproportionate, and that if each document were to be regarded as a picture there were things plainly lacking in additional artistic attraction, which gave a clear indication that though there was a pictorial representation the article was not a picture. He argued further that the words on the back made it quite plain that it was a coupon. But, in my judgment, it is a pictorial coupon, and a pictorial coupon may be a picture or it may not. It must depend on the facts of each particular case. One could imagine a coupon which contained all the information printed on these stamps and, in addition, had some inferior pictorial representation of a lion or a cat or something printed on it. I am by no means sure that that would be a picture. It would be a pictorial coupon. That is what I mean by saying that each case must depend upon its own particular facts. But here the case is quite different. Walt Disney cartoons are universally known and beloved by many, and Stephenson Brothers Ld. have stated that they attach importance to these cartoons as cartoons. I refer to what is said about them in the recital to the licence. I do not for a moment suggest that this kind of question has to be determined upon evidence, and therefore that is not evidence against them, because evidence is not admissible on this matter; but I rely on it only to confirm my view that these are quite definitely dual purpose stamps, one of the purposes of which is to entertain by these cartoons.

That, of course, is the normal purpose of a cartoon, and normally a cartoon is a picture within group 25; thus so far they are for the normal purpose for which cartoons are reproduced, and so far they are, in my judgment, pictures. On the other hand, of course, they are plainly coupons. Therefore, in my view, they are pictorial coupons; but the pictorial element is so important in the particular circumstances of this case that they are, in my judgment, pictures, and none the less so because at the same time they are coupons.

Therefore both these actions must fail.

*Actions dismissed.*

Solicitors: *Ward, Bowie & Co. for A. V. Hammond & Co., Bradford; M. G. Whittome.*

I. G. R. M.

[QUEEN'S BENCH DIVISION.]

## * HARRIS *v.* BRIGHTS ASPHALT CONTRACTORS LD.

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*Jan.* 13, 14, 15, 16, 19, 20.

Slade J.

[1951 H. 2576.]

*Building—"Scaffold"—Boards on roof for workman to stand on—Duty to provide—Warning notice—Fragile roof—Risk of falling on adjoining roof—Whether working "above" it—Building (Safety, Health and Welfare) Regulations,* 1948 (*S.I.* 1948, *No.* 1145), *regs.* 3, 5, 31 (3) (*a*) (*b*).

*Damages—Personal injuries—Workman's life materially shortened—Damages not to include wages which, but for the accident, would have been earned during natural life.*

The plaintiff, while working for the defendants on the drip edge of a flat roof fell on to an adjoining sloping roof, about two feet below, made of asbestos. The asbestos broke and he fell more than 10 feet to the ground and was seriously injured, his expectation of life being materially shortened. He claimed damages from the defendants, alleging that they were in breach of their common law duty to him to provide a safe system of working, and in breach of their statutory duty under regulations 5 and 31 (3) (*a*) of the Building (Safety, Health and Welfare) Regulations, 1948, to provide scaffold and other plant, and under regulation 31 (3) (*b*) to display warning notices:—

*Held*, first, that the risk of the plaintiff falling through the asbestos roof was one which the defendants could and should have reasonably foreseen, and that in failing to take such precautions as would guard him from falling they had failed in their duty to provide a safe system of working and were guilty of negligence at common law.

*Smith* v. *Baker & Sons* [1891] A.C. 325, and *Wilsons and Clyde Coal Co. Ld.* v. *English* [1938] A.C. 57; 53 T.L.R. 944; [1937] 3 All E.R. 628 applied.

*Held*, secondly, that had boards been placed on the asbestos roof for the plaintiff to stand on to perform his work they would have constituted a "scaffold" within the definition in regulation 3 of the Building Regulations, and in failing to provide such boards for that purpose the defendants were in breach of regulation 5.

The defendants not having displayed any notice that the roof was fragile, were also in breach of regulation 31 (3) (*b*), but inasmuch as the plaintiff knew that it was fragile that breach had no bearing on the accident and his claim failed so far as that regulation was concerned. There was no breach of regulation 31 (3) (*a*) since the defendant was not working "above" the asbestos roof in the vertical sense.

*Held*, lastly, that in assessing damages no sum could be allowed in respect of loss of wages between the anticipated date of the plaintiff's death due to shortened expectation of life and the date to which he would normally have lived but for the accident. The statement of principle to the contrary in the headnote to *Roach* v. *Yates* [1938] 1 K.B. 256 ([1937] 3 All E.R. 442) was not borne out by the judgments in that case.

*Phillips* v. *London and South-Western Railway Co.* (1879) 5 Q.B.D. 78 and *Rose* v. *Ford* [1937] A.C. 826; 53 T.L.R. 873; [1937] 3 All E.R. 359 considered.

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ACTION.

On November 24, 1950, the plaintiff, an asphalt spreader, employed by the defendants, was chipping old asphalt from the vertical drip edge, about eight-and-a-half inches wide, of a flat roof, 13 to 15 feet above the ground, preparatory to replacing it with new asphalt. He was kneeling about 9 inches from the edge. He either overbalanced or slipped whilst changing his position and fell on to an adjoining sloping roof about two feet below, which rose at an angle of about 30 degrees to a central ridge and was covered with asbestos. That roof broke and the plaintiff fell through it more than 10 feet on to the floor below and sustained serious injuries. The Building (Safety, Health and Welfare) Regulations, 1948, were admittedly applicable to the work the plaintiff was doing.

The method of working adopted by the plaintiff was the normal one for such work, but it could have been performed by standing on boards placed on the sloping roof. The plaintiff was aware that the roof below him was fragile, but he did not ask for planks to be placed upon it or for anything to catch him in case he fell. The defendants' foreman was aware of the nature of the asbestos roof, but no safety devices were provided, nor were there any notices stating that the roof was fragile.

At the time of the accident the plaintiff was 35 years of age, and had always enjoyed good health. As a result of the accident his spine was fractured and, among other things, the lower portion of his body became paralysed, and his expectation of life was materially reduced, medical reports estimating it at between six months and two years from the date of the trial of the action (between two-and-a-half to four years from the date of the accident). Since the accident all his time had been spent in hospital and he had undergone two operations; he had suffered, and would continue to suffer, great pain and discomfort, and he would require nursing and attention for the remainder of his life.

The plaintiff claimed damages from the defendants, alleging that his injuries were caused by their failure to comply with the provisions of regulation 31 (3) (*a*) and (*b*),[1] or, alternatively, of regulation 5[2] of the Building (Safety, Health and Welfare) Regulations, 1948. He further alleged that the defendants were

[1] Building (Safety, Health and Welfare) Regulations, 1948, reg. 31 (3): "Where work is being done on "or near roofs . . . covered with "fragile materials through which a "person is liable to fall a distance of "more than 10 feet—(*a*) where work-"men have to pass over or work "above such fragile materials, suit-"able and sufficient ladders, duck "ladders or crawling boards, which "shall be securely supported, shall be "provided and used; (*b*) prominent "notices stating that the coverings "are fragile shall be affixed at the "approaches thereto."

[2] Building (Safety, Health and Welfare) Regulations, reg. 5: "Suit-"able and sufficient scaffolds shall be "provided for all work that cannot "safely be done on or from the "ground or from part of the building, "or from part of a permanent struc-"ture or from a ladder or other avail-"able means of support. . . ."

guilty of negligence at common law in that, inter alia, they negligently adopted an unsafe system of working.

The defendants denied breach of statutory duty and negligence, and alleged that the plaintiff's injuries were solely caused, or contributed to, by his own negligence.

For the plaintiff the point was taken, on the authority of *Roach* v. *Yates*,[3] that the damages to which he was entitled included damages in respect of loss of the wages which he would have earned during his natural life had it not been shortened by the accident.

*J. R. Crichton Q.C.* and *Leonard Lewis* for the plaintiff.

*F. W. Beney Q.C.* and *J. L. Elson Rees* for the defendants.

*A. Gerrard Q.C.* and *Stephen Chapman* for certain third parties.

The following cases were cited in argument: *Smith* v. *Baker & Sons*[4]; *Wilsons and Clyde Coal Co. Ld.* v. *English*[5]; *Glasgow Corporation* v. *Muir*[6]; *Paris* v. *Stepney Borough Council*[7]; *Bolton* v. *Stone*[8]; *Vyner* v. *Waldenberg Brothers Ld.*[9]; *Watts* v. *Enfield Rolling Mills*[10]; *Caswell* v. *Powell Duffryn Associated Collieries Ld.*[11]; *Norris* v. *Syndic Manufacturing Co.*[12]; *Flint* v. *Lovell*[13]; *Rose* v. *Ford*[14]; *Roach* v. *Yates*[15]; *Phillips* v. *London & South-Western Railway Co.*[16]; *Benham* v. *Gambling*[17]; *Walker* v. *Bletchley Flettons Ld.*[18]; *Rowley* v. *London & North-Western Railway Co.*[19]

SLADE J. stated the facts and continued: The breaches of common law duty alleged, with one exception, are substantially a repetition of the breaches of regulations 5 and 31 (3) (*a*) and (*b*) of the Building Regulations. The important exception is the allegation of failure to provide a safe system of working. The first question is: What is the duty which an employer owes to his servant? Mr. Beney referred me to *Wilsons & Clyde Coal Co. Ld.* v. *English*,[1] where Lord Wright cited[2] with approval the well-known definition of those duties by Lord Herschell in *Smith* v. *Baker & Sons*.[3] Lord Herschell said[3]: "It is quite clear that

[3] [1938] 1 K.B. 256; [1937] 3 All E.R. 442.
[4] [1891] A.C. 325; 7 T.L.R. 679.
[5] [1938] A.C. 57; 53 T.L.R. 944; [1937] 3 All E.R. 628.
[6] [1943] A.C. 448; 59 T.L.R. 226; [1943] 2 All E.R. 44.
[7] [1951] A.C. 367; [1951] 1 T.L.R. 25; [1951] 1 All E.R. 42.
[8] [1951] A.C. 850; [1951] 1 T.L.R. 977; [1951] 1 All E.R. 1078.
[9] [1946] K.B. 50; 61 T.L.R. 545; [1945] 2 All E.R. 547.
[10] [1952] 1 T.L.R. 733; [1952] 1 All E.R. 1013.
[11] [1940] A.C. 152; 55 T.L.R. 1004; [1939] 3 All E.R. 772.
[12] [1952] 2 Q.B. 135; [1952] 1 T.L.R. 858; [1951] 1 All E.R. 935.
[13] [1935] 1 K.B. 354; 51 T.L.R. 127.
[14] [1937] A.C. 826; 53 T.L.R. 873; [1937] 3 All E.R. 359.
[15] [1938] 1 K.B. 256; [1937] 3 All E.R. 442.
[16] (1879) 5 Q.B.D. 78.
[17] [1941] 1 A.C. 157; 57 T.L.R. 177; [1941] 1 All E.R. 7.
[18] [1937] 1 All E.R. 170.
[19] (1873) L.R. 8 Ex. 221.
[1] [1938] A.C. 57; 53 T.L.R. 944; [1937] 3 All E.R. 628.
[2] [1938] A.C. 57, 79.
[3] [1891] A.C. 325, 362; 7 T.L.R. 679.

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" the contract between employer and employed involves on the " part of the former the duty of taking reasonable care to provide " proper appliances, and to maintain them in a proper condition, " and so to carry on his operations as not to subject those " employed by him to unnecessary risk." In case there is any doubt about the meaning of " unnecessary," I would also take the duty as being a duty not to subject the employee to any risk which the employer can reasonably foresee, or, to put it slightly lower, not to subject the employee to any risk that the employer can reasonably foresee and which he can guard against by any measures, the convenience and expense of which are not entirely disproportionate to the risk involved. I am prepared to approach this case upon whichever of those possible definitions imposes the lowest duty upon the defendants. I also bear in mind Lord Wright's remarks in *Wilsons & Clyde Coal Co. Ld.* v. *English*[4]: " The same principle, in my opinion, applies to those funda- " mental obligations of a contract of employment which lie " outside the doctrine of common employment, and for the " performance of which employers are absolutely responsible. " . . . The obligation is fulfilled by the exercise of due care and " skill."

[His Lordship considered the evidence and continued:] I find as a fact that the accident which happened to the plaintiff was one which his employers could reasonably have foreseen; that the risk was one which could and should reasonably have been foreseen, and that the accident was unnecessary in the sense that it could have been prevented or guarded against by the simplest possible measures. It could have been guarded against simply by the use of three or four 9-inch-wide boards placed on the sloping roof. That would have operated as a safeguard in two ways: firstly, against the risk of overbalancing, in that had the plaintiff fallen on to such boards he would have fallen a distance of a maximum of some 2 feet, and, secondly, he could have performed the work in complete safety by standing on the planks. True, that would have meant standing at an angle of 30 degrees, but I cannot imagine that there would be any very great difficulty in working with a hammer and chisel in that position for the comparatively short time required to chip off the asphalt from the drip edge. In my judgment, it is almost impossible to contend that there was not a risk in kneeling only 9 inches from an edge with a fall of 13 feet to 15 feet.

In the result, therefore, I find that the defendants were in breach of their common law duty to the plaintiff, and it becomes, strictly speaking, unnecessary for me to decide the question of breach of statutory duty, but in case the matter goes further, I will express my view.

A breach of regulation 5 of the Building Regulations (as to the provision of scaffolds) is first alleged. Regulation 3 defines

[4] [1938] A.C. 57, 78.

"scaffold" as including, amongst other things, "any working "platform," and as meaning "any temporary structure on or from "which persons perform work." I interpret that to mean that if the three or four boards which I have mentioned were placed on the sloping roof to catch a man who overbalanced from above they would not constitute a scaffold, but if they were used for the purpose of standing on to do the work from, they would constitute a scaffold within the meaning of the definition. I hold, therefore, that regulation 5 requires the use in the present case of such planks for the purpose of their being used to do the work from. I find that there was a breach of the statutory duty imposed by regulation 5 in that had such boards been provided the plaintiff could have done the work from their security in complete safety.

The other two breaches alleged are both breaches of regulation 31 (3). Regulation 4 provides that it shall be the duty of every contractor and employer of workmen to whom the regulations apply to comply with regulation 5 and, inter alia, with such requirements of regulation 31 "as relate to any work, act or "operation performed or about to be performed by such "contractor or employer of workmen." Regulation 31 (3) states: "Where work is being done on or near roofs . . . covered "with fragile materials through which a person is liable to "fall a distance of more than 10 feet"—which was the case here —"(*a*) where workmen have to pass over or work above such "fragile materials, suitable and sufficient ladders, duck ladders "or crawling boards, which shall be securely supported, shall be "provided and used." If this regulation is to apply it must be because the plaintiff had to work "above" the fragile roof. What does "above" mean? Does it mean above in the vertical plane of the fragile roof, or does it mean above merely in the sense of at a greater height? I think that it means the former. In my view, therefore, "working above" means working over in the sense of higher in the vertical sense than the fragile roof. I hold that regulation 31 (3) (*a*) is inapplicable, and it follows that the defendants committed no breach of it.

Regulation 31 (3) (*b*) provides: "Prominent notices stating "that the coverings are fragile shall be affixed at the approaches "thereto." It is not necessary for me to decide precisely what the words "approaches thereto" mean. I should have thought that they applied to work being done on or near roofs, because "approaches" can only mean somewhere where, if a notice were affixed, it would give a warning to a person who was about to work on or near the roof. I am satisfied here that there was a breach of this regulation in that no notice, prominent or otherwise, stating that the coverings were fragile had been affixed anywhere at all. The claim fails, however, so far as there was a breach of that regulation, because that breach had no bearing on, and was not a cause of, the accident. The plaintiff knew at the material time that the roof was fragile and, therefore, it

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would have been a work of supererogation to have acquainted him by means of notices of that which he already knew.

I turn now to the defence of sole and contributory negligence. In *Caswell* v. *Powell Duffryn Associated Collieries Ld.*[5] Lord Wright said[6]: "What is all-important is to adapt the standard "of what is negligence to the facts, and to give due regard to "the actual conditions under which men work in a factory or "mine, to the long hours and the fatigue, to the slackening of "attention which naturally comes from constant repetition of "the same operation"—these are the words that I emphasize— "to the noise and confusion in which the man works, to his pre- "occupation in what he is actually doing at the cost perhaps of "some inattention to his own safety. . . . The policy of the "statutory protection would be nullified if a workman were held "debarred from recovering because he was guilty of some care- "lessness or inattention to his own safety, which though trivial "in itself threw him into the danger consequent on the breach "by his employer of the statutory duty." In that case there had been a breach of statutory duty, but I think that what is there said is equally applicable to breach of a common law duty to provide a safe system of working. I can see no distinction in principle.

Of course, I appreciate that it might be said that, as I have found against the defendants on negligence and breach of duty, I ought to accept and apply the same standards to the plaintiff in considering whether he was also guilty of negligence. I do not think that a court ought to be too astute to find a workman guilty of negligence, either as the sole or contributory cause of the accident, when he does not demur from a risk which the employer has imposed upon him, ex hypothesi, by a breach of common law duty or a breach of statutory duty. I am satisfied that the risk which the plaintiff ran was one which employee after employee knowingly, not voluntarily but knowingly, runs; in other words, a risk which is imposed on him by the system of working which is adopted by his employers and to which he does not demur. I am fully alive to the fact that an employee is also under a duty to his employer to take reasonable precautions for his own safety; but I do say that when the failure to do so consists of not demurring against a risk which his employers have imposed on him, the court ought not to be astute in finding contributory negligence. Using the best judgment which I can on the facts and the evidence in this case, I find as a fact that the plaintiff was not guilty of contributory negligence.

In the result, therefore, I find that this action succeeds.

That brings me to the question of damages, which I regard as the most difficult matter in this case. At the time of the accident the plaintiff was 35 years of age; he is now 37, and his

[5] [1940] A.C. 152; 55 T.L.R. 1004; [1939] 3 All E.R. 772.

[6] [1940] A.C. 152, 178–9.

expectation of life is a maximum of two years. Mr. Crichton said: "In dealing with the general damages you will have to "deal with the loss of earnings for the period between this man's "death"—at the latest, I am told, at the age of 39—"and the age "to which he would have lived if he had not sustained the "accident." I have no evidence before me, but I should take judicial notice, if necessary, that apart from all the hazards of life a man in A.1 physical health would normally live to an age of at least 60. That means that Mr. Crichton invited me to award as part of the general damages some sum to represent the loss of earnings for 21 years during which the plaintiff would no longer be alive. When I expressed some little surprise, Mr. Crichton referred me to the headnote in *Roach* v. *Yates*,[7] a decision of the Court of Appeal, which is, of course, binding upon me. If I thought that the headnote was supported by the judgments, I should unhesitatingly follow it.

The headnote reads: "In a collision between a pedal bicycle "ridden by the plaintiff, a bricklayer, 33 years of age, and a car "driven by the defendant, occasioned by the negligence of the "latter, the plaintiff sustained serious injury to the brain render- "ing him permanently, not only unfit for work, but incapable "of looking after himself and dependent both day and night upon "the care of a nurse, and shortening his expectation of life from "30 to 16 years. At the time of the accident the plaintiff was "earning an average wage of £3 10s. a week. The plaintiff "having brought an action against the defendant for damages "for personal injury, it was agreed between the parties "that the plaintiff's pecuniary losses and expenses by reason of "the accident down to the date of the action amounted to £542, "and in respect thereof and of all his other damages past and "prospective the trial judge awarded him the sum of £2,742 in "all." Subtracting the special damages, the general damages awarded by the trial judge were precisely £2,200. "The plaintiff, "being dissatisfied with that sum, appealed: *Held*, by the Court "of Appeal, that in assessing the amount due to the plaintiff a "proper, though not necessarily the only, method to adopt"—I emphasize the word "proper"—"was to allow him (i) in respect "of his pecuniary losses and expenses down to the date of the "action the said agreed sum of £542; (ii) in respect of his prospec- "tive loss of wages the sum which he would have earned during "what, but for the accident, would have been his normal life "according to actuarial tables, subject to deductions for all con- "tingencies, that sum to be not less than £2,000."

I emphasize those words "the sum which he would have "earned during what, but for the accident, would have been his "normal life." His normal life should have lasted for another 30 years; in fact, of those 30 years he was going to be alive for 16 and dead for 14 if the prognostications of the doctors proved

[7] [1938] 1 K.B. 256; [1937] 3 All E.R. 442.

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correct. According to the headnote, therefore, the Court of Appeal laid down that the damages must be based not only upon 16 years' loss of wages during actual life but also upon loss of wages for the further 14 years that he would not be alive. The headnote continues: "(iii) in respect of nursing attendance, a sum "sufficient to cover a reasonable weekly payment for that purpose "during the period of his life as shortened by the accident, that "sum being estimated at upwards of £2,000; and (iv) in respect of "his past and future physical and mental pain and suffering, and "the shortening of his life," a further sum, "in estimating which "the following considerations should be kept in view."

Of those four heads of damages, (i) is the special damage, and no question arises on that; but (ii) seems to me to be wholly unsupported by the judgments. In the judgment of Greer L.J. I can see no reference at all to assessing the value of imaginary earnings after the death of the injured party. There was no separate judgment on the part of Mackinnon L.J., but there are dicta in the judgment of Slesser L.J. which do lend support to the proposition stated in (ii) of the headnote. I am satisfied, however, that they are merely dicta. Greer L.J., at the end of his judgment, said[8]: "My learned brothers and I "have to decide what sum in all shall be awarded in this case "as damages to this unfortunate man, and we have come to the "figure of £6,542. That is the sum which, independently, each "member of this court thinks is a proper sum to award in this "case." I read that to mean not that each of the three judges had by a coincidence arrived at the figure of £6,000, but that they had thought that it was the sum which ought to be substituted for the £2,000 found by the trial judge; and that he (Greer L.J.) had arrived at that sum without any reference to the imaginary earnings after death.

I think that Slesser L.J. was saying no more than that he agreed that that was the proper sum, and that it could not be said to be improper, so to speak, particularly bearing in mind the loss of earnings after death, and that that was an element to be taken into consideration derived support from the decision in *Phillips* v. *London & South-Western Railway Co.*[9] Moreover, so far as it is possible to glean from the arithmetic in *Roach* v. *Yates*,[10] I cannot think that the figure of £6,000 could have been arrived at by taking into consideration the imaginary earnings of the plaintiff for the 14 years during which he ought to have been alive but would be prevented from being alive by the accident. His wages were £182 a year, and his normal expectation of life was 30 years; as a result of the accident, of those 30 years he was going to be alive for only 16 and dead for 14. As I understand it, it would be indisputable that he would be entitled to general damages for the loss of earnings from the date of judgment for the ensuing 16 years, but in computing that all the hazards of life, apart from the

[8] [1938] 1 K.B. 256, 276.
[9] (1879) 5 Q.B.D. 78.
[10] [1938] 1 K.B. 256.

accident, would have to be taken into consideration. So far as I can see from the arithmetic, item (ii) was taken as being £2,000. Loss of wages for the 16 years of life at £182 a year would be somewhere between £2,900 and £3,000, and might very properly be discounted to a figure of £2,000; if another 14 years' loss of wages was also taken into consideration the figure would be 30 times £182, discounted for the whole of that period. The £2,000 seems, in my judgment, to be more aptly awarded upon the footing that the remaining 14 years were excluded. At any rate, it is sufficient for me to say that I am unable to find from the judgments in *Roach* v. *Yates* [10] that the Court of Appeal in fact decided any such thing as is ascribed to them in paragraph (ii) of the headnote, and I accordingly consider that the matter is res integra.

*Phillips* v. *London and South-Western Railway Co.*,[11] referred to by Slesser L.J., a claim by a doctor who was injured in a railway accident, was tried with a special jury before Field J. In summing up he referred to the prospect of the plaintiff's speedy death. The plaintiff was proved to have been earning between £6,000 and £7,000 a year and the jury assessed the damages at £7,000. The plaintiff appealed to the Queen's Bench Division on the ground that the verdict of £7,000 damages was grossly inadequate; it was, indeed, about the amount of one year's earnings. The Queen's Bench Division ordered a new trial and the defendants appealed from that order to the Court of Appeal. The defendants argued in the Court of Appeal that no misdirection had been found by the Queen's Bench Division, and that an appellate court ought not to interfere with the jury's verdict in the absence of misdirection. The Court of Appeal held that the Queen's Bench were right in ordering a new trial, and they did so, as I understand the decision, not on the basis that there had been any misdirection, but on the basis that the assessment was so grossly inadequate as to lead to the inference that it was an entirely erroneous estimate of damages.

James L.J. did use some expressions which are capable of being construed as referring to damages being allowable for losses after death and during the period the injured party would have lived but for the accident; but after quoting from the summing-up by Field J., he said [12]: "The case could not have been put more "favourably for the plaintiff than it was thus put by Field J." I think that he was merely saying that so far as misdirection had been alleged, there was nothing in that allegation because it could not have been put more favourably for the plaintiff, and that the ground on which the order of the Queen's Bench Division for a new trial was upheld was that, to award only the equivalent of one year's salary, without including the salary for whatever period the plaintiff would live, and to quantify the damages, including all his pain and suffering—which were of a terrible description.

[10] [1938] 1 K.B. 256.
[11] 5 Q.B.D. 78.
[12] Ibid. 87.

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I think that he was made virtually insane—at the sum of £7,000 was so inadequate, that the jury must have omitted to take into consideration matters which they ought to have taken into consideration.

I am unable to find anything in that case laying down the principle that a plaintiff in circumstances like the present is entitled to have taken into consideration the fact that he is prevented from earning wages over the period between the date of his death and the date to which he would normally have lived but for the accident. I therefore award no general damages on that basis, because I do not think that I am entitled to take them into consideration. Nothing can lengthen the plaintiff's life by the period by which it has been shortened as a result of the accident—restitutio in that sense is impossible—and I cannot think it right that I should give damages for loss of earnings for a period during which ex hypothesi he is not alive to earn them; if I were to give them I would not know upon what possible basis to assess them. The plaintiff might normally have been expected to live for 21 years longer than he is now likely to live. If I were to take his wages at £494 a year, and as remaining the same, and to multiply £494 a year by 21, discount that by a large amount because the capital sum would then be prematurely in his hands, and discount it by all the other hazards of life and arrive at a purely hypothetical figure of, say, £5,000, as a dead man has not got himself to keep and a dead man cannot spend money, I would be giving him that sum on the footing that he was alive and able to earn the salary when in fact he would be dead, and would not be able to spend it.

This point was present to the mind of Lord Atkin in *Rose* v. *Ford*,[13] when he said[14]: "Can the damages include a calculation "of loss of income which the deceased would have received "during normal expectation of life but would not have saved so "as to increase his estate? I express no opinion." *Rose* v. *Ford*[15] was not a case in which the plaintiff was still alive, but was a claim under the Fatal Accidents Acts, and I am fully alive to the provisions of section 1 (2) (*c*) of the Law Reform (Miscellaneous Provisions) Act of 1934, which provides that where the death of a person has been caused by the act or omission which gives rise to the cause of action, the damages shall be calculated without reference to any loss or gain to his estate consequent on his death. But it is at least strange, if the argument submitted to me based on *Roach* v. *Yates*[16] is correct, that no one has yet thought it necessary to argue in a death case that damages in respect of the loss of a life interest, the cesser of an annuity, or funeral expenses, are not damages which arise consequent on death, but are something which accrued to the injured party, as it has been suggested in this case, and pass to the plaintiff in an

[13] [1937] A.C. 826; 53 T.L.R. 873; [1937] 3 All E.R. 359.

[14] [1937] A.C. 826, 835.

[15] [1937] A.C. 826.

[16] [1938] 1 K.B. 256.

action commenced after the death of the injured party under this Act.

In my judgment, therefore, the only relevance of earnings which would have been earned after death is that they are an item of damages for loss of expectation of life, in the sense that they are one of the minor elements which indicate that a person earning a reasonable livelihood is more likely to have an enjoyable life. Save, therefore, in so far as I have just indicated, I exclude from the general damages any sum for loss of wages between the date of death and the date of the plaintiff's normal expectation of life apart from the accident.

I now have to quantify the damages that I ought to award under the head of prospective loss of wages, limiting that to the actual duration of life. I fix the plaintiff's expectation of life at 18 months; and the quantification becomes simple subject to the allowance which I have to make under the Law Reform (Personal Injuries) Act, 1948. His wages at the time of the accident were £8 3s. 7d. a week, and they are now £9 10s. 1d. a week. The time is so short that I can eliminate any contingencies such as that the plaintiff might die before the expiration of that period. I therefore take a year and a half, 78 weeks, at £9 10s. 1d. a week—that is £741 6s. 6d., and accordingly the sum I award under that head will be that sum less an amount [£224 4s. 6d.] as representing the appropriate allowance for the period of 18 months under the Act of 1948 which, of course, will be within the period of five years mentioned in section 1.

I now come to the question of nursing attendance. Mr. Crichton referred me to section 2 (4) of the Act of 1948 which provides "In "an action for damages for personal injuries (including any such "action arising out of a contract), there shall be disregarded, in "determining the reasonableness of any expenses, the possibility "of avoiding those expenses or part of them by taking advantage "of facilities available under the National Health Service Act, "1946." I think that all that that means is that, when an injured plaintiff in fact incurs expenses which are reasonable, that expenditure is not to be impeached on the ground that, if he had taken advantage of the facilities available under the National Health Service Act, 1946, those reasonable expenses might have been avoided. I do not understand section 2 (4) to provide the quite revolutionary alteration that a plaintiff shall be deemed to be entitled to recover expenses which in fact he will never incur. The plaintiff has been in one hospital or another from November 24, 1950, until today, and no claim of any kind is made for special damage in respect of past nursing and attendance. I consider it in the highest degree unlikely that there will be any change in that most desirable position between now and 18 months hence, but as nursing attendance is clearly a justifiable expense if it is incurred, I must have regard not to the probability, but to the possibility that some expense may be incurred under that head during the ensuing 18 months. I think that the

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possibility is so remote that this head of claim will be adequately met by an award of the sum of £25.

I now come to the last head of damages, for past and future physical and mental pain and suffering and the shortening or loss of expectation of life. I think that so far as it is humanly possible to assess damages for loss of expectation of life upon any basis whatever, the proper figure to take in the case of this particular plaintiff, who had an A.1 prospect of life and was 35 years of age at the time of the accident, bearing in mind the fact that he would have continued to receive wages sufficiently adequate not to cause him to live in penury, is £500.

The most serious item of all is the past and future physical and mental pain and suffering. [His Lordship reviewed the medical reports and continued:] I have to award a sum for the terrible physical and mental suffering, and I assess that sum at £5,000. The agreed special damage is £747 4s.

The damages I award to the plaintiff are, therefore, £6,789 6s. 0d.

*Judgment for the plaintiff.*

Solicitors: *A. L. Phillips & Co.; Kingsbury & Turner; L. Bingham & Co.*

J. F. L.

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[CHANCERY DIVISION.]

1953
*Feb.* 3.

Upjohn J.

## *HINCKLEY AND COUNTRY BUILDING SOCIETY *v.* HENNY.

[1951 H. 4163.]

*Mortgage—Attornment clause—Default—Claim by mortgagee for possession—Requirement of notice—R.S.C., Ord.* 55, *r.* 5 (*a*), *note.*

An attornment clause in a mortgage contained a provision that, if the borrower was in default, the mortgagee might determine the tenancy after giving to the mortgagor at least seven days' notice in writing of his intention to do so:—

*Held,* that the mortgagee was not entitled to re-enter until seven days' notice had been given to the mortgagor.

The note in the Annual Practice under the heading "Possession" in the notes to R.S.C., Ord. 55, r. 5 (*a*) (see Ann.Pr. [1952] p. 1128), applies only to forms of attornment clause containing a provision dispensing with notice to determine the tenancy, when the security had become enforceable.

*Woolwich Equitable Building Society* v. *Preston* [1938] Ch. 129; 54 T.L.R. 80, distinguished.

PROCEDURE SUMMONS.

By a legal charge dated May 17, 1947, and made between Ronald Henny (the mortgagor) and the Hinckley and Country

Building Society, by which certain premises were mortgaged by him to the society to secure payment of a sum of £950, it was provided (by clause 9): "The borrower hereby attorns tenant to "the society of such part of the property hereby charged as may "at any time be in his occupation at the yearly rent of sixpence "if demanded. (2) Provided that the society may at any time "after such default has been made as set out in section 4 hereof "by giving to the borrower or leaving upon the property at least "seven days' notice in writing of the intention of the society so "to do determine the tenancy hereby created and enter upon the "property but so that the said tenancy shall not render the "society liable to account to any person as mortgagees in "possession."

Default having been made by the mortgagor, this application was made to the court to determine whether the society was entitled to re-enter on the property without giving the seven days' notice provided by clause 9 of the mortgage.

*J. A. Plowman* for the applicants.

The defendant mortgagor did not appear.

The cases referred to in the argument are set out in the judgment.

UPJOHN J. This is a summons by the Hinckley and Country Building Society against Ronald Henny for an order for possession of certain premises which have been mortgaged by the defendant to the plaintiff building society. The mortgage was to secure payment of a sum of £950, which was to be repaid by certain weekly instalments. The mortgage provided that, if default should be made by the mortgagor for 13 weeks, the mortgage should become enforceable.

Clause 9 of the mortgage was in these terms: [His Lordship read clause 9 and continued:] In this case default has been made by the borrower and there is no doubt that on giving seven days' notice in writing to him the society would be entitled to determine the tenancy and to re-enter on the property. The sole question which I have to determine is whether the society is entitled to re-enter without giving the seven days' notice provided by clause 9.

The position of a mortgagor and a mortgagee where there is an attornment clause is well set out in a judgment of Lord Chelmsford in *Jolly* v. *Arbuthnot*.[1] He said: "A mortgagor "who remains in possession after the execution of a mortgage, "and continues to enjoy the profits of the land, is not con-"sidered as a tenant from year to year to the mortgagee, nor "even as a tenant at will; he receives the profits for his own "use, and not as agent or bailiff of the mortgagee, and when he "has once received them he is absolutely entitled to keep them "as his own: *per* Alderson B., *Trent* v. *Hunt*.[2] But he may

[1] (1859) 4 De G. & J. 224, 235–6. [2] (1853) 9 Exch. 14, 22.

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" at any time be treated as a trespasser by the mortgagee, who " may maintain ejectment against him without any previous " notice or demand of possession. Such being the precarious " dependence of a mortgagor upon the will of the mortgagee, it is " competent to them to enter into an agreement by which the " mortgagor's possession may be rendered more secure by the " creation of a tenancy. This is sometimes effected by a " stipulation in the mortgage deed itself."

The attornment clause, therefore, is designed to give a greater measure of protection to the mortgagor. It may also be designed to give additional advantages to the mortgagee; that is to say, if a substantial rent is reserved by the attornment clause, it may be possible (and before the various Acts dealing with bills of sale it certainly was possible) for a mortgagee to distrain on the mortgage property to secure payment of his rent. That is clear from the observations of Bramwell L.J. in *In re Stockton Iron Furnace Company*[3]; see also the observations of Clauson J. in *Woolwich Equitable Building Society* v. *Preston*.[4] It is perfectly clear, therefore, that an attornment clause in a mortgage is valid and effectual, and in order to regain or resume possession a mortgagee must give notice in accordance with the provisions of the tenancy.

The claim by the plaintiff society that they are not bound to give such notice appears to be founded on a note in the Annual Practice under the heading " Possession " in the notes to Ord. 55, r. 5 (*a*). The note (Ann.Pr., 1952 ed., p. 1128) reads: " In proceedings claiming possession, as soon as the summons is " issued, the applicant is deemed to have re-entered and the " tenancy, year by year, as in the attornment clause, becomes " a tenancy at will, and as soon as the summons is served, the " tenancy at will is determined by the claim for possession. " Therefore it is not necessary for the applicants to prove they " had given a notice to quit determining the tenancy from year " to year," and the *Woolwich Equitable Building Society* case,[5] which I have already mentioned, is relied on as authority for that note.

But when that case is examined, it is quite clear that the attornment clause was in a form which is frequently found; that is, that after the power of sale has arisen, the tenancy can be determined without any previous notice to quit. Of course, in such circumstances, that provision is valid and effectual and it enables the mortgagee to re-enter without giving any notice. That decision really amounts to this, that the issue of a summons claiming possession was in fact a re-entry so that the tenancy became a tenancy at will; but that decision applies only, in my judgment, to cases where there is such a provision dispensing

[3] (1879) 10 Ch.D. 335, 357.
[4] [1938] Ch. 129; 54 T.L.R. 80.
[5] [1938] Ch. 129; 54 T.L.R. 80.

with notice to determine the tenancy when the security has become enforceable.

In this case there is no such provision, and it is quite clear upon the clause that, even after the borrower has made default, the society must give seven days' notice in writing to determine the tenancy. Until they do that, the borrower remains in possession as tenant and, therefore, as in this case there has been no such notice, the claim for possession fails, and I must dismiss the summons.

*Summons dismissed.*

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Solicitors: *Preston, Lane-Claypon and O'Kelly for Pilgrim & Webster, Hinckley.*

J. L. D.

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[CHANCERY DIVISION.]

* BRITISH ELECTRICITY AUTHORITY AND ANOTHER *v.* EXETER CORPORATION.

1953
*Jan.* 28, 29.

Danckwerts J.

[1949, B. 1793.]

*Nationalization — Gas — Local authority — Electricity undertaking — Transfer to statutory authority—Part of surplus revenue applied to general rate fund—Electricity Act*, 1947 (10 *&* 11 *Geo.* 6, *c.* 54), *ss.* 14, 15—*Exeter Corporation Act*, 1935 (25 *&* 26 *Geo.* 5, *c. cii*), *s.* 112 (1).

By section 112 of the Exeter Corporation Act, 1935, it was provided that surplus revenue of their electricity undertaking should in certain events be credited "to the revenue account of the undertaking for the next following year." By section 108 all money received by the corporation was to form part of the general rate fund. By virtue of the Electricity Act, 1947, the property of the Exeter Corporation, as electrical undertakers, vested in the British Electricity Authority as new statutory authorities, on April 1, 1948.

At the end of the financial year, 1947, the corporation applied a sum of £33,355, representing surplus revenue in respect of its electrical undertaking, in aid of local rates:—

*Held*, that on the true construction of section 112, that sum ought to have been carried over as revenue for the year 1948 in addition to the sum which had been transferred to the credit of the revenue account, and that, notwithstanding the provisions of section 108, there must be an order for payment of the sum of £33,355 by the corporation to the authority.

*Allchin* v. *Coulthard* [1942] 2 K.B. 228; [1943] A.C. 607; 59 T.L.R. 396; [1943] 2 All E.R. 352 considered.

ACTION.

By virtue of sections 14 and 15 of the Electricity Act, 1947, the electricity undertaking of the Exeter corporation vested on April 1, 1948, in part in the British Electricity Authority, and as to the remainder in the South-Western Electricity Board (the

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two plaintiffs in this action). From April 1, 1935, until March 31, 1948, the corporation was, in regard to the disposal of the surplus revenue of their electricity undertaking, subject to the provisions contained in section 112 of the Exeter Corporation Act, 1935.[1]

In the financial year ending March 31, 1947, the corporation, purporting to act under the provisions of the local Act, transferred a profit balance (stated to be "Balance of contributions "1926/27—1942/43. Electricity (Supply) Act, 1926 (Fifth "Schedule) as amended by Exeter Corporation Act, 1935, "section 112.") from the electricity account to the general rate fund. At that date the reserve fund of the electricity undertaking exceeded the one-twentieth referred to in the section.

The plaintiffs were of opinion that this transfer was improper and unauthorized by the section, and that the sum in question should have been allowed to remain in the electricity account to enure for their benefit when the electricity undertaking vested in them.

The plaintiffs accordingly brought this action against the corporation, claiming a declaration that, in determining the amount of the assets held by the corporation immediately before April 1, 1948, there should be included therein the said sum of

[1] Exeter Corporation Act, 1935, s. 112 (1): "In lieu of the provisions "of subsection (1) of section 7 of the "Schedule to the Electric Lighting "(Clauses) Act, 1899 and of the "amendments to that subsection set "out in the Fifth Schedule to the "Electricity (Supply) Act 1926 the "following provisions shall apply with "respect to the electricity under-"taking' (in addition to the provisions "of the section of this Act of which "the marginal note is 'application "'of revenue of undertakings') "(namely):—

"If in any year the moneys received "by the corporation on account of the "revenue of the undertaking (includ-"ing the interest and annual proceeds "received by the corporation in that "year on the investments represent-"ing or forming part of any such "fund as is referred to in para-"graph (*b*) of subsection (1) of the "section of this Act of which the "marginal note is 'Receipts and ex-"'penses and as is provided in "connexion with the undertaking) "shall exceed the aggregate of the "moneys paid or expended by the "Corporation in respect of the under-"taking for the several purposes "mentioned in paragraphs (*a*) to (*f*) "of subsection (1) of the section of "this Act of which the marginal note "is 'Accounts' then—

"(*a*) If the reserve fund in respect "of the undertaking does not amount "to more than one-twentieth of the "aggregate capital expenditure for "the time being on the undertaking "a sum equal to the amount of such "excess shall be credited to the "revenue account of the undertaking "for the next following year and the "charges for electricity supplied by "the corporation shall be reduced by "such amount or respective amounts "as will as nearly as reasonably "practicable be equivalent in the "aggregate to the said excess;

"(*b*) if the said reserve fund "amounts to more than one-twentieth "of the said aggregate capital expen-"diture such amount as the corpora-"tion may think fit (not being less "in cases where the said excess of "receipts over expenses is more than "a sum equal to one and a half "per centum of the outstanding "debt of the undertaking than the "difference between the said excess "and that sum) shall be credited to "the revenue account of the under-"taking for the next following year "and the charges for electricity "supplied by the corporation shall be "reduced by such amount or respec-"tive amounts as will as nearly as "reasonably practicable be equiva-"lent in the aggregate to the amount "so deemed to be revenue."

£33,355, being the amount transferred to the general rate fund unlawfully and contrary to the statutory enactments relating to the electricity undertaking transferred by the corporation; and a declaration that in so far as the corporation had unlawfully done any act, in consequence of which the revenue of their electricity undertaking or the assets to be transferred to the plaintiffs on April 1, 1948, were less than they otherwise would have been, the corporation were liable to pay the amount of such deficiency either by way of damages or otherwise to the plaintiffs.

The plaintiffs claimed also certain further sums of a minor nature.

*Harold I. Willis Q.C.* and *H. F. J. Teague* for the plaintiffs.

*Sir Andrew Clark Q.C.* and *Denys Buckley* for the defendant corporation.

The following cases were cited in argument: *Allchin* v. *Coulthard* [2]; *Hinckley Urban District Council* v. *West Midlands Gas Board* [3]; *North-Eastern Gas Board* v. *Leeds Corporation* [4]; *Reg.* v. *Minister of Housing and Local Government, ex parte Hove Corporation* [5]; *East Midlands Gas Board* v. *Doncaster Corporation*.[6]

DANCKWERTS J. This is an action by the British Electricity Authority and the South-Western Electricity Board as plaintiffs. Both those bodies came into being by virtue of the Electricity Act, 1947, which vested certain assets previously belonging to electrical undertakers in new bodies, and they came into operation on April 1, 1948, which was the appointed day for the purposes of the Act. The defendants, the Corporation of Exeter, were electrical undertakers before the coming into operation of the Act. The action is concerned with the assets which, under the provisions of the Act, the plaintiffs, or one of them, became entitled to take over from the defendants as the previous undertakers. The second plaintiffs, the South-Western Electricity Board, have only been joined with the British Electricity Authority because of a possible doubt as to whether all of the assets under consideration might or might not have vested in the British Electricity Authority, as certain assets of certain kinds vest in the board and not in the authority. Nothing really, however, turns on that and I need not really consider the matter further.

The Act by section 14 provides: "(1) Subject to the provisions "of this Part of this Act all property, rights, liabilities and "obligations which, immediately before such date as may be

[2] [1942] 2 K.B. 228; [1943] A.C. 607; 59 T.L.R. 396; [1943] 2 All E.R. 352.

[3] [1951] Ch. 577; [1951] 1 T.L.R. 771; [1951] 1 All E.R. 788.

[4] [1952] 2 T.L.R. 536; [1952] 2 All E.R. 326.

[5] [1952] 2 T.L.R. 203; [1952] W.N. 373.

[6] [1953] 1 W.L.R. 54; [1953] 1 All E.R. 54.

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" appointed by order of the Minister (in this Act referred to as " ' the vesting date ') were property, rights, liabilities and obligations of a body to whom this part of this Act applies, shall on " the vesting date vest by virtue of this Act and without further " assurance in such electricity board or boards as may be specified in the following provisions of this section or determined " thereunder. . . . (2) Subject to the provisions of this section " relating to the North of Scotland district—(*a*) the property, " rights, liabilities and obligations mentioned in subsection (1) " of this section of the Central Electricity Board, any power " station company and any electricity holding company, shall vest " in accordance with the said subsection (1) in the central " authority; (*b*) the property, rights, liabilities and obligations " aforesaid of any authorized undertakers to whom this part of " this Act applies (other than the Central Electricity Board) shall " vest as aforesaid in such one of the area boards as may be " determined by order of the minister: Provided that—(i) all " generating stations of any such authorized undertakers and " all main transmission lines of such undertakers, being lines " connecting a generating station directly with another generating " station or with any main transmission lines of the Central " Electricity Board, and all property and rights held or used by " the undertakers wholly or mainly for the purposes of such " stations and transmission lines and all liabilities and obligations " wholly or mainly incurred by the undertakers for those " purposes; (ii) all rights, liabilities and obligations under agreements between any authorized undertakers and any railway " undertakers for the supply of electricity to the railway " undertakers for the purposes of haulage or traction, and all " transmission lines used wholly or mainly for the purpose of " giving a supply to any railway undertakers for the purposes of " haulage or traction; and (iii) all investments and cash of any " such undertakers and all rights and liabilities thereof in respect " of income tax and excess profits tax; shall vest in the Central " Authority and not in an Area Board."

The difficulties in the present case really are concerned with the question of what vested in the plaintiffs; because the defendants, being a local authority, carried on not only the electrical undertaking but all the other activities which are normally carried on by a local authority. Therefore, it is necessary for the purposes of the Act to ascertain what part of the assets vested in the local authority are to be attributed to the electricity undertaking, and are therefore to be treated as vesting in the plaintiffs. There is a provision in section 15 (3) providing for the reference to the Minister of certain questions of this type. [His Lordship read the subsection.] But the present question has not been referred to the Minister because it was considered, as I understand, that the present question did not fall within the ambit of that subsection.

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Section 15 (1) of the Act, which has particular reference to the undertakings of local authorities, is in the following terms: "In the case of any authorized undertakers being a local "authority the provisions of the last foregoing section shall only "apply to property held or used by the local authority wholly or "mainly in their capacity as authorized undertakers, and rights, "liabilities and obligations acquired or incurred by the local "authority in the said capacity, and accordingly references in "that section to the property, rights, liabilities and obligations "of a body to whom this part of this Act applies, or to any "agreement to which any such body was a party, or to docu-"ments referring to any such body, or to legal proceedings or "applications by or against any such body shall be construed as "references to property held or used by the local authority "wholly or mainly in their capacity as authorized undertakers."

The question for decision is one which lies in a comparatively small compass, but is also one of considerable difficulty. It arises on the accounts which have been kept by the defendant corporation. It is plain that a sum of £33,355 which appears in the account headed "Net Revenue Account, 31st March, 1947," of the defendant corporation, stated to be a "transfer in aid of "rate," was wrongly transferred out of the account and should have been retained as part of the carry forward for the following year.

Before considering exactly how that is to be dealt with, it is necessary to deal with the position under the statutory provisions relating to electricity undertakings. The original Act dealing with these matters was the Electric Lighting (Clauses) Act, 1899. [His Lordship read paragraph 7 of the Schedule to that Act, and continued:] That was the provision which applied to the defendant corporation until the passing of their local Act—one of a series of local Acts passed about that time, it appears, for the purpose of assisting local authorities to gain some benefits in respect of payments of income tax in regard to interest which they might have to pay to other persons. The local Act is the Exeter Corporation Act, 1935. The material provisions of that Act begin for the purposes of this case with section 108. Section 108 provides: "Notwithstanding anything contained in "any previous enactment all money received by the corporation "whether on capital or revenue account including (but without "prejudice to the generality of this provision)—(*a*) all money "received by the corporation on account of the revenue of any "undertaking of the corporation as from time to time existing "from which revenue is derived; and (*b*) interest and other "annual proceeds from time to time received by the corporation "on the investments or balances"—and so on—"shall be carried "to and form part of the general rate fund and all payments and "expenses made and incurred by the corporation in respect of "any such undertaking or in carrying into execution the powers "and provisions of this or any other Act whether public or local

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" (including interest on moneys borrowed by the corporation and " all sums required by law to be paid or transferred or which the " corporation may determine to pay apply or transfer to any such " fund as is referred to in paragraph (*b*) of this subsection) shall " be paid or transferred out of the general rate fund." So, pausing there for a moment, it is plain that all the receipts of the corporation from its various operations and activities are to be paid into this general rate fund and will form part of that fund. On the other hand, all payments that have to be made by the corporation will have to be paid out of that fund. Then section 109 provides for the keeping of accounts. " The corpora- " tion notwithstanding the provisions of any Act or Order to the " contrary shall keep their accounts so as to distinguish capital " from revenue and shall keep separate accounts in respect of " each of the undertakings of the corporation as from time to time " existing from which revenue is derived (each of which is in this " section separately referred to as ' the undertaking ') and as to " revenue shall show under a separate heading or division on the " one side all receipts in respect of the undertaking (including " the income from any such fund as is referred to in para- " graph (*b*) of subsection (1) of the last preceding section of this " Act provided in connexion with the undertaking) and on the " other side all payments and expenses in respect of the under- " taking such payments and expenses being divided so as also " to show the amounts representing "—a number of things which are set forth as matters which are to be shown in the accounts. Then section 110 contains certain provisions as to the application of the revenue of the undertaking which I need not read. Section 111 provides for a reserve fund. I think that I can go to section 112, which is the vital section for the purposes of the present action. Section 112 provides:

[His Lordship read subsection (1), and continued:] Then there is a provision which I need not read about reserve funds. By subsection (3): " Subsection (1) of section 7 of the Schedule to " the Electric Lighting (Clauses) Act, 1899 shall be deemed to " have ceased to be incorporated with any of the Acts or Orders " relating to the electricity undertaking." So it was plain that when this Act came into force the provisions of the Electric Lighting (Clauses) Act, 1899, no longer applied, and the situation is regulated for the present purposes entirely by the terms of section 112 of the Act of 1935.

That being the situation, I can return to the accounts of the corporation to see what has happened. Taking, first of all, the revenue account of March 31, 1947, I find on the right-hand side the credits—first, the balance of March 31, 1946, brought forward in accordance with the provisions of section 12, amounting to £42,161 8s. Then there are credits in respect of the sale of fittings and on account of generation and the transfer of certain small items to the Central Electricity Board, interest on sinking fund investment, reserve and renewals fund, contingencies reserve

(amount not required), and finally, an item "War damage "insurance: reserve written back, £40,000." That requires a word of explanation. Undertakings of this kind were exempted from the provisions of the War Damage Acts of 1941 and 1943 on the supposition or provision that separate provisions were intended to be made by Parliament to deal with such cases, and eventually provision was made by an Act of 1948 for that purpose. But in the meantime in each of four war years ending, I think, in 1945, the corporation had set aside from revenue a sum of £10,000 as a contingent reserve against the liability which might arise in the future under such statutory provisions as were envisaged by the Acts of 1941 and 1943. What has happened was that in this year that £40,000, the accumulation of four years, was treated as no longer used for the purpose and has been brought back as a credit in the revenue account. Those credits came to a total of £92,805 17s. On the debit side there is a loss, first, on the undertaking which was described as "Balance from revenue account, "£4,739 3s. 4d." There is certain redemption of debt and interest, £10,232 odd, revenue contributions to capital amounting to £3,346 1s. 6d., and then we come to that item of £33,355 which I have already mentioned and which is treated as a transfer in aid of rate. It is further described in the balance sheet as "Balance of "contributions, 1926/27–1942/43. Electricity (Supply) Act, 1926 "(Fifth Schedule) as amended by Exeter Corporation Act, 1935 "(Section 112)." It is therefore treated as though it represented contributions over a number of years. But in the argument before me that contention or allocation was abandoned, and it was simply argued on the footing that this was a transfer in this year of £33.355 from the revenue account in respect of the electricity undertaking for the benefit of the rates. Then there is a provision relating to income tax, and a contribution in aid of rates for 1946/47 of £830, which represents the 1½ per cent. on the amount of the outstanding debt according to the provisions of section 112. Then there is an item in respect of adaptation of certain premises. Then the result is that the debits show a credit balance to make up a total of £37,099 0s. 4d. That sum of £37,099 0s. 4d. was the amount which was carried forward to the following year ending on March 31, 1948. The contention of the plaintiffs is that the transfer of £33,355 to the rates account, or, rather, in aid of rate—because it is already, of course, in one sense in the rates account —was not authorized and was a breach of the duty of the undertakers under the Act, and therefore that the balance carried forward ought to have been in the region of £70,000 instead of merely being some £37,000.

Turning to the account for March 31, 1948, which, of course, is a period ending immediately before the appointed day, we find credited the sum of £37,099 odd, and various other items. We find on the other side that at this time there is a loss of £21,963 15s. 3d., and there are items "Contribution in aid of rate

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" for 1947/48, £800," and " Contribution in aid of rate for 1948/49 "—which, of course, would be after the date of taking over—" £1,000." That leaves a balance of £15,410 9s. 7d. It is only that sum of £15,410 9s. 7d. of which the plaintiffs obtain the benefit, instead, as they contend should be the case, of a sum larger by a considerable amount. As regards the two items amounting to £1,800, it was contended originally that the £1,000 was quite unauthorized as being in regard to a future year. But on examination of the figures it appears that if one takes the amount of the debt at the end of the financial year 1947/48 and not the beginning, 1½ per cent. of that amount would allow a figure to be transferred of £1,930, and that therefore it was possible, if that was the correct date to take, that these two payments could be justified, not indeed as partly a payment in respect of 1948/49, but within a figure of £50 in respect of the year 1947/48. I do not see any reason why the corporation should not take the amount standing at the end of their financial year as the basis for their figure for calculating the 1½ per cent. Therefore, I do not propose to trouble further about those two amounts of £800 and £1,000, because that would be the amount allowed upon that view to be transferred to the rates.

It is also to be observed before leaving the accounts that in the final balance sheet of the undertaking on March 31, 1948, on the basis of which it appears that the transfer to the Electricity Authority was actually made, there are these items to be considered. On the revenue account there are, on one side, investments amounting to £95,500, which represents a reserve fund, and there are stock and stores in hand and sundry debtors, the benefit of which was all transferred to the British Electricity Authority. On the other side there are sundry creditors amounting to £99,225, reserve and renewals amounting to £96,000 odd, that sum of £15,410 9s. 7d. which came from the net revenue account which I have just referred to, and there is an overdraft described as " Cash due to bank " amounting to £54,463 12s. 8d. In fact, a cheque was paid over by the British Electricity Authority to the corporation to discharge that sum. It is true that there was a reservation that such payment was made before the account had been examined in order to prevent further bank interest being incurred. But in fact there was a payment made to the corporation on the basis that there was an overdraft which was owing by the electricity undertaking of the corporation and which had therefore to be borne by the British Electricity Authority on the taking over.

I now come to the questions which have to be decided in this case. It is contended by the plaintiffs that they are entitled to be recouped the loss which they have suffered by the breach of the defendants' statutory duties in not carrying over as they should have done, as they claim, a larger sum amounting to an increase of £33,355. On the other hand, it is contended by the defendants, first, that those items which are in the accounts are merely

matters of book entries. Their contention is that there is simply a general rate fund and that everything is paid in or out of that rate fund, and that therefore one cannot say that there is any actual cash which is attributable to the electricity undertaking more than to any other particular activity of the corporation. Secondly, say the defendants: Whatever might be the situation, there is no prohibition in the corporation's Act as it now stands like that which was contained in the Electric Lighting (Clauses) Act, 1899, and that therefore there was nothing whatever to prevent the defendants paying over in aid of the rate fund part of the surplus of revenue over the outgoings in any particular year; and that therefore what they have done cannot possibly be attacked on that ground. Finally, as I understand it, there was a third contention, and that was that the £40,000, which was brought back from what might be termed a special reserve fund in respect of war damage contingency, ought not to have been brought into the revenue fund, but ought to have been simply treated as coming back into the general rates fund and, therefore, forms no part of any balance which ought to be carried forward from 1947 to 1948. Those are very shortly the contentions which were put forward.

I was referred to certain authorities, including a number of cases with regard to gas undertakings. I do not propose to go into the authorities relating to gas undertakings, although they were properly called to my attention, because I do not think that they assist in the present case, as there were no similar provisions in regard to gas undertakings respecting amounts to be paid over as there were with regard to electricity supply. There are, however, two cases in regard to electricity undertakings which I should mention in regard to the present matter. In *Reg.* v. *Minister of Housing and Local Government, ex parte Hove Corporation* [1] it was held that the sum that was in the bank at the vesting date amounting to £17,520, which had been received by the corporation from transactions in its capacity as electricity undertakers, and which, pursuant to section 188 of the Local Government Act, 1933, was carried to the general rate fund of the borough, and included in that fund immediately before the vesting date, was surplus net revenue which the local authority "were not entitled to use for "general purposes of rate reduction except to the limited extent "authorized by section 7 of the Electric Lighting (Clauses) Act, "1899, as amended; that they held the balance in their capacity "as undertakers and in no other capacity; and that it constituted "property or rights acquired by the local authority wholly or "mainly in their capacity as authorized undertakers within the "meaning of section 15 (1) of the Act of 1947, and accordingly "vested in the Central Electricity Authority." That case, of course, depended on the Electric Lighting (Clauses) Act, 1899, and the provisions which contained a prohibition of the transfer to the

[1] [1952] 2 T.L.R. 203, 204.

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benefit of the rates of more than 1½ per cent. ascertained on the amount as mentioned in section 7 of the Schedule to that Act, which was a very definite provision which would prevent the general rates fund acquiring the benefit of the sum in question to the exclusion of the electricity undertaking of the local authority. It seems that that case cannot affect the matter which I have to consider, and I do not find that it helps me.

There is a very important case—*Allchin* v. *Coulthard*[2]—concerning the South Shields Corporation, who had an electricity undertaking and a local Act not dissimilar from the local Act of the Exeter Corporation. That was a case in regard to income tax, and was a decision of the Court of Appeal in favour of the local authority. It was affirmed by the House of Lords,[3] which expressly approved the judgment of Lord Greene M.R. Therefore, it is his very important and illuminating judgment which bears the authority of the House of Lords. The headnote is as follows: "The phrase 'profits or gains brought into charge' as "used in rules 19 and 21 of the General Rules Applicable to All "Schedules to the Income Tax Act, 1918, does not indicate the "cash resources out of which the payment of the interest is in "fact made, but a fund in the accountancy sense of taxed profits "up to but not exceeding the amount of the assessment ascer-"tained for the purpose of an account between the taxpayer and "the revenue and deemed to be in his hands, to which the "payment of the interest is to be debited. No profits which "cannot be lawfully applied to the payment of the interest can "be treated by the taxpayer as forming this fund or any part "of it, but subject to this, apart from special circumstances, "instances of which are provided by *Birmingham Corporation* v. "*Inland Revenue Commissioners*[4] and *Central London Railway* "v. *Inland Revenue Commissioners*,[5] the taxpayer is entitled to "treat the interest as having been paid out of that fund, no "matter out of what cash resources he in fact paid it. [South "Shields] Corporation paid out of their general rate fund, which "consisted partly of untaxed income (namely, the rates col-"lected)"—which, of course, are not subject to tax—"and "partly of profits from its undertakings duly assessed to income "tax, interest on a loan raised for the purpose of their electricity "and transport undertakings and general purposes, deducting "income tax in the usual way. The corporation claimed, under "the provisions of the South Shields Corporation Act, 1935, to "treat the assessed profits of the electricity and transport under-"takings as part of the assessed profits out of which the interest "was paid and to retain the amount of tax paid on those "profits:—*Held*, reversing the decision of Lawrence J., that by "the provisions of the Act the profits of those undertakings could "lawfully be applied to the payment of the interest on the whole

[2] [1942] 2 K.B. 228.
[3] [1943] A.C. 607.
[4] [1930] A.C. 307; 46 T.L.R. 262.
[5] [1937] A.C. 77; 52 T.L.R. 581; [1936] 2 All E.R. 375.

" of the loan, and, consequently, those profits as assessed to " income tax formed part of the profits brought into charge out " of which the interest was paid or deemed to be paid, notwith- " standing that it appeared from the accounts of those under- " takings, kept separately as required by the Act, that the surplus " revenues of those undertakings had been treated as applied to " certain specified purposes of those undertakings."

The South Shields Corporation Act contains, as I have said, provisions not dissimilar from the Exeter Corporation Act. Sections from section 108 onwards in the Exeter Corporation Act correspond closely to section 112 onwards of the South Shields Act. The provisions contained in section 112 of the Exeter Corporation Act and section 115 of the South Shields Act are almost identical, except for certain differences which are contained in sub-paragraph (*b*) of subsection (2) (ii) of the South Shields Act, of which subsection (2) provides: " (ii) any moneys " applied to a fund for providing working capital "—that is, after the provision in respect of how you ascertain the surplus—" then " (*a*) if the reserve fund in respect of the electricity undertaking " does not amount to more than one-twentieth of the aggregate " capital expended for the time being upon the undertaking the " charges for electricity supplied by the corporation shall be " reduced by such amount or respective amounts as will as nearly " as reasonably practicable be equivalent in the aggregate to the " said excess "—that is exactly similar to the provision contained in the Exeter Act—" (*b*) if the said reserve fund amounts to more " than one-twentieth of the said aggregate capital the corporation " shall fix such amount as they may think fit (not being less in " any case in which the said excess is more than a sum equal to " one and a half per centum of the outstanding debt of the under- " taking than the difference between that sum and the said " excess) and the charges for electricity supplied by the corpora- " tion shall be reduced by such amount or respective amounts as " will as nearly as reasonably practicable be equivalent in the " aggregate to the amount so fixed." In other words, the difference between that provision and the provision contained in section 112 of the Exeter Act is that the Exeter Act provides that such amount as the corporation may think fit " shall be credited " to the revenue account of the undertaking for the next following " year." Both provide " the charges for electricity supplied by the " corporation shall be reduced by such amount or respective " amounts as will as nearly as reasonably practicable be equiva- " lent in the aggregate " (in the case of the South Shields Act) " to the amount so fixed," and in the case of the Exeter Act " to " the amount so deemed to be revenue."

I cite these passages to show that the provisions in the South Shields Act are very similar to those in the Exeter Act, but there was that difference. Later on I shall proceed to consider whether that difference makes a vital change or not.

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Of course, the subject-matter of the decision in *Allchin* v. *Coulthard* [6] was very different, in a sense, from the subject-matter in the present case. The question was simply this: Where a payment is made out of the general rate fund for interest, that interest could be taken as being paid out of a fund which had already borne tax, so that the local authority making the payment were entitled to retain the amount of the tax deducted after paying the interest on the basis that they had already paid the tax.

That point is very different from the present, but it was relied on, I think, principally by the defendants, because of the distinction drawn by Lord Greene M.R. between an amount which represents actual money and one which really simply represented figures on paper. To put it shortly, on pages 234 and 235 there is a passage which I think explains in very clear language what the Master of the Rolls really meant. He said: "Much of the obscurity which surrounds this matter is due to a "failure to distinguish the two senses in which the phrase 'pay-"'ment out of a fund' may be used. The word 'fund' may "mean actual cash resources of a particular kind (e.g. money "in a drawer or a bank), or it may be a mere accountancy "expression used to describe a particular category which a person "uses in making up his accounts. The words 'payment out of' "when used in connexion with the word 'fund' in its first mean-"ing connote actual payment, e.g. by taking the money out of "the drawer or drawing a cheque on the bank. When used in "connexion with the word 'fund' in its second meaning they "connote that, for the purposes of the account in which the fund "finds a place, the payment is debited to that fund, an operation "which, of course, has no relation to the actual method of "payment or the particular cash resources out of which the pay-"ment is made. Thus, if a company makes a payment out of its "reserve fund—an example of the second meaning of the word "'fund'—the actual payment is made by cheque drawn on the "company's banking account, the money in which may have "been derived from a number of sources. The phrase 'reserve "'fund' only has a meaning as indicating the item in the "company's accounts to which it decides to debit the payment. "It will be seen, therefore, that to speak of an actual payment "being made out of a fund in the second sense is really a misuse "of language. A fund in the second sense is merely an "accountancy category. It has a real existence in that sense, "but not in the sense that a real payment can be made out of it "as distinct from being debited to it. Unless these two meanings "of the phrase 'payment out of a fund' are kept distinct, much "confusion of thought must ensue. A real payment cannot be "made out of an imaginary fund: *per* Lord Macmillan in the "*Central London Railway* case.[7]" The result of that is that

[6] [1942] 2 K.B. 228.

[7] [1937] A.C. 77.

he reaches the conclusion that there was nothing to prevent the corporation in the South Shields case from treating payments of interest as being paid out of the profits of its undertaking, and therefore funds which had already been subject to tax and had borne tax.

It may be that in the present case the fund which is treated as a fund in the accounts relating to the electricity undertaking of the Exeter Corporation is a fund in the second sense in which it is used by Lord Greene, that is to say, that all the actual funds are in the general rates account, but that for the purposes of the undertaking certain funds are treated as falling to that undertaking, and that therefore those must be regarded not as cash separated in that way, but merely as a series of book-keeping entries for the purposes of ascertaining the financial situation of the electricity undertaking. I am prepared to accept that, but I do not think that it necessarily follows that that disposes of the claim of the plaintiffs, because it seems to me that, in considering what is to be taken over by the Electricity Authority in the present case, one has to ascertain what are to be treated as the assets of the Exeter Corporation in respect of its electricity undertaking. Therefore it is not an answer to say that those are merely entries on paper and merely entries in accounts. They have to be treated under the provisions of the Exeter Corporation Act, 1935, as part of the assets of the electricity undertaking of the corporation, and, that being so, when you find that those assets are to be taken over by the body which is created by the Electricity Act, 1947, it may well be that it is those assets or the amount equivalent to those assets which has to be handed over, and it is not an answer to say: "Of course, the moneys "actually are not in a separate account; they are in the general "rates account of the corporation."

I turn again, therefore, to the provisions of the Act. What I find is that, in the event which has happened, one must ascertain on the operations for the year—and I agree with the contention of Sir Andrew Clark, of course, that the provisions of section 112 are clearly related to operations of a given year—first of all, if in that year the revenue of the undertaking exceeds the expenditure mentioned under the various heads of section 109 of the Act. If one finds that there is an excess of revenue over expenditure, then one proceeds to apply the provisions which are found in the section. We have in this case, of course, provisions to be applied under subsection (1) (*b*) of the section because the reserve fund amounts to more than one-twentieth of the aggregate capital expenditure. What has to happen then is that first the corporation have to decide what amount shall be credited to the revenue account, and they are entitled to take out, as we know, 1½ per cent. of the outstanding debt of the undertaking and credit that to the benefit of the rates. Then the section says that there shall be credited to the revenue account of the undertaking for

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the next following year that sum, and the charges for electricity supplied by the corporation shall be reduced to correspond as nearly as possible with that sum, by which I understand that it is intended, theoretically at any rate, that the charges for the following year to be made by the corporation will be reduced so that the revenue received in respect thereof by the corporation will in the following year be less if possible by the amount which is carried over in the accounts, and the amount which is carried over in the accounts is so "deemed to be revenue." It seems to me that if it is to be revenue, it has got to be considered as revenue of the following year. It was contended then by Sir Andrew Clark that one merely treated it as revenue for that year with the result that at the end of the year it went back again for the benefit of the rates. I think that that was the effect of his argument. The effect, as I think he made it on the figures, was that if that course had been adopted by the corporation the result would have been that the plaintiffs would, instead of being underpaid, have in fact been overpaid. Now it seems to me that that construction will not work. It produces, I agree, some odd results, because it means that the amount carried over will in a sense be carried over again possibly until it is extinguished, with the result that the charges will again have to be reduced and possibly there may eventually be a loss which will require the charges to be increased again; whereas, according to this view—which was attractive in many respects—once one had carried over the sums so carried over to the following year one would theoretically, if the adjustments and charges were perfectly accurate, simply wipe out the surplus so carried over, and would be left in hand with revenue equivalent to the expenditure for the following year and the sum carried over would be left intact. One would then have a state of equilibrium, all being well, and one would go on from year to year without having to reduce the charges unless the expense of generation or other charges were so reduced that a further excessive profit was made. I do not think, however, that that was the effect of the section, because whatever may have been the intention of the draftsman of the provisions, it seems to me that it cannot produce that result. If the sum carried over forms part of the revenue of the following year, it is deemed to be revenue for that year by the Act. Then it appears that it must again come into consideration in ascertaining at the end of that year whether there is an excess of revenue over the outgoings, as contemplated by section 109 of the Act. If one finds that on setting-off the two sums against each other there is again an excess of revenue over expenditure, I do not see how one can escape from the necessity of having to apply the provisions of section 112 again, and again you have the result that you may have to reduce the charges further. I do not know whether that was the intention of the Act or not, but it

seems to me to be the result. In my view, accordingly, that Act requires the whole of the excess of revenue over expenditure in any given year to be carried over to the following year and to be deemed to be revenue of that following year, and that the only amount that may be carried to the aid of the rates is the 1½ per cent. on the amount of the debt.

That being so I must reach the conclusion that the £33,355 ought to have been carried over to the year ending on March 31, 1948, as revenue of that year, in addition to the sum of £37,099 0s. 4d. which was in fact carried over.

I think that the only other matter with which I have to deal is the sum of £40,000. That undoubtedly represents revenue of the undertaking originally, and I cannot see how it could have been dealt with, when brought back again as no longer required for the contingent liability, except by bringing it back into the revenue account. It appears that it was brought back into the accounts in a way which was perfectly proper, and that it must be treated, therefore, as being part of the revenue of the year into which it was brought. I was very much impressed by the point which was taken by Mr. Willis, that if one were entitled to depart from these accounts and treat them as having no real value at all, but simply as mere book-keeping assets, it was difficult to see how the plaintiffs could have been responsible for the overdraft of £54,463 12s. 8d. In my view one must treat these accounts as showing the assets of the undertaking for the purposes of the take over required by the Act of 1947, because otherwise, if one merely treats the sums received by the corporation in respect of its electricity undertaking as part of the revenue paid into the general rates account, one must treat the liabilities in the same way. Therefore, in my view there would have been no justification for requiring the plaintiffs to discharge the overdraft shown in the balance sheet of the undertaking.

Accordingly, in my view, the plaintiffs are justified in the claim which they make that they have suffered financial loss to the extent of £33,355, and there will be an order for payment of that sum to the plaintiffs by the defendants.

*Order accordingly.*

Solicitors: *R. A. Finn; Sharpe, Pritchard & Co. for Town Clerk, Exeter.*

J. L. D.

[COURT OF APPEAL.]

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*Jan.* 28, 29.

Lord Goddard C.J., Jenkins and Morris L.JJ.

# * SMITH *v.* CHESTERFIELD AND DISTRICT CO-OPERATIVE SOCIETY LD.

[1951 S. No. 2154.]

*Factory—Dangerous machinery—Fencing—Duty to guard against acts reasonably foreseeable, including unreasonable behaviour of operatives—Factories Act,* 1937 (1 *Edw.* 8 & 1 *Geo.* 6, *c.* 67), *s.* 14.

The plaintiff was employed by the defendants on a pastry rolling machine which was so fenced as to leave a space between the fence and the bed of the machine sufficiently wide for an operative to thrust a hand through the space. The plaintiff put down the guard properly, and then, contrary to her instructions, put her hand through the space to push odd pieces of dough against the moving rollers, with the result that her fingers were injured. She claimed damages, alleging that her injury was due to a breach by the defendants of their statutory duty under section 14 of the Factories Act, 1937, to keep the dangerous part of the machine "securely fenced":—

*Held,* that the machine was not securely fenced within the meaning of section 14 of the Act of 1937, and that the plaintiff's act, though constituting contributory negligence, did not involve a notional breaking of the fence. The standard of duty on the employer under the section was to give protection not only against accidental happenings but also against acts and omissions reasonably foreseeable—and the plaintiff's action was reasonably foreseeable—including negligent, indolent, ill-advised and even frivolous acts of operatives.

Dicta of Lord Normand in *Lyon* v. *Don Brothers, Buist & Co. Ld.* 1944 S.C. (J.) 1, 5, applied.

Decision of Oliver J. reversed.

In view of the plaintiff's contributory negligence judgment was entered for her for 40 per cent. of the damages to be assessed.

APPEAL from Oliver J.

The plaintiff, Miss Betty Smith, an infant, was employed as a baker by the defendants, the Chesterfield and District Co-operative Society Ld., at their bakery department, the premises being a factory within the meaning of the Factories Act, 1937. She was in charge of a puff-pastry machine, which consisted of a long table with a pair of rollers, the bottom roller being fixed, and the top moving slightly up and down according to the thickness of the bed of dough which was being put through. The rollers had a guard over them which came down to within three-and-a-quarter inches at the lowest point from the table to protect the dangerous side of the nip and to prevent the operator's fingers from coming into contact with the moving rollers. Thus there was a space between the guard and the bed of the machine of something over three inches, sufficient to take a bed of dough three inches thick.

The plaintiff's duty was to manipulate a lump of dough about three inches thick, consisting of layers of margarine and dough,

first by rolling or beating it with a hand roller, and then, as the pastry was heavy, by putting it back and forth through the mechanical rollers. There were usually some small pieces of dough left at the end of the run which had not been taken in the nip. The plaintiff's duty then was to stop the machine, collect the small pieces into a lump, roll them, this time with a hand roller, and put them back on the bed of dough to go through the rollers when the dough was coming back through the machine in the reverse order.

The operators who worked the machines were given special directions and training, and they were specifically forbidden to put the small pieces of dough collected from the ends back into the machine, but were instructed to roll them with a rolling pin, the reason being that if the small pieces were pushed up tight against the rollers when the machine was working there was a danger of the operator's fingers coming into contact with the rollers.

On January 13, 1950, the plaintiff, then aged 16, stopped the machine, collected the pieces of dough, and then, because it was heavy work to roll them out again by hand, put them back in the machine and put the guard down as instructed. She then put her hand into the space under the guard to push the odd dough up against the roller. The machine was working, her fingers were cut, and she suffered injury.

The plaintiff, by her father, claimed damages from the defendants, alleging breach of statutory duty under section 14 of the Factories Act, 1937,[1] in failing securely to fence the rollers, which were a dangerous part of the machine, or to provide an automatic device to prevent the plaintiff's fingers from coming into contact with the rollers.

The defendants denied negligence and, alternatively, alleged that the plaintiff, having put her hand under the guard deliberately and unnecessarily for some purpose of her own, had been guilty of contributory negligence.

Oliver J. found that the plaintiff was an intelligent girl who had been properly instructed. He said that since the essence of section 14 of the Factories Act, 1937, was that there should be fencing against accident and not against deliberation, he was bound, once he had found that the plaintiff had acted contrary to instructions and with knowledge that she was acting wrongly, to hold that her act had become a deliberate and notional, though not a physical, breaking of the fence. In his view, the machine was adequately

[1] Factories Act, 1937, s. 14: "(1) Every dangerous part of any machinery, other than prime movers and transmission machinery, shall be securely fenced unless it is in such a position or of such construction as to be as safe to every person employed or working on the premises as it would be if securely fenced: Provided that, in so far as the safety of a dangerous part of any machinery cannot by reason of the nature of the operation be secured by means of a fixed guard, the requirements of this subsection shall be deemed to have been complied with if a device is provided which automatically prevents the operator from coming into contact with that part."

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fenced against accident; there could be no fence incapable of being broken; and since the plaintiff had broken the fence notionally with her hand, she could not succeed in a claim under the Factories Act. He gave judgment for the defendants. The plaintiff now appealed.

*H. B. H. Hylton-Foster Q.C.* and *R. W. Sykes* for the plaintiff.

*Tristram Beresford Q.C.* and *S. Seuffert* for the defendants.

The following cases were cited in argument:—*Carr* v. *Mercantile Produce Co. Ld.*[2]; *Cakebread* v. *Hopping Brothers (Whetstone) Ld.*[3]; *Lyon* v. *Don Brothers, Buist & Co.*[4]; *Burns* v. *Joseph Terry & Sons Ld.*[5]; *Smithwick* v. *National Coal Board*[6]; *Watt (or Thomas)* v. *Thomas.*[7]

LORD GODDARD C.J. stated the facts and continued:—It has been said repeatedly that the provisions of the Factories Acts with regard to fencing are not meant to apply only to preventing accidents to careful workmen. It is recognized that in workshops and factories people are not always careful: they are very often thoughtless, and sometimes they deliberately do things which they ought not to do and which result in very serious injury.

I need not go through all the cases which have laid down that fencing is intended to protect the careless and the ignorant as well as the careful and the well-instructed, because in *Burns* v. *Joseph Terry & Sons Ld.*[1] Somervell L.J.[2] cited a passage from the judgment of Lord Normand, the Lord Justice-General, in *Lyon* v. *Don Brothers, Buist & Co. Ld.*,[3] who said: "It can be "appositely said that the standard to be observed is a fence which "will prevent accidents from occurring in circumstances which "may be reasonably anticipated, but the circumstances which "may be reasonably anticipated include a great deal more than "the staid, prudent, well-regulated conduct of men diligently "attentive to their work, and the occupiers of factories are bound "to reckon on the possibility of conduct very different from that. "They are bound to take into account the possibility of negli-"gent, ill-advised or indolent conduct on the part of their "employees, and even of frivolous conduct, especially where "young workers are employed. If the fencing is to secure "operatives against injury which may reasonably be anticipated "in that sense, then I am of opinion that there was a contra-"vention of the section of the Act."

[2] [1949] 2 K.B. 601; 65 T.L.R. 504; [1949] 2 All E.R. 531.
[3] [1947] K.B. 641; 63 T.L.R. 277; [1947] 1 All E.R. 389.
[4] 1944 S.C.(J.) 1.
[5] [1951] 1 K.B. 454; [1951] 1 T.L.R. 349; [1950] 2 All E.R. 987.
[6] [1950] 2 K.B. 335; 66 (Pt. 2) T.L.R. 173.
[7] [1947] A.C. 484; 63 T.L.R. 314; [1947] 1 All E.R. 582.
[1] [1951] 1 K.B. 454.
[2] [1951] 1 K.B. 454, 462.
[3] 1944 S.C.(J.) 1, 5.

The guard here was put there for the very purpose of preventing operatives from touching or getting their fingers up against the rollers. The only point was that it was not sufficiently secure. It was a guard through which a girl could put her hand, and it is quite obvious that some means might have been taken, by means of a roller which would rise or fall, to prevent that sort of thing. Our attention was called by Mr. Tristram Beresford to the proviso to section 14 of the Factories Act, which, with all respect to him, I think operates against the defendants in this case. Section 14 is the section which requires all dangerous parts to be "securely fenced"—not merely "fenced," but "securely "fenced"; and then, because it is recognized that there may be machinery which makes a permanent fence impracticable, it is provided "that, in so far as the safety of a dangerous part of "any machinery cannot by reason of the nature of the operation "be secured by means of a fixed guard, the requirements of this "subsection shall be deemed to have been complied with if a "device is provided which automatically prevents the operator "from coming into contact with that part." If this guard had come down when the dough was no longer there so that it touched the bed of the machine in such a way as to prevent a person's hands going through, then it would have been a sufficient guard; and no doubt if an operative deliberately picked up the guard and put her hand through the machine, very different considerations would apply.

We are asked to say that this was a finding of fact by the judge with which we cannot interfere, but we take a different view from the judge on this point. He thought that because the girl deliberately put her hand underneath this guard—that is, through the space which was left between the guard and the bed of the machine—that was equivalent to breaking or taking away the guard and that, therefore, the employers were not liable. With all respect to the judge, I do not agree with that view. Here was a guard through which it was possible for a girl, without breaking the guard, to get her hand in conjunction with the rollers. It seems to me, therefore, that it is impossible to say that the dangerous part of the machine—that is to say, the moving rollers—was "securely fenced."

For these reasons I think that there was a breach of statutory duty. Of course, the girl was guilty of contributory negligence. She was guilty of doing a deliberate act which she ought to have known was highly dangerous, and which anybody would see was highly dangerous; she had been warned, and had been instructed, about it. But that it was foreseeable on the part of the employers that that might be done is clear, because not only was the guard provided to prevent fingers getting into contact with the rollers, but these employees were instructed on it. It cannot be said that it was not foreseeable. The fact is that the guard was not adequate, but the girl had been guilty of folly and direct disobedience to orders in doing what she did. Therefore it

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is impossible that she should be allowed to recover the whole of the damages. Had it not been for the Law Reform (Contributory Negligence) Act, 1945, she would have got nothing. As it is, the court has come to the conclusion that the damages should be apportioned 60:40—that is to say, she will recover 40 per cent. of whatever sum may be awarded.

JENKINS L.J. I agree. Mr. Tristram Beresford, for the employers, contended that the question whether or not this machine was "securely fenced" in accordance with the requirements of section 14 of the Factories Act was a question of fact on which the judge had reached his conclusion after hearing and seeing the witnesses, and that this court ought not therefore to interfere with that conclusion. It is, of course, obvious that the question whether any particular machine is "securely fenced" in accordance with the statutory duty must be judged with reference to the facts of each particular case. That is no more than a truism. But it is equally obvious that the question must be judged by reference to the right principle of law, and here, to my mind, the judge was in error when he said, after stating the facts: "But on those facts how can she succeed in an action "under the Factories Act? I do not think that she can. The "essence of the provision of section 14 of the Factories Act, "from what I know of the cases and from what has been cited "to me, seems to be that there should be a fencing against "accident and not a fencing against deliberation."

The judge, having laid down that principle for his guidance, came to the conclusion that the act in this case, being a deliberate act, was tantamount to a breaking of the fence and involved no breach of statutory duty on the part of the defendants inasmuch as the fence provided was a sufficient protection against anything except a deliberate act amounting to a breaking of the fence.

To my mind, the judge's statement of the principle of law by which he was guided states far too narrowly the duty of the employer under section 14. It is plain from the passage from the judgment of Lord Normand in *Lyon* v. *Don Brothers, Buist & Co.*[3] cited in *Burns* v. *Joseph Terry & Sons Ld.*[4] in the judgment of Somervell L.J., that the security to be provided by means of the fencing extends not merely to protection against accidental occurrences but to protection also against "negligent, "ill-advised or indolent conduct"; and it extends also, in my judgment, to conduct such as that of the plaintiff in the present case. The test, as was said by du Parcq J. in *Walker* v. *Bletchley Flettons Ld.*,[5] is this: "In considering whether "machinery is dangerous"—and, one might add there, whether it is securely fenced—"it must not be assumed that everybody "will always be careful. A part of a machine is dangerous if it is

[3] 1944 S.C.(J.) 1, 5.
[4] [1951] 1 K.B. 454, 462.
[5] [1937] 1 All E.R. 170.

"a possible cause of injury to anybody acting in a way in which "a human being may be reasonably expected to act in circumstances which may reasonably be expected to occur." I may add this comment from Redgrave (18th ed., p. 32): "This, "which is the test now most commonly applied, is, it is submitted, the correct one. In spite of the first sentence of the "test, the same learned judge had in *Stimpson* v. *Standard "Telephones and Cables Ld.*[6] to complain that the test had in "some quarters been misunderstood. The behaviour of human "beings that has to be regarded is such behaviour as is reasonably foreseeable which is not necessarily confined to such "behaviour as is reasonable behaviour."

It seems to me not open to doubt that the action of the plaintiff, unreasonable as it may have been, was behaviour on her part which was reasonably foreseeable by the defendant employers. That seems to me to be demonstrated by the fact that Mr. Naylor, the defendants' bakery manager, when asked what instructions were given to the staff concerning the machine and the use of the guard, said this: "Yes. We have always "given the staff instructions that, when they put the paste "through and it comes that they have small pieces to finish "off, they must not use the machine for the small ends; they "must use a rolling pin, because it is awkward practice to "put small pieces through the machine, and also dangerous." It appears clear, therefore, that this procedure of putting small pieces through the machine was one which the employers had in mind and against which they thought it necessary to caution their employees. It was, therefore, a foreseeable act of anyone working the machine. The guard was so constructed as to leave room between the table and the lower member of the guard sufficient for a person minded to follow this forbidden procedure to thrust his or her hand through, with a view to putting the small pieces between the rollers, and thus get the hand caught in the nip.

Accordingly, I agree with my Lord that this appeal should be allowed.

MORRIS L.J. I am in full agreement with the judgments which have been delivered.

*Appeal allowed. Judgment entered for plaintiff for 40 per cent. of the amount of damages to be assessed by the District Registrar, Leeds.*

Solicitors: *George A. Herbert for Willey, Hargrave & Co., Leeds; F. Hollis for C. W. Nelson & Co., Leeds.*

M. M. H.

[6] [1940] 1 K.B. 342; 56 T.L.R. 90; [1939] 4 All E.R. 225.

[CHANCERY DIVISION.]

1953
*Feb. 4.*

Upjohn J.

## * *In re* HENRY. MUSSETT *v.* HENRY.

[1952 H. 1762.]

*Will—Construction—Executory trust—Bequest to trustees on trust to pay income to A. "until she marries and then to settle the said "sum upon her for her benefit as my trustees may think best"—Death of beneficiary unmarried.*

A testator gave £2,000 to his trustees on trust to pay the income thereof to A. "until she marries and then to settle the said sum "upon her for her benefit as my trustees may think best." A. died without having married and a summons was taken out to ascertain whether the legacy formed part of her estate or fell into residue:—

*Held*, that there was a disposition of the income to A. for a time—until marriage, followed by a disposition of corpus on marriage only, and that the legacy fell into residue.

*Rishton* v. *Cobb* (1839) 5 My. & Cr. 145 distinguished.

*In re Mason* [1910] 1 Ch. 695 considered.

ADJOURNED SUMMONS.

By his will, dated May 22, 1899, Thomas Henry, who died on March 22, 1901, gave a number of specific and pecuniary legacies which included a bequest of £2,000 to his trustees on trust to pay the income thereof to his grandniece, Margaret Alice Mussett, "until she marries and then to settle the said sum "upon her for her benefit as my trustees may think best." The testator devised and bequeathed his residuary estate to his trustees as therein mentioned.

Margaret Alice Mussett never married and died on September 20, 1951.

A summons was taken out by the sole surviving trustee of the will to ascertain (inter alia) whether the legacy of £2,000 was "vested absolutely and indefeasibly in her legal personal repre-"sentative as part of her estate notwithstanding she died with-"out ever having been married," or whether on her death the legacy fell into residue.

*R. W. Goff* for the plaintiff.

*G. M. Parbury* for the legal personal representative of Margaret Alice Mussett.

*Peter Foster* for residuary legatees.

*N. S. S. Warren* for the Treasury Solicitor.

Cases referred to in argument: *Rishton* v. *Cobb* [1]; *In re Howard* [2]; *In re Boddington* [3]; *In re Mason* [4]; *Magrath* v. *Morehead* [5]; *In re Bannister* [6]; *Loch* v. *Bagley* [7]; *Carruthers* v. *Crawford* [8]; *In re Spensley's Will Trusts*.[9]

[1] (1839) 5 My. & Cr. 145.
[2] [1901] 1 Ch. 412.
[3] (1884) 25 Ch.D. 685.
[4] [1910] 1 Ch. 695.
[5] (1871) L.R. 12 Eq. 491.
[6] (1921) 90 L.J.Ch. 415.
[7] (1867) L.R. 4 Eq. 122.
[8] 1945 S.C. 82.
[9] [1952] Ch. 886; [1952] 2 All E.R. 49; [1952] 1 T.L.R. 1435.

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UPJOHN J. This summons gives rise to an interesting point of construction.

[After stating the question raised by the summons his lordship continued:] I propose in the first place to consider the construction of this clause quite apart from any authority. There is a gift of income to Margaret Mussett until she marries, and then a direction to settle the sum on her for her benefit. That plainly means on her marriage. Apart from authority, I should have thought that a gift until marriage was necessarily a gift which must come to an end on death or marriage, and that is then followed by a gift of corpus on marriage; but, nothing being said with regard to the disposition of corpus on death unmarried, that, apart from authority, I should have thought, was undisposed of, and therefore fell into residue.

It is said, however, that there are authorities which bind me to hold that this is an indefinite gift of income until marriage and that, as the beneficiary died a spinster, that indefinite gift of income continues and carries the corpus. The principle which it is said is applicable was first laid down in *Rishton* v. *Cobb*.[1] In that case there was a direction to invest the sum of £2,000 in the names of the trustees and to pay the income to the legatee "so long as she shall continue single and unmarried." There was no gift over in express terms of the income or of the corpus on marriage. Lord Cottenham L.C. said[2]: "If, therefore, "she had been single and unmarried, and had so remained, she "would have been entitled to the dividends, without any limita- "tion of time. Her interest would not have been determinable "by her death, but (independently of the forfeiture upon aliena- "tion) only by her ceasing to be single and unmarried. This is "different from a gift of dividends during widowhood. The "state of widowhood must determine with the life of the "widow; but the gift, so long as the legatee shall remain single "and unmarried, must be considered as requiring the act of "marriage to determine the interest. This gift, therefore, is of "the dividends of stock, without limitation as to time, which "carries the stock itself."

That decision has been severely criticized since. In *In re Boddington*[3] Lord Selborne (who was then Lord Chancellor), sitting in the Court of Appeal, plainly disapproved of the decision. He said: "With regard to the case of *Rishton* v. *Cobb*[4] the "respect I feel for the great judge who decided it prevents my "saying more of the judgment than that I do not understand it, "and that if it were applicable to this case I should hesitate for "some time before I could follow it."

However, in 1901, Sir George Farwell, then a judge of first instance, in *In re Howard*,[5] considering the passage from which

[1] 5 My. & Cr. 145, 152.
[2] Ibid. 152.
[3] 25 Ch.D. 685, 689.
[4] 5 My. & Cr. 145.
[5] [1901] 1 Ch. 412, 413.

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I have already read, said: "I understand Lord Selborne to "mean that *Rishton* v. *Cobb* [6] can be supported on the ground "stated by Lord Cottenham in the above passage. The Court of "Appeal did not, and in my opinion could not, overrule it, and "it is binding on me." In that case again it is to be observed that the direction was for payment to the wife so long as she remained unmarried, and there was no further disposition of corpus.

The matter came again before the Court of Appeal in *In re Mason* [7] and there again the decision in *Rishton* v. *Cobb* [8] came in for somewhat severe criticism. Lord Cozens-Hardy M.R. said with regard to the will in suit: "It will be observed here that there "is not in form an absolute indefinite gift of income to Alice. In "form it is limited up to a time. It is until she shall marry. It "will also be observed that there is a gift over of the residue to the "sons in the event of her marriage—a gift over of the residue, "diminished only in that event by a capital gift of £3,000 to the "daughter. The question of construction for us to determine is "whether on the face of this will, having regard to that gift over, "we are bound to say that by construction there is an absolute "indefinite gift of income to Alice, and that the period which and "which alone was to limit it has never happened and can never "happen, and that therefore the gift over can never take effect." Then he proceeds to discuss the decision in *Rishton* v. *Cobb* [9] by which Joyce J. had reluctantly felt bound him. After discussing that case, the Master of the Rolls continued: "A similar point "came before Farwell J. in *In re Howard*.[10] There there was no "gift over—nothing whatever but a simple trust to pay the income "to Amelia Howard so long as she remained unmarried. Far-"well J. held that in the absence of a gift over the passage I have "read from *Rishton* v. *Cobb* [11] ought to be followed, that he had "no power to overrule it, and that the lady was therefore entitled "absolutely. In the present case I think there is enough in the "fact of the gift over to enable us to hold that the gift here is to be "read as a gift to the daughter during her life or until marriage, "and, that being so, I think that the gift over, although it is only "expressed to be a gift over on her marriage, falls within the "well-known rule of *Jones* v. *Westcomb* [12] and takes effect either "on the death or on the marriage of Alice—in the case of her "marriage, subject to the deduction of the £3,000 legacy to her; "in the case of her death, without any such deduction. On the "whole, therefore, I think that the judgment of Joyce J. must be "reversed and that this appeal must be allowed."

Buckley L.J. said [13]: "The learned judge felt himself con-"strained by authority to hold that Alice Mason took an absolute

[6] 5 My. & Cr. 145.
[7] [1910] 1 Ch. 695, 697, 699.
[8] 5 My. & Cr. 145.
[9] Ibid.
[10] [1901] Ch. 412.
[11] 5 My. & Cr. 145.
[12] (1711) 1 Eq.C.Ab. 245.
[13] [1910] 1 Ch. 695, 699.

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" interest. The question is whether that is right. Now Alice does " not take an absolute interest unless there in an indefinite gift " of income. Reading this will I cannot find that there is. There " is a gift of income to Alice until a time, and after that time there " is another gift, a gift of the corpus. The testatrix has divided the " time into two periods, one until Alice marries, and the other " after she marries. She disposes of the income during the first " period and she disposes of the capital at the commencement of " the second period. There is no indefinite gift of income." Then he discusses *Rishton* v. *Cobb*,[14] and expresses the view that he cannot follow the decision of Lord Cottenham.

The fact, however, remains, that Farwell J. regarded the authority of *Rishton* v. *Cobb* [15] as binding on him. It has, as I have pointed out, been criticized, but in every case where it has been criticized it has been distinguishable, and I regard it as binding on me, if it is applicable to the particular words of this will: but I do not regard it as so applicable. I think that the testator has given income to Miss Mussett until marriage and then disposes of the corpus. It is perfectly true that the disposition of corpus on marriage cannot be quite appropriately described as a gift over, which was the case in *In re Mason*,[16] but I do not regard that nicety of distinction as decisive in this matter. The true principle is to be found in the passage I have read from the judgment of Buckley L.J. There is a disposition of income for a time and that is followed by a disposition of corpus. I therefore do not regard the decision in *Rishton* v. *Cobb* [17] as binding on me and, for the reasons I have given, as Margaret Mussett never did marry, in my judgment corpus is not disposed of by the will.

In these circumstances, I think that it is unnecessary for me to come to any conclusion on the second point that was argued before me, a point of some interest, which was whether the direction to settle could be treated as a direction to settle on the marriage settlement trusts or whether it was virtually a gift of corpus to her on marriage. The cardinal fact remains that the testator was intending to dispose of capital on marriage, and that distinguishes, in my judgment, *Rishton* v. *Cobb*.[18]

I therefore propose to declare that the legacy fell into residue.

Solicitors: *Moon, Gilks & Moon; Sharpe, Pritchard & Co.; Treasury Solicitor.*

J. L. D.

[14] 5 My. & Cr. 145.
[15] Ibid.
[16] [1910] 1 Ch. 695.
[17] 5 My. & Cr. 145.
[18] Ibid.

[QUEEN'S BENCH DIVISION.]

1953
*Feb.* 3.

# * CARNILL *v.* ROWLAND.

Lord Goddard C.J., Lynskey and Pearson JJ.

*Road Traffic — Insurance — Motor-cycle — Sidecar "permanently attached"—Sidecar body removed—Chassis and wheel still attached — Insurance company admittedly "on risk" — Road Traffic Act,* 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *Part II and s.* 35 (1).

A motor-cyclist who held a cover note for third party insurance limited to a motor-cycle "with sidecar permanently attached," removed the body of the sidecar leaving only its chassis and wheel attached to the motor-cycle. The insurance company accepted that in those circumstances they were "on risk":—

*Held,* that inasmuch as the insurance company admitted that the chassis and wheel of the sidecar constituted a sidecar within the meaning of the cover note issued by them, and as that was a possible construction, the assured was insured against third party risks for the purpose of section 35 (1) of the Road Traffic Act, 1930.

CASE STATED by the City of Sheffield justices.

An information was laid by the appellant, Mr. George Alfred Carnill, a superintendent of police, against the respondent, Mr. Tom Rowland, alleging that on July 17, 1952 "he . . . did "use on a road a motor-cycle . . . there not being in force in "relation to the user of the vehicle such a policy of insurance ". . . . in respect of third party risks as complied with the "requirements of Part II of the Road Traffic Act, 1930, contrary "to section 35 (1) of the Act." [1]

At the hearing of the information the following facts were proved or admitted. On July 11, 1952, the respondent signed a proposal form for the insurance of a motor-cycle combination by the Co-operative Insurance Society Ltd. By the terms of the proposal form the policy was to be restricted to the use of a motor-cycle to which a sidecar or box-carrier was permanently attached. On July 14, 1952, a cover note was issued to the respondent by the insurance company with the words "Exclusion "and special conditions—Sidecar permanently attached." The form of certificate of insurance which would have been issued in due course would have contained the words "Use of the cycle is "only permitted when a sidecar or box-carrier is attached."

On July 17, 1952, the respondent, having removed the sidecar body from the motor-cycle, drove the vehicle on a road in Sheffield, there being attached to the motor-cycle at that time only the sidecar chassis and the wheel.

[1] Road Traffic Act, 1930, Part II, s. 35 (1): ". . . it shall not be lawful "for any person to use . . . a motor-"vehicle on a road unless there is in "force in relation to the user of the "vehicle . . . such a policy of insur-"ance . . . in respect of third-party "risks as complies with the require-"ments of this part of this Act."

[Reported by Mrs. E. M. WELLWOOD, Barrister-at-Law.]

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On behalf of the prosecution it was contended that the special condition in the cover note that a sidecar must be permanently attached was a condition which circumscribed the operation of the policy from the beginning, and that there was therefore no policy of insurance in force in relation to the use of the vehicle by the respondent when it was used without a sidecar permanently attached; that no sidecar was attached to the vehicle when used on July 17, 1952; that the test whether the policy of insurance was in force was not whether the insurance company considered itself "on risk," but whether it was in law liable to indemnify the user if damage and injury had resulted from the use of the vehicle at a time when no sidecar was permanently attached.

On the part of the respondent it was contended, inter alia, that it was within the contemplation of the respondent and the insurance company at the time when the insurance was effected that the vehicle could be used without a body being attached to the sidecar, and that the policy was not vitiated in any way by the removal of the sidecar body.

A representative of the Co-operative Insurance Society gave evidence before the justices that the insurance company for the purposes of the policy of insurance regarded what was attached at the material time as a sidecar.

The justices, being of opinion that the respondent's use of the vehicle was covered by insurance against third party risks, dismissed the information.

The prosecutor appealed.

*P. Wrightson* for the appellant.

*R. Stock* for the respondent.

LORD GODDARD C.J. I do not think that this is a case of any general importance, for all these cases must depend on their particular facts. Because in this particular case the justices have dismissed the charge and because this court upholds their decision, it does not follow that where the facts are nearly the same and there is some different insurance policy, or another company is involved, that the decision would necessarily be the same.

It has often been pointed out that inconvenience has arisen in cases where a person has been charged with using a motor-car when there was not a policy of insurance in force in relation to it because the cases, which sometimes involved nice questions of insurance law, have had to be decided in the absence of one of the parties most interested, namely, the insurance company. For that reason, it is to be hoped that use will be made of an arrangement which has been come to, with the approval of the appropriate authorities, for consultation between the police and insurance companies on whether or not the insurance companies

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are "on risk" or consider themselves "on risk." If an insurance company informs the appropriate authority in a particular instance that they consider themselves "on risk," the mischief at which the Act is aimed does not arise because, if an accident took place the company would indemnify, and be liable to indemnify, the respondent so that the injured person would recover the money. On the other hand, the court has to give these decisions in the absence of an insurance company, and if the justices decide, and this court upholds or reverses their decision and gives a decision on the construction of the policy, although that decision may have some persuasive effect, it is in no way binding between the insurance company and the assured. If, for instance, in the present case we decided that the insurance company were not "on risk," although they have said that they were, that would not debar or bind the assured, who is the respondent to this appeal, if he met with an accident and chose to bring an action against his insurers for a declaration that they were bound to indemnify him.

The facts of this particular case are that the respondent made a proposal to the Co-operative Insurance Society Ld. for a policy of insurance, and he was asked: "Do you desire the policy to be "restricted to the use of any motor-cycle to which a sidecar or "box-carrier is permanently attached?" and he answered "Yes." Thereupon a cover note was issued pending the issue of the policy, and the cover note contained the words: "Exclu- "sions and special conditions: sidecar permanently attached," and if the sidecar is not attached presumably liability is thereby excluded, but these exclusions and conditions are put in for the protection of insurance companies. They may take a smaller premium if their risk is limited, and if the insurance company do not wish to rely on an exclusion or say that in their view the exclusion does not arise in any particular case, I do not know why the court should be acute to find that they are wrong, because every policy has to be read contra proferentem. If the insurance company insert exceptions or conditions in the policy, those conditions have to be read against the insurance company so far as it is possible.

In this case a representative of the insurance company was called before the justices, and he told them that the company considered themselves "on risk." That means no more than that they said that for the purposes of the policy of insurance they regarded what was attached to the cycle as a sidecar. Under those circumstances the justices came to the conclusion that the charge was not made out, because they thought that the respondent was insured, and I see no reason to differ from them. For my part, I put it simply on this ground: the insurance company having said that they read the policy as meaning that at the time

what was attached to the cycle satisfied the conditions of the policy, I think that there is no reason to say that the respondent was uninsured at the time when he was stopped.

LYNSKEY J. I agree. It is clear that if a condition in a policy is so broad that it has only one meaning, and that meaning is to exclude the insurance company from liability when the machine is used either for certain purposes or in certain conditions, the court is bound by that clause and must act upon it, But if there is a clause in the policy which is open to two constructions, it is for the court to construe that condition contra proferentem, that is, against the insurance company.

The question here was whether this was a motor-cycle which was fitted with a sidecar. What is the meaning of " a sidecar " permanently fixed " may be a question of doubt. According to the evidence before the justices on which they so found, the insurance company itself read the policy as putting them " on " risk " when the cycle was in the condition in which it was found at the time when this offence was alleged to have been committed, namely, fitted with a chassis and a third wheel but with the body of the sidecar temporarily absent. If that was a construction of the meaning of a sidecar which was impossible on the wording of the policy, one would be able to say that the justices had no right so to find, but in fact, it seems to me that the meaning of " passenger-carrying sidecar attached " is open to two constructions. The insurance company took one, which the justices accepted; they accepted the fact that the insurance company was on risk and that the respondent was in fact covered. Under those circumstances, I agree with my Lord that this appeal should be dismissed.

PEARSON J. I agree that this appeal should be dismissed. I only want to say that I should agree with the contention of the appellant, set out in the stated case, " That the test whether a " policy of insurance is in force is not whether the insurance " company consider itself on risk, but whether it was in law " liable to indemnify the user if damage and injury had resulted " from the use of the vehicle at a time when no sidecar was " permanently attached." If it was plain that there was no sidecar attached to this vehicle at the material time, then I think that the view of the insurance company that they were bound would be in such circumstances quite manifestly incorrect in law and would have to be disregarded. But here is a case in which it is arguable one way or the other whether there was a sidecar or not attached at the material time. That being so, and it being a very reasonable view that there was still a sidecar attached because the sidecar had not ceased to be a sidecar merely because a part of it had been taken off the machine, I think that it was

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perfectly in order for the justices to take into account the view expressed by the insurance company as one of the material factors for them to consider. For that reason, I do not think that it is shown that any error was made by the justices in coming to the decision which they did, and I agree with the proposed judgment.

*Appeal dismissed.*

Solicitors: *Sharpe, Pritchard & Co., agents for Town Clerk, Sheffield; A. J. A. Hanhart, agent for Neal, Scorah, Siddons & Co., Sheffield.*

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[QUEEN'S BENCH DIVISION.]

1953
*Feb.* 4.

## * PEARSON *v.* BOYES.

Lord Goddard C.J., Lynskey and Pearson JJ.

*Road Traffic—Licensing—Goods vehicle—Utility van, constructed for carriage of goods, towing caravan—No goods carried in van or caravan—Van licensed as private vehicle—Not used for carriage of goods or burden—Haulage—Carriage—Vehicles (Excise) Act,* 1949 (12, 13 & 14 *Geo.* 6, *c.* 89), *ss.* 5, 13, 27.

The defendant used a utility van, constructed for the carriage of goods but licensed as a private vehicle, to tow a caravan on a public road. No goods were being carried in either the van or the caravan at the time. The defendant was charged with unlawfully using the van on a public road for a purpose which brought it within a class of vehicles to which a higher rate of duty was chargeable, such higher rate of duty not having been paid, contrary to section 13 of the Vehicles (Excise) Act, 1949. The justices considered that the van was not a "goods vehicle" within section 27 of the Act and dismissed the charge. On appeal by the prosecutor:—

*Held*, that the van was not being used for the carriage of goods or burden and was not therefore a "goods vehicle" within the meaning of section 27. The Act was concerned primarily with haulage as opposed to carriage, and, had the caravan been laden with goods, it seemed that the van would have been used to convey the goods, but in the absence of clear and precise words in the Act showing that it was intended that the van, as being used at the material time, should be subject to a higher rate of tax, and in view of the vagueness and uncertainty of the matter, it could not be said that the justices were wrong.

*Cook* v. *Hobbs* [1911] 1 K.B. 14 followed.

CASE STATED by Lincolnshire justices.

An information was preferred against the defendant, Donald Boyes, for that he, on July 15, 1952, while there was in force a certain licence taken out for a mechanically propelled vehicle, namely, a Bedford utility van, at a certain rate under the Vehicles (Excise) Act, 1949, unlawfully used the vehicle on a

public road for a purpose which brought it within a class or description of vehicle to which a higher rate of duty was chargeable, such higher rate not having been paid before the vehicle was so used, contrary to section 13 [1] of the Act.

At the hearing of the information the following facts were proved or admitted. The defendant was a towing contractor and was at the material date the owner of a Bedford utility van constructed or adapted for the conveyance of goods. On July 15, 1952, the defendant used the vehicle on a public road for the purpose of towing a caravan, but no goods were at the time being carried in either the vehicle or the caravan. The vehicle was licensed as a private vehicle, duty having been paid at the rate of £10 per annum, but if it had been licensed as a goods vehicle duty would have been chargeable at the rate of £27 10s. 0d. per annum, and an additional duty at the rate of £10 per annum would have been chargeable in respect of the use of the vehicle for towing a trailer.

On behalf of the prosecutor it was contended that, as the vehicle was constructed for the conveyance of goods, and was drawing a caravan, it was a "goods vehicle" within the meaning of the Vehicles (Excise) Act, 1949.

On behalf of the defendant it was contended that the vehicle was not used for the conveyance of goods and was properly licensed as a private vehicle notwithstanding that it was towing a caravan.

The justices were of the opinion that the vehicle was not a "goods vehicle" within the definition in section 27 [2] of the Act, as there was no evidence that it was being used for the conveyance of goods; they were also of the opinion that it was properly licensed as a private vehicle and could lawfully draw a caravan without further duty being chargeable, and they dismissed the information.

The prosecutor appealed.

[1] Vehicles (Excise) Act, 1949, s. 5: "(1) . . . the duty chargeable in "respect of a goods vehicle . . . shall "be at the rate specified . . . in "[Part I of the Fourth Schedule to "the Act]."

S. 13: "(1) . . . where a licence "has been taken out in respect of "a mechanically propelled vehicle "at any rate under this Act and "the vehicle is . . . used . . . in "a manner or for a purpose which "brings it within, or which if it was "used solely . . . in that manner or "for that purpose would bring it "within, a class or description of "vehicle to which a higher rate of "duty is applicable under this Act, "duty at that higher rate shall "become chargeable in respect of the "licence for the vehicle. . . . (2) "Where a licence has been taken out "in respect of a mechanically propelled vehicle, and by virtue of "such user as aforesaid a higher rate "of duty becomes chargeable and "duty at the higher rate was not "paid before the vehicle was so used, "the person so using the vehicle "shall be liable to . . . penalties. ". . ."

[2] Vehicles (Excise) Act, 1949, s. 27: "(1) In this Act, except "where the context otherwise requires . . . 'goods vehicle' means "a mechanically propelled vehicle ". . . constructed or adapted for use "and used for the conveyance of "goods or burden of any description, "whether in the course of trade or "otherwise; . . ."

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*J. P. Ashworth* for the prosecutor.

The defendant did not appear and was not represented.

The following cases were referred to in argument: *James* v. *Davies* [3]; *Carrimore Six Wheelers Ld.* v. *Arnold* [4]; *Cook* v. *Hobbs* [5]; *Manning* v. *Hammond* [6]; *Speak* v. *Powell* [7]; *Foster* v. *Great Eastern Railway Co.* [8]

LORD GODDARD C.J. This is a case stated by justices, before whom the respondent, a towing contractor, was charged with using a vehicle on a public road "for a purpose which brought "it within a class or description of vehicle to which a higher rate "of duty was chargeable, such higher rate not having been paid "before the vehicle was so used, contrary to section 13 of the "Vehicles (Excise) Act, 1949."

The case turns upon the fact that the vehicle, a utility van, which could be used for the carriage of goods, was at the time in question towing an unladen caravan. Section 27, the interpretation section, of the Vehicles (Excise) Act, 1949, provides: "'Goods vehicle' means a mechanically propelled vehicle "(including a tricycle weighing more than 8 cwts. unladen) "constructed or adapted for use and used for the conveyance of "goods or burden of any description, whether in the course of "trade or otherwise." The question is: if this vehicle was constructed as a goods vehicle, was it being used for the conveyance of goods or burden of any description?

The Act deals with different varieties of vehicles and different occasions, and is concerned primarily with the haulage of vehicles or vehicles used for haulage, and it refers to tractors, goods vehicles and the like. A very interesting argument was addressed to us and Mr. Ashworth referred to a considerable number of authorities in an attempt to elucidate this point. For myself, I should be content to decide this case very much on the same lines as this court decided *Cook* v. *Hobbs* [1]; if it is desired to tax these vehicles they should be taxed in clear words. A subject is only to be taxed if the taxing authority can show that there is no question about it that he is taxed, and if it is necessary to hunt about through a large number of sections and consider a large number of cases it seems to me to show that the legislature has not used clear and precise words showing that a tax is to be imposed.

In my opinion, taking into consideration the whole scheme of the Act and the words of the different sections and the expressions used, I think that the Act is concerned with haulage as something quite distinct from carriage. If a utility van were

[3] [1953] 1 Q.B. 8; [1952] 2 T.L.R. 662; [1952] 2 All E.R. 758.
[4] [1949] W.N. 349; 65 T.L.R. 506; [1949] 2 All E.R. 416.
[5] [1911] 1 K.B. 14.
[6] [1951] 2 All E.R. 815.
[7] (1873) L.R. 9 Ex. 25.
[8] [1920] 2 K.B. 574.
[1] [1911] 1 K.B. 14.

used with a trailer which was laden with goods, it would seem to me that it would be being used for the conveyance of goods because, although the goods were put into the trailer attached to the van, it would be the van which would be conveying the goods from point to point. It might be said, of course, from one point of view, that it was conveying a caravan, but what it would actually be doing would be towing an empty caravan. As the Act seems to differentiate between haulage and towage, which are the same things, and carriage, and because the whole matter is left so vague and debatable, I cannot see here that the justices were wrong, or that Parliament intended to tax this vehicle in the way suggested.

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For these reasons, in my opinion, the decision of the justices should be upheld.

LYNSKEY J. I agree.

PEARSON J. I agree.

*Appeal dismissed.*

Solicitor: *Treasury Solicitor.*

J. F. L.

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[PROBATE, ETC., DIVISION.]

## * DAVIDSON *v.* DAVIDSON.

1953
*Jan.* 29.

Collingwood and Karminski JJ.

*Husband and Wife—Justices—Persistent cruelty—Allegations of sodomy—Questions of corroboration and acquiescence—Justices' reasons—Necessity to state precise nature of findings.*

When justices have made a finding of persistent cruelty in a case where there have been allegations of sodomy and of other abnormal practices they should state in clear terms what precisely they have found, and not say merely that there have been abnormal sexual practices. If they find sodomy, they should say so.

In a case where sodomy has been alleged the court must in accordance with the authorities direct itself on the desirability, though not the necessity, of corroboration; and if sodomy be found after such a direction, must then consider the possibility of acquiescence. If the justices have properly directed themselves upon the questions of corroboration and acquiescence, they should refer to these matters in the reasons given for their decision.

There cannot be a true assent to acts of sodomy if such acts are forced upon a wife either literally or by some fraudulent persuasion that such an act is only one of the normal incidents of married life.

*Statham* v. *Statham* [1929] P. 131; 45 T.L.R. 127; *D. B.* v. *W. B.* [1935] P. 80 applied.

APPEAL from justices.

The parties were married in 1949, when the husband was 22 and the wife 18, and they lived together until the summer of

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1952. On August 20, 1952, the wife issued a summons alleging persistent cruelty, and an order was made on that ground under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895–1950, on September 16, 1952.

The husband appealed. The justices' reasons and the facts are given in the judgment of Karminski J.

*Geoffrey Crispin* for the husband.
*Stranger-Jones* for the wife.

The cases referred to in the judgment of Karminski J. were cited in argument.

COLLINGWOOD J. I will ask my brother to deliver the judgment.

KARMINSKI J. The summons was, in form, one alleging persistent cruelty, but, as shown at the hearing, the evidence was largely, but by no means entirely, directed to sodomy. There was an allegation put in cross-examination to the husband, though not spoken to by the wife, that on one occasion or more than one occasion he had sought sexual intercourse per oram. He denied it, and presumably the justices were bound to accept his denial, since there was no evidence the other way. There were also certain allegations, not in my view very serious in their nature, of blows; and though it was common ground that at any rate on one occasion, and probably more, the husband had struck the wife by slapping her, the only serious allegation was that in a quarrel at a dance on New Year's Eve, outside the six months preceding the summons, he had struck her, possibly not without provocation, sufficiently hard to cut her mouth. There was one incident which was dealt with in evidence, but not expressly found to be proved, though to some extent corroborated, that on one occasion within the six months the husband, in the presence of another couple who were neighbours, put his hand up his wife's clothing underneath her skirt. It is not clear whether that was relied on as an act of cruelty of itself or in some way intended to corroborate the charge of sodomy.

The wife gave evidence that the husband had committed a number of acts of sodomy upon her, and she said that she consented; she was only a very young woman, and she alleged that the husband persuaded her that it was normal sexual intercourse, or at any rate a kind of normal sexual intercourse, and that it was only when she discovered that it was not normal that she refused to allow him to do it further. No corroboration was given of the wife's complaints, nor, indeed, does it appear that she ever made a complaint to anybody about the husband's sexual conduct in this respect.

The marriage was apparently broken up by a quarrel over the husband's brother staying with them. It is not necessary

to go into detail on this matter, but it is the fact that the wife objected to the brother's presence in their hut, and a quarrel developed which resulted in the wife leaving and apparently being kept out thereafter by the husband; though he seems to have repented of his action later and to have consulted the probation officer. But be that as it may, it seems to me that the whole gravamen of the wife's complaints was the allegation of sodomy. The matter was gone into quite thoroughly, and the husband gave evidence emphatically denying that he had ever committed sodomy upon his wife.

There is one other matter which should, at any rate, be touched on. It is clear that both the husband and the wife committed adultery during this short marriage, and I say no more about it than this, that it is at least arguable on the facts at present known to us that each connived in the clearest possible way at the adultery of the other, and that now, therefore, neither is at liberty to complain of the other's adultery. It must not be thought that this court is making any finding on that matter, but on the facts before us I am bound to say that at any rate there is a good deal of evidence to support the possibility of connivance on both sides.

The case was fully investigated as to the facts by the justices, and at the end they found that the cruelty was proved. It now becomes necessary to consider the reasons they gave for their findings, which, I am bound to say, are in my view wholly unsatisfactory and unconvincing. I do not desire to say more than is necessary, because in the view which I have been able to form of this case it is clearly one in which the issues between the parties have not yet been properly or fully tried, and therefore, must be retried.

The justices in their findings rightly said that it was an unusual case, " and for that reason gave special attention to the appear- " ance and demeanour of the parties," and with that finding, having regard to their mutual adultery, nobody can quarrel. They also emphasized that the wife at the time of the marriage was only 18 years of age. They then said: " While the wife was not " entirely blameless regarding the events starting at Christmas, " 1950, she was to a large extent influenced by what she believed " about her husband's health." I am not quite sure what, if anything, that means, but there was some evidence that the husband had been in hospital, the wife suggested for some neurosis. They then found this, and it is a most important finding: " There had been abnormal sexual practices, although " these had ceased some few months before the final break-up." I emphasize the phraseology " abnormal sexual practices," and I will content myself with observing only this, that if justices are finding something of this nature they should say what precisely they have found in clear terms.

Sodomy, of course, is a matrimonial offence as well as a criminal one, and it is a very serious offence. If they were finding

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other sexual practices it was, I think, desirable that they should state the precise nature of the offences which they found. In this case that has some special significance, because of the question put to the husband in cross-examination on sexual intercourse per oram. We were invited by Mr. Stranger-Jones to say that the finding of abnormal practices meant sodomy and nothing else, but I am quite unable to accept that argument. If they were finding sodomy they should have said so.

The justices then went on to accept the wife's evidence of the blow at the dance, which I have already mentioned, and I see no reason why, on the evidence, they should not have accepted it, though apparently they did not deal, as they might have done with the husband's admission of that blow and its mitigation by the wife's conduct, which he said amounted to provocation.

They then dealt in a somewhat mysterious way with the complaint, which was corroborated, that the husband on one occasion put his hand up his wife's clothing, and they said: "There was "corroboration of the indecent incident when the husband put "his hand up his wife's clothes in front of [the two neigh- "bours]." That was, of course, true. I do not know whether by that they meant to find any sort of corroboration of the husband's sodomy; but if they did I cannot accept their reasoning. An incident of that kind may amount to bad manners, maybe to very indecent conduct, but it does not seem to have anything to do with abnormal sexual practices.

They then found that the husband was a conceited and overpowering individual, "who had little regard for the truth, and "one who, while setting himself up as a public benefactor (in "a perverted sense) for women, did his best to throw his wife "into the company of other men." It is clear from that that they did not like the appellant husband, and maybe they were justified in not liking his manner and demeanour; but they did not say, nor do I think that they could have said, that that finding helped in any way towards finding abnormal sexual practices in general, or sodomy in particular.

Lastly they said that "no wife could tolerate such conditions "without her health being seriously affected." What conditions they were referring to I do not know, and I do not propose to speculate.

We are told that the justices had their attention drawn to the well-known case of *Statham* v. *Statham*,[1] where it was pointed out that it was necessary for a jury to be directed, or a court to direct itself, on the desirability, though not the necessity, of corroboration in cases of this kind. If the justices were so warned, it is a matter of great regret that they did not refer to the question of corroboration in their reasons. It is, of course, always open to any court to find a charge of this kind proved

[1] [1929] P. 131; 45 T.L.R. 127.

without corroboration, but it must first warn itself of the dangers of so doing. In a case in this court reported as *D. B.* v. *W. B.*,[2] and, therefore, a case decided some years after *Statham* v. *Statham*,[1] the principles to be applied in cases of sodomy and sexual perversion were fully argued by experienced counsel. The President dealt with the matter, if I may respectfully say so, in the clearest possible terms, in these words[3]:—"The court "demands that when a matrimonial offence, whatever it is, is "charged, if possible the evidence of the spouse making the "charge should be corroborated, and not least with regard to "matters of the sort charged in this case about which, if there "was not a reasonably strict rule in this respect, one spouse "would be so easily at the mercy of the other in relation to things "which from their nature must happen in private. But when "that has been said it is admitted that the necessity for cor-"roboration is not an absolute rule of law. Justices should "direct themselves, just as a judge should direct a jury, that it "is safer to have corroboration, if possible; but when that "warning has been given and given in the fullest form, then "there is no rule of law which prevents the tribunal finding the "matter proved in the absence of corroboration."

The matter before the justices, and before this court, in *D. B.* v. *W. B.*,[4] were allegations of perverted sexual intercourse; and that direction I must follow, of course, in any event. I am far from satisfied that the justices, if their attention was called to *Statham* v. *Statham*,[5] either understood it or directed themselves properly according to that decision. It is clear in this case, as so often happens in cases either of sodomy or perversion, that there can be no corroboration, but it also must be remembered that no kind of charge can be made more easily by a wife, nor is there one which is more difficult for a husband to answer.

There remains, even if the justices did direct themselves properly as to the desirability of corroboration, this aspect of the matter: even if they were right in finding sodomy after a proper direction to themselves, they do not seem to have considered at all the question which must arise in charges of this kind of acquiescence by the complaining wife, and as Sir Boyd Merriman P. pointed out in *D. B.* v. *W. B.*,[6] referring to *Statham* v. *Statham*,[7] "If the conduct charged against the "husband is a thing which could prima facie only have happened "with the assent of the wife there must be some corroboration; "and she ought not to be able to come to the court and complain "of something to which she herself has consented. Whichever "way it is put, it is plain that the closest scrutiny ought to be "given by justices to an allegation of cruelty which at the end

[2] [1935] P. 80.
[3] Ibid. 83.
[4] [1935] P. 80.
[5] [1929] P. 131.
[6] [1935] P. 80, 84.
[7] [1929] P. 131.

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" of it all is based upon filthy acts of this sort which cannot have " occurred without at least the assent of the wife." Pausing there for a moment, it is, of course, true that the assent of a wife, especially a young wife, cannot be true assent if the acts are forced upon her, either literally by overwhelming force or by some fraudulent persuasion that it was all right and only one of the normal incidents of married life. But that aspect of acquiescence, which in my view is vital in these cases, does not seem to have been considered by the justices at all. At any rate, the matter is not mentioned in their findings.

I have gone into the questions of corroboration and acquiescence in the hope that it may be of some possible assistance to the justices who will have to retry this matter. These cases are inevitably difficult, whether for justices or for higher tribunals, and I have referred to *Statham* v. *Statham* [7] and *D. B.* v. *W. B.* [8] in the hope that the justices' attention may be called to the requisites to be proved and to the dangers to be avoided in cases of this kind.

I have no doubt whatsoever that the trial by the justices which resulted in this order was completely unsatisfactory, and in my view there must be a new trial before a fresh panel of justices.

COLLINGWOOD J. I agree, and as we are sending this case back for retrial by a fresh panel of justices I propose to add nothing to what my Lord has said.

*Case remitted.*

Solicitors: *Gregory, Rowcliffe & Co., for Wood, McLellan & Williams, Chatham; T. Boyd White, Gillingham.*

J. B. G.

[7] [1929] P. 131. [8] [1935] P. 80.

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[COURT OF CRIMINAL APPEAL.]

C. C. A.

1953
*Feb.* 9.

Lord Goddard C.J., Lynskey and Pearson JJ.

## *REGINA v. SANDERSON.

*Criminal Law—Evidence—Witness for defence called after summing-up.*

Although a practice not to be encouraged, it is permissible, if the circumstances warrant it, for a witness for the defence to be called after the summing-up, and for the judge to add to his summing-up thereafter.

*Reg.* v. *Owen* [1952] 2 Q.B. 362; [1952] 1 T.L.R. 1220; [1952] 1 All E.R. 1040 distinguished.

APPLICATION for leave to appeal against conviction.

The applicant, Andrew John Sanderson, was convicted at the Central Criminal Court of wounding with intent and assault,

and was sentenced to three years' and 18 months' imprisonment respectively to run consecutively.

The applicant did not appear and was not represented.

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PEARSON J. delivered the following judgment of the court:— In this case the application is refused, but the case has a peculiar feature in that a witness, whom the defence desired to call, did not arrive until a very late stage when the summing-up had been almost completed. After the summing-up, an application was made on the part of the defence that that witness should be called, and that application was acceded to. The recorder then delivered a short supplementary summing-up with reference to the evidence of that witness.

In *Reg.* v. *Owen* [1] it was held that it was wrong for witnesses to be called for the prosecution after the summing-up, but we think that the present case is distinguishable from that case because here extra liberty was extended to the defence. It is not a matter one would wish to happen very often but, on the particular facts, which have been carefully considered, we think that there is no objection to be taken to what was done and that the recorder was fully justified in the rather unusual course which he took.

*Application refused.*

J. D. P.

[1] [1952] 2 Q.B. 362; [1952] 1 T.L.R. 1220; [1952] 1 All E.R. 1040.

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[QUEEN'S BENCH DIVISION.]

## * YORKSHIRE DYEING AND PROOFING CO. LD. *v.* MIDDLETON BOROUGH COUNCIL.

1953
*Feb.* 4, 5.

Lord Goddard C.J., Lynskey and Pearson JJ.

*Local Government—Sewage—Trade Effluent—Discharge into sewer—Consent of local authority—Additional premises acquired—Effluent therefrom blended with and discharged with that from old premises—No alteration in character, volume or rate of discharge—Consent not obtained—Offence—Public Health (Drainage of Trade Premises) Act,* 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 40), *ss.* 2 (1) (2), 4 (1), 14 (1).

Before 1937 a company occupied a dye works from which, with the consent of the local authority, they discharged a trade effluent into the local authority's sewer. In 1946 the company acquired adjoining premises which had been a foundry, and made them part of their works as a new dye house in which a trade effluent was produced in addition to the effluent produced on the old premises. The effluent from the new premises was carried to the old premises where it was blended with the effluent there produced and the blended effluent was discharged into the sewer from the old premises. The quantity so discharged did not exceed the quantity discharged from

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the old premises on any one day during the year ending March 3, 1937, and the rate of discharge was not higher than the old rate.

The company were convicted before a court of summary jurisdiction of contravening the provisions of section 2 (1) of the Public Health (Drainage of Trade Premises) Act, 1937, and their appeal to quarter sessions was dismissed. They appealed to the Divisional Court:—

*Held*, dismissing the appeal, that the trade effluent now being discharged into the sewer was not produced at the same premises as those in which the effluent was produced before March 3, 1937, since it was now the effluent of two premises and not of one set of premises. It was impossible to say that the effluent now being produced in the new premises was not discharged into the sewer, although the discharge was being effected indirectly; and, as no consent to the discharge had been given by the local authority, the company were guilty of the offence charged.

CASE STATED by Lancaster Quarter Sessions.

On June 20, 1952, the Yorkshire Dyeing and Proofing Co. Ld. appealed to quarter sessions against their conviction before a court of summary jurisdiction on two informations preferred against them by the town clerk of the Middleton Borough Council. The convictions were on informations charging (1) that they (the company) on July 25, 1951, were the occupiers of certain trade premises situate at Spring Vale, Middleton, from which premises a certain trade effluent was discharged into a public sewer of the council of the Borough of Middleton, the local authority, in contravention of section 2 of the Public Health (Drainage of Trade Premises) Act, 1937[1] no trade effluent notice

[1] Public Health (Drainage of Trade Premises) Act, 1937, s. 2 (1): "No "trade effluent shall be discharged "from any trade premises into a "public sewer of a local authority "otherwise than in accordance with "a written notice (hereafter in this "Act referred to as 'a trade effluent "notice') served on the local autho- "rity by the owner or occupier of the "premises, stating—(*a*) the nature or "composition of the trade effluent, "(*b*) the maximum quantity of the "trade effluent which it is proposed "to discharge on any one day, and "(*c*) the highest rate at which it "is proposed to discharge the trade "effluent; . . ."

Subs. (2): "In so far as the "discharge of any trade effluent in "accordance with a trade effluent "notice would not be lawful without "the consent of the local authority, "the notice shall be deemed to be an "application for that consent."

S. 4 (1): "For the purposes of this "Act the consent of a local authority "to the discharge of any trade effluent "from any trade premises into a sewer "of the local authority shall not be "necessary, if any trade effluent of "the same nature or composition as "that of the trade effluent in question "was lawfully discharged as aforesaid "from those premises into that sewer "at some time within the period of "one year ending on March 3, 1937, "and if and so long as—(*a*) the quan- "tity of the trade effluent discharged "from the premises into the sewer on "any one day does not exceed the "maximum quantity thereof so dis- "charged on any one day during the "said period, and (*b*) the rate at "which the trade effluent is discharged "from the premises into the sewer is "not higher than the highest rate at "which it was so discharged during "the said period, . . ."

S. 14 (1): ". . . 'trade effluent' "means any liquid either with or with- "out particles of matter in suspension "therein, which is wholly or in part "produced in the course of any trade "or industry carried on at trade pre- "mises, and, in relation to any trade "premises, means any such liquid as "aforesaid which is so produced in "the course of any trade or industry "carried on at those premises but does "not include domestic sewage; . . ."

having been served on the local authority, and (2) that the effluent was so discharged without the consent of the local authority.

At the hearing before quarter sessions the following facts were proved or admitted: For many years before 1936, and in particular during the period of one year ending on March 3, 1937, the company had lawfully discharged into a public sewer of the council a trade effluent wholly produced in a portion of their trade premises which they then occupied. The discharge in question was by means of two pipes which left the premises at two defined points. In 1946 the company extended their premises by adding a new portion which was not within the company's curtilage nor within their occupation or ownership during the year ending March 3, 1937, but was the site of entirely separate premises, then known as Campbell's Foundry.

The new premises had direct internal communication with the original premises of the company. The company moved part of their machinery from their old premises into the new, but the total amount of plant and machinery in the two parts was not increased or altered.

At all material times, and in particular on July 25, 1951, all the trade effluent produced in the new premises passed into the old premises where it was joined by and blended with an equal quantity of trade effluent wholly produced in the old premises. At all material times the trade effluent blended, as stated, passed into the public sewer through the same pipes as those in use before the new premises were acquired. The blended effluent was of the same nature and composition as that which had been discharged from the old premises within the period of one year ending on March 3, 1937, and the quantity of the blended trade effluent discharged on any one day did not exceed the maximum quantity lawfully discharged on any one day during the period, and the rate at which the blended effluent was discharged was never higher than the highest rate at which trade effluent was lawfully discharged during the period.

Before the discharge of the blended effluent on July 25, 1951, the company had not served on the local authority a trade effluent notice nor had they obtained the consent of the local authority to the discharge of the blended effluent on July 25, 1951, or to the discharge of any effluent produced in the new premises. No by-laws had been made by the council under the Act.

It was contended on behalf of the company (1) that having regard to the definition of "trade effluent" and of trade effluent "in relation to any trade premises" in section 14 (1) of the Act, the trade effluent discharged on July 25, 1951, was produced in part in the course of trade or industry carried on in the old premises, and that the discharge into the public sewer was from the old premises, and not the new, and that, therefore, by the provisions of section 4 (1) of the Act, no trade effluent notice or

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consent of the local authority was required and that, consequently no offence had been committed; and (2) that, in any event, the new premises were part of the premises from which trade effluent of the same nature and composition as that which formed the subject-matter of the informations had been lawfully discharged into the sewer during the period of one year ending in March, 1937, and that the provisos of section 4 (1) having been complied with, for that reason also no trade effluent notice or consent of the local authority was necessary, and that no offence had been committed.

It was contended for the council (1) that the passage of trade effluent from the new premises into the sewer was a discharge of a trade effluent into a public sewer, and that no trade effluent had been discharged into that sewer from those premises at any time within the period of one year ending on March 3, 1937; (2) that the new premises were not part of the premises from which trade effluent of the same nature and composition as that which was the subject of the informations had been lawfully discharged during the year ending March 3, 1937; and (3) that it was unlawful to discharge trade effluent from the new premises without serving a trade effluent notice or obtaining the consent of the local authority in respect of such discharge.

The appeal committee of quarter sessions decided by a majority that the appeal should be dismissed on the ground that they considered that the new and the old premises did not constitute the same premises. The argument for the company that the trade effluent was wholly or partially discharged from the old premises, and so relieved the company from giving notice or obtaining authority, was not accepted by quarter sessions. They accordingly upheld the decision of the court of summary jurisdiction.

*Harold Willis Q.C.* and *C. T. B. Leigh* for the company.
*Kenneth Diplock Q.C.* and *J. D. Cantley* for the council.

No cases were cited during the arguments.

LORD GODDARD C.J. This is a case stated by the Appeal Committee of the Quarter Sessions for the County of Lancaster, before whom the Yorkshire Dyeing and Proofing Co. Ld. appealed against two convictions by justices in petty sessions. The first conviction was: "For that they on July 25, 1951, were the "occupiers of certain trade premises situate at Spring Vale, "Middleton, from which premises a certain trade effluent was "discharged into a public sewer of the Council of the Borough "of Middleton, the local authority, in contravention of section 2 "of the Public Health (Drainage and Trade Premises) Act, 1937, "no trade effluent notice having been served."

The second conviction was on the same facts except that the offence was discharging the effluent without the consent of the

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local authority. The appeal committee dismissed the appeals subject to the case which they have stated.

Very briefly, the facts are these: for many years before 1937 the appellants occupied a dye works at Middleton and discharged their trade effluent into the local authority's sewer. In 1946 they acquired adjoining premises. They were not originally their premises; they were a foundry. They acquired those premises and made them part of their works. The new premises formed a substantial addition to the original premises. They were not within the original curtilage or in the original ownership of the firm.

Having acquired the premises, the appellants transferred part of their dye works to the new premises, which were described on the plan as a new dye house, and in that dye house a certain trade effluent was produced. Since their acquisition of the new premises there was also a trade effluent produced in the former dye works which existed before 1946, and the trade effluent from the new dye house and the old dye house merges or blends actually on the old premises, and therefore the discharge into the sewer still takes place from the old premises, but it includes not only the effluent from the old premises but also the effluent from the new premises.

The question for decision depends principally on section 4 (1) of the Public Health (Drainage of Trade Premises) Act, 1937, and section 14, the definition section. The Act is intended to prohibit the discharge of trade effluent into the sewers of local authorities except with their consent, which has to be applied for in a certain manner by serving notice; and if consent is required and is given, the local authority are entitled to impose conditions. The Act, however, by section 4 (1), exempts from its provisions the discharge of trade effluent which was lawfully discharged at some time within the period of one year ending on March 3, 1937, but the exemption is hedged around with certain conditions, and it is therefore just as well to read it. [His Lordship read section 4 (1) and continued:] Quarter sessions have found that the composition of the blended trade effluent is the same; that the quantity does not exceed the maximum quantity previously discharged, and that the rate at which it is discharged is not higher than the rate at which it was discharged down to March 3, 1937. It may be said that it would appear as though the merits of this case were with the appellants, or at any rate that it is not easy to see why, as they are not discharging any more or different effluent into the sewer than they did before 1937, the local authority should object, but what we have to consider is whether or not this case comes within the exemption. If it does not, then the offence has been committed although, as I have said, it would appear that the merits are not conspicuously against the appellants.

The definition of trade effluent in section 14 of the Act, which has given rise to a good deal of discussion, is: "'Trade

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"effluent" means any liquid, either with or without particles "of matter in suspension therein, which is wholly or in part "produced in the course of any trade or industry carried on "at trade premises, and, in relation to any trade premises, "means any such liquid as aforesaid which is so produced in "the course of any trade or industry carried on at those premises, "but does not include domestic sewage." For my part, I think that the words "wholly or in part" relate to the composition or constitution of the trade effluent, and that "trade effluent" for the present purpose means a fluid which is partly composed, or may be partly composed, of the product of the trade or business and of something else which in the ordinary course would be water. It is not to be said, therefore, that the effluent is not a trade effluent because part of it is water. It must be wholly or in part produced in the course of the business carried on at trade premises, and in relation to any trade premises it means any liquid which is wholly or in part produced in the course of a trade or industry carried on at those premises.

I agree with the view taken by quarter sessions that the whole question really depends on whether or not the trade effluent which is now going into the local authority's sewer is produced at the same premises as those at which it was produced before March, 1937. Quarter sessions have taken the view that it is not, because it is now the effluent of two premises and not the effluent of one set of premises. They have held, and I think rightly held, that the old foundry which has now become the new dye house is not a part of the old premises, they are separate and new premises, and it seems to me impossible to say that the trade effluent which is being produced in the new dye house is not being discharged into the local authority's sewer. It is true that it passes through the old premises and that it mingles there with the effluent which is produced in the old premises, but none the less it seems to me that the effluent produced is being produced in the new premises and is being discharged from the old premises into the sewer.

For these reasons, though I rather regret it, I feel bound to say that I think that quarter sessions came to a right decision, and this appeal therefore fails. It may be that if the local authority seek to impose conditions, the appellants will have a right of appeal to the Minister, but what view he would take of it is not a matter for us.

LYNSKEY J. I agree. Under the Public Health Act of 1936, which is referred to in the Act of 1937, which we are considering, as the principal Act, there was a complete prohibition against the discharge either directly or indirectly of trade effluent into the public sewers. But by the Act of 1937 provision was made to enable such effluent to be discharged subject to certain notices being given and to the consent of the local authority being obtained, and subject to the right of appeal to the Minister.

Section 2 (5) provides that: "If, in the case of any trade "premises—(*a*) any trade effluent is discharged in contravention "of this section, or without such consent (if any) as is necessary "for the purposes of this Act, or (*b*) any direction or condition "given or imposed under this section is contravened, the occupier "of the premises shall be guilty of an offence." On the face of the Act, the owners of trade premises are prohibited from discharging effluent into the sewers. [LYNSKEY J. referred to the facts and continued:]

The first point that arises is: was what took place a discharge of the effluent from the new premises into the sewer? It has been suggested on behalf of the appellants that "discharge" must mean direct discharge. In my view, having regard to the wording of the Act of 1936, to the object of the Act of 1937 and to the results which would follow if one narrowed the discharge to meaning direct discharge, I take the view that "discharge" here means discharge directly or indirectly into the sewer. The result of that, on the finding of quarter sessions, is that the trade effluent from the new premises is discharged into this sewer. Those premises were not in use for their present purpose in 1937, and in that year there was no discharge of effluent from them into the sewer.

The result is that on the wording of the Act, the new premises being found by quarter sessions to be different premises from the old premises, there was a discharge of effluent from the new premises into the sewer and those new premises cannot by themselves be brought within the provisions of the exemption in section 4. Prima facie, that was clearly an offence, but it was suggested by the appellants that the effect of section 4 (1) of the Act was to enable them to carry the effluent from the new premises through their old premises and discharge it into the sewer because the total effluent discharged from the two lots of premises did not exceed either in quantity, in rate of discharge or in its constituents, the effluent which was discharged in 1937.

The whole matter really seems to me to turn upon the interpretation of section 4 (1) and the definition of trade effluent in section 14. The definition there is "any liquid, either with "or without particles of matter in suspension therein, which is "wholly or in part produced in the course of any trade or "industry carried on at trade premises." That is the definition of "trade effluent," an effluent in part produced by the trade operation and in part coming from other sources. Then the definition goes on: "and, in relation to any trade premises, "means any such liquid as aforesaid which is so produced in the "course of any trade or industry carried on at those premises." In my view, the object of the second part of the definition was to restrict the trade effluent to the particular premises upon

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which the trade was carried on, and it would not bear the construction that it would allow the effluent from other premises, which were not covered by section 4 (1), to be discharged under the umbrella of the exemption which the old premises had acquired under section 4 (1).

In those circumstances, I take the view that quarter sessions were right, and that this appeal should be dismissed.

PEARSON J. I agree. I think that the first question is whether one should regard the old and the new premises as one aggregate or as two separate sets of premises for the present purpose. I do not think that it would be right to treat them as one aggregate having regard to their previous history and to the extent of the new portion and, in particular, to what has been found by quarter sessions here. In any case, if it were right to treat them as one aggregate, in my view they would clearly be different premises from those which were occupied by the appellants in 1937. If it were right to treat them as one aggregate, as they were different premises from anything that existed in 1937, section 4 (1), which confers the exemption, which the appellants then enjoyed, would have no application at all, and that would put the appellants here in the worst possible position. But let it be assumed that the new and the old premises constitute two separate premises, which is the way in which quarter sessions approached this question, then one has to consider two problems: first, is the direct discharge of the effluent in question from the old premises into the sewer covered by the provisions of section 4 (1)?; and—secondly, a separate question—is the indirect discharge of the effluent from the new premises through the old premises also covered by section 4 (1)?

As to the first question, namely, whether the direct discharge from the old premises is wholly covered by section 4 (1), I should have thought that it was, because that depends upon what is the exact meaning of the second part of the definition of "trade "effluent" in section 14. As I read the second part of that definition, when one makes the necessary substitutions for the words "such liquid as aforesaid" and the word "so," I think it comes to this: "Trade effluent in relation to any trade premises "means any liquid with or without particles of matter in suspen- "sion therein, which is wholly or in part produced in the course "of any trade or industry carried on at trade premises." It seems to me that the word "so" must be regarded as incorporating the words "wholly or in part." Then, one must read as a whole the words which follow, "In the course of any trade "or industry carried on at those premises." It seems to me that that requirement is satisfied as regards the old premises, because the effluent which is discharged from there into the

local authority's sewer is in part liquid of the kind described, produced in the course of a trade or industry carried on in the old premises, and it does not prevent the application of that definition that some part of what is discharged has with it some other part which is discharged from different premises. It would not matter whether the premises were in the occupation of the same or a different company. I think that part of the definition read literally, which it should be unless it produces an impossible conclusion, would have that result, and therefore the appellants are innocent so far as that direct discharge is concerned.

But there is the further question whether section 4 (1) protects them in respect of the indirect discharge from the new premises. There, one has to consider whether the word " discharge " means direct or indirect discharge or is limited only to direct. On that point I entirely agree that it is all-important to look back to section 34 of the Public Health Act, 1936, which imposed an absolute prohibition on the discharge of liquid from a factory into a sewer subject to certain conditions. Section 1 of the Act of 1937 remedies or alters or mitigates that prohibition. Section 34 of the Public Health Act, 1936, uses the words " discharge directly or indirectly " quite plainly. As section 1 of the 1937 Act is introducing a relaxation of that prohibition, I think that the word " discharge " in section 1 of the Act, and therefore throughout the Act, should have the same meaning of directly or indirectly discharge. Also I think that without any limiting words one would naturally read the word " discharge " as meaning directly or indirectly. Therefore, I think it is necessary for the appellants to show some reason or justification for their indirect discharge from the old premises into the sewer and they have not shown it, and they clearly do not come for that purpose within section 4 (1). There was no discharge in the year 1937 or before the year 1937 from the new premises into the sewer, and therefore they have failed to show any right to make that indirect discharge without the consent of the local authority. For that reason, I agree that the appeal should be dismissed.

*Appeal dismissed.*

Solicitors: *Charles Russell & Co. for Skelton & Co., Manchester; Sharpe Pritchard & Co. for Frank Johnston, Town Clerk, Middleton.*

P. B. D.

[QUEEN'S BENCH DIVISION.]

1953
*Jan.* 20, 21.

Hilbery J.

# * NEWMAN *v.* FRANCIS.

[1951 N. 540.]

*Statutory Duty—By-laws—London County Council—Regulation of parks and open spaces—Enforceable by penalty—Breach—No cause of action to member of public.*

The London County Council By-Laws in relation to their parks, gardens and open spaces are intended for enforcement by the London County Council by way of proceedings for penalties only, as provided in the by-laws, and are not intended to give a cause of action at law to members of the public, either one against another, or, for breach of them, against the London County Council.

*Cutler* v. *Wandsworth Stadium Ltd.* [1949] A.C. 398; 65 T.L.R. 170; [1949] 1 All E.R. 544 referred to.

ACTION.

An Alsatian dog owned by the defendant was being taken for a walk by the defendant's daughter, aged 13, on Hackney Downs, to which the London County Council By-laws [1] applied. The girl was walking on the grass which was separated from a pathway by a fence, over which the dog had been jumping. At the approach of the plaintiff with her family along the pathway the girl took hold of the dog. She subsequently let it go and it jumped over the fence, causing the plaintiff to fall.

The plaintiff claimed damages for serious personal injuries occasioned by her fall, alleging (1) negligence against the father in allowing his dog to go out with a child of 13, and against the child in respect of her management and control of the dog; and (2) that a breach of by-law 21 [2] of the London County Council By-laws gave the plaintiff a cause of action.

The defendant denied the allegations.

The case is reported only on the second point. With regard to the allegation of negligence, his Lordship, stating that he was not deciding whether an action would lie at common law for negligence such as was alleged, found that on the facts there was no negligence.

[Reported by Miss C. J. ELLIS, Barrister-at-Law.]

[1] By-laws made on November 1, 1932 (in operation as from and including April 1, 1939) by the London County Council in pursuance of the provisions of the London County Council (General Powers) Act, 1890, the London County Council (General Powers) Act, 1898, and the London County Council (General Powers) Act, 1935, in relation to the parks, gardens and open spaces vested in or under the control of the council.

[2] By-law 21 of the London County Council By-Laws: "No person shall "cause or suffer any dog belonging "to him or in his charge for the "time being to enter or remain in "any open space unless such dog be "under proper control and be effectually restrained from injuring, "annoying or disturbing any person "or animal or from running on any "flower bed or injuring any tree, "shrub or plant."

*L. J. Solley* for the plaintiff.
*Michael C. Parker* for the defendant.

The following cases were referred to in argument: *Cutler* v. *Wandsworth Stadium Ltd.*[3] and *Monk* v. *Warbey.*[4]

HILBERY J., having stated the facts and dismissed the claim based on negligence at common law, continued:—Mr. Solley argued subsequently that, on the cases, the London County Council By-Laws did give a cause of action to a member of the public where one of the by-laws was broken, and he referred to and relied on by-law 21. [His Lordship read the by-law and continued:] The principle on which one has to decide whether statutory provisions or regulations made under statutory power are to be construed as giving a cause of action to a member of the public, or to a particular person or class of persons, in the case of a breach, has been considered many times and has recently been restated in the House of Lords in *Cutler* v. *Wandsworth Stadium Ltd.*[1] by Lord Simonds. I can quote this passage without, I think—though I tear it from the context—falsifying its force: "The only rule which in all circumstances "is valid is that the answer must depend on a consideration of "the whole Act and the circumstances, including the pre-"existing law, in which it was enacted. But that there are "indications which point with more or less force to the one "answer or the other is clear from authorities which, even where "they do not bind, will have great weight with the House," and he considered those matters. Then, having dealt with the force of the argument to be adduced from either the absence of penalty or its presence, Lord Simonds went on to say[2]: "But this "general rule is subject to exceptions. It may be that, though "a specific remedy is provided by the Act, yet the person injured "has a personal right of action in addition. I cannot state that "proposition more happily, or indeed more favourably to the "appellant, than in the words of Lord Kinnear in *Black* v. *Fife* "*Coal Co. Ltd.*[3]: 'If the duty be established, I do not think "'there is any serious question as to the civil liability. There "'is no reasonable ground for maintaining that a proceeding by "'way of penalty is the only remedy allowed by the statute. "'The principle explained by Lord Cairns in *Atkinson* v. "'*Newcastle Waterworks Co.*,[4] and by Lord Herschell in "'*Cowley* v. *Newmarket Local Board*[5] solves the question. "'We are to consider the scope and purpose of the statute and "'in particular for whose benefit it is intended. Now the object "'of the present statute is plain. It was intended to compel "'mine owners to make due provision for the safety of the men

[3] [1949] A.C. 398; 65 T.L.R. 170; [1949] 1 All E.R. 544.
[4] [1935] 1 K.B. 75; 51 T.L.R. 77.
[1] [1949] A.C. 398.
[2] Ibid. 407.
[3] [1912] A.C. 149, 165.
[4] (1877) 2 Ex.D. 441, 448.
[5] [1892] A.C. 345, 352.

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" ' working in their mines, and the persons for whose benefit all " ' these rules are to be enforced are the persons exposed to " ' danger. But when a duty of this kind is imposed for the " ' benefit of particular persons, then arises at common law a " ' correlative right in those persons who may be injured by its " ' contravention.' " In that case Lord Simonds and the other Lords of Appeal held that it was a matter of penalties, and that the obligations imposed by the section of the Act which they were there considering were only enforceable by proceeding for the penalties specified and not by the class of persons who were being dealt with and affected by the provisions of that particular statute.

I have carefully read through all these by-laws, and it appears to me that, under the statute, the London County Council is given power to make enforceable by-laws such as these for the regulation and for the conducting of their parks, gardens and open spaces. I am satisfied that these by-laws are intended for enforcement by the public authority, the London County Council, by way of proceeding for the penalties; they are by-laws to enable them to enforce disciplinary measures on people who go to the parks, gardens and open spaces both for the protection of those parks, gardens and open spaces and the things that are therein either displayed or made available for public use or enjoyment or in the cause of public decency. There is nothing to indicate, in my view, that they are intended to give a cause of action at law to the members of the public, either one against another, or, for breach of them, against the London County Council.

With regard to the particular by-law relied on so strongly, by-law 21, it is to be observed that it is essentially a by-law intended to protect the comfort and convenience of those using the gardens; to save them from annoyance and, at the same time, to require them to control their dogs and animals taken to the open space or park. But it is observable that the same by-law is there to prevent the same dogs from disturbing or injuring or running on any flower bed or injuring any tree, shrub or plant. It is like the rest of them, in other words: a power taken under statutory powers by the London County Council to enable them effectually to control their parks, gardens and open spaces under the penalties which those by-laws provide, and I have no doubt that those by-laws are not intended to give the public a cause of action in the case of the failure of the London County Council to enforce them or the failure of other members of the public to observe them.

*Judgment for the defendant.*

Solicitors: *Miller, Clayton & Co.; J. Clifford Watts.*

[COURT OF APPEAL.]

## *HEATLEY *v.* STEEL COMPANY OF WALES LD.

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*Jan.* 29.

[1951 H. No. 4364.]

Lord Goddard C.J., Jenkins and Morris L.JJ.

*Damages—Fatal Accidents Acts—Basis of assessment of loss of income—Leasehold house subject to mortgage as family home—No financial benefit accruing to widow—Widow not required to give credit for equity of redemption in house.*

The plaintiff, a widow with four children, claimed damages from the defendants, her deceased husband's employers, in respect of his death in an accident at work. The family lived in a leasehold house mortgaged to a building society. The trial judge, on the basis that the weekly income of the deceased would but for his death have been £12, estimated the notional keep of the deceased at £5 a week, thus assessing the loss to the family at £7 a week. He held further that the plaintiff should give credit of £750 on the estimated value of the house, which passed to her on the deceased's intestacy; and on the claim under the Fatal Accidents Acts, 1846 to 1908, he awarded a total lump sum of £3,250, £800 of which he apportioned variously among the children. That total sum was subject to further reduction by the amount—£400 plus funeral expenses—awarded on a claim under the Law Reform (Miscellaneous Provisions) Act, 1934. On appeal by the plaintiff against the amount of the damages only:—

*Held,* increasing the total award to £6,000 and the apportionment to the children to £1,000, (1) that, on the facts, the estimate of £5 a week to keep one member of a family of six was disproportionately high; and (2) that since the leasehold house remained the family home and represented no financial benefit to the plaintiff, she was not required to give credit for its value.

Decision of Croom-Johnson J. varied.

APPEAL from Croom-Johnson J.

Evan Gwynffryd Heatley, a locomotive driver, was killed on March 30, 1951, in an accident during the course of his employment with the defendants, the Steel Company of Wales Ld. At the time of his death he was 43 years of age, and was earning just under £10 a week, his custom being to retain £1 out of his pay packet for spending money and to hand the rest of his wages to his wife. But for his death, however, he would almost immediately have earned £12 a week. He and his wife and four infant children, whose ages ranged from 17 to 9 years at the time of the accident, lived in a leasehold house, which was mortgaged to a building society, and the interest payments at the rate of £2 4s. 3d. a month were made by his wife. Something over £250 was owing on the principal at the time of his death. The eldest son was partly self-supporting, and the elder daughter about to start work. The youngest child was delicate.

The deceased died intestate, and his widow as administratrix of his estate brought an action for damages against the defendants under the Fatal Accidents Acts, 1846 to 1908, and the Law Reform (Miscellaneous Provisions) Act, 1934.

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Croom-Johnson J., on July 11, 1952, gave judgment for the plaintiff, holding the defendants liable for negligence and breach of statutory duty. In assessing the damages payable under the Fatal Accidents Acts, he calculated that on a weekly wage of £12 the amount to be deducted for the notional keep of the deceased was £5 a week, so that the family, he held, had lost something like £7 a week contributed by him to their support. Taking 20 years at £7 a week as the estimate of what they had lost, and making allowances for the benefit of money down instead of money payable in the future, he arrived at a figure of £4,000 to be distributed between the widow and the children under the Fatal Accidents Acts. He then apportioned £800 among the four children, leaving for the widow a notional balance of £3,200. His lordship, bearing in mind that the family home was a leasehold house, the estimated value of which was £1,450, held that the widow should give credit for £750 on the equity of redemption on the house, which passed to her on the intestacy. He awarded £400 (plus funeral expenses) under the Law Reform (Miscellaneous Provisions) Act, 1934, for loss of expectation of life, which was deducted from the amount awarded to the widow under the Fatal Accidents Acts, so that she was left with a total lump sum award of £2,050.

The widow appealed against the amount of damages only.

*H. V. Lloyd-Jones Q.C.* and *Norman Richards* for the plaintiff.

*J. R. Bickford-Smith* for the defendant company.

The following cases were cited in the argument: *Bishop* v. *Cunard White Star Co. Ltd., The Queen Mary* [1]; *Roughead* v. *Railway Executive* [2]; *Davies* v. *Powell Duffryn Associated Collieries Ltd.* [3]; *Grand Trunk Railway Co. of Canada* v. *Jennings* [4]; *Taylor (formerly Ryan)* v. *Cheltenham & Hereford Breweries Ltd.* [5]

LORD GODDARD C.J. stated the facts and continued:—The judge obviously took a great deal of trouble over this case, and certainly paid attention to what has often been said in these cases, that is, that one must try to find a basic figure, apply a certain number of years' purchase, and discount some of it because one is paying down a lump sum at once; that is to say, one has to find the present value. But no case, I think, ever has laid down, nor can lay down, the number of years to be taken nor how the amount is to be discounted. There are many other

[1] [1950] P. 240; 66 T.L.R. (Pt. 1) 828; [1950] 2 All E.R. 22.
[2] (1949) 65 T.L.R. 435; [1949] W.N. 280.
[3] [1942] A.C. 601; 58 T.L.R. 240; [1942] 1 All E.R. 657.
[4] (1888) 13 App.Cas. 800; 4 T.L.R. 752.
[5] [1952] 2 Q.B. 493; [1952] 1 T.L.R. 1224; [1952] 1 All E.R. 1135.

matters to be considered here, and we should not interfere with the award of a judge merely because we thought that it was too low, unless it was very much too low, and unless we were satisfied that he had applied some wrong principle. I think that it is a very difficult problem, certainly in regard to two matters on which we disagree with the judge.

In the first place, in considering the weekly income lost to the family he has allowed no less than £5 a week for the keep of the father—or, rather, the father had £1 spending money, and, therefore, the judge has allowed £4 a week because, he said, the keep of the husband altogether would come to £5 a week. With great respect to the judge, there was no evidence on this. The widow was not asked anything about it. Her proof was read, but there was nothing in the proof about it; and it is very difficult to say, even over a period of years, that the man would be taking as much as £5 a week—certainly not out of £10 a week, his income at the time of the accident. The widow, unfortunately, was never asked what she thought it cost her. I should say that the judge had taken much too large a sum, and I think that he must have done it per incuriam. I do not think that anybody would say that at the present time and at present prices, when there is a family of six, the feeding and clothing of the father would be allowed to come to as much as £4 a week, especially when his own personal expenses, such as tobacco and an occasional glass of ale, were provided for by his keeping £1 for himself out of his pay packet. We think, therefore, that the judge must have gone wrong in taking so high a figure as £5 for one member of this family.

A more serious matter on which we differ from the judge is with regard to the leasehold house, which passed on the deceased's death intestate, under the provisions of the Administration of Estates Act, 1925, to the widow and the four children (or such of them as attain the age of 21 years or marry) who are between them entitled to the whole estate. The widow's interest greatly predominates, as, apart from the few personal chattels, which go to her absolutely, she takes £1,000 with interest thereon at five per cent. per annum from the death of her husband on March 30, 1951, and a life interest in half the ultimate residue. Now the residue, before providing the £1,000 and interest, appears to consist of nothing more than the house subject to the mortgage, and the equity of redemption is worth not more than £1,200, the value of the house being some £1,450 and the outstanding balance of the mortgage some £260. What allowance, if any, should be made in the assessment of damages for the beneficial interests thus accruing to the widow, and in some small degree to the children, by reason of the death? It is very difficult to see how any substantial sum whatever can be allowed for these interests. Pending any sale of the house, the widow will no doubt continue to live in it with her family exactly as she did before, the children being provided with a home there

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exactly as they were before. What the court has to try to ascertain in these cases is: How much have the widow and family lost by the father's death? This is not a case where, by the death of the father, the widow will come into some large sum of money of which she never before had the handling. She will simply continue to live in this house and provide a home there for the children until it is sold, and if and when it is sold she will have to get another house. At any rate, her two younger children are likely to be living with her in this house or elsewhere for a long time, and her two elder children are still dependent on her. The court cannot see that there is really any sum to be deducted for the value of the house at all. It is true that a successful sale of the house might produce as much as £1,200. But if it were sold and she went out, she would have to go somewhere else. To get accommodation for these children she would have to get another house, and she would be lucky if she could get another house for rent. The fact is that she is in the same position as she was; she has not benefited, save possibly by some nominal amount, by her husband's death. The trifling interests of the children under the intestacy are offset by the necessity for providing them with a home, and it obviously cannot improve the position of themselves and their mother considered collectively. It may be that some value could be shown on paper for the, so to speak, reversionary interests in the lease of the house which, but for the untimely death of the deceased, would not have accrued to his wife and children for many years; but that is hardly a matter which from a practical point of view can be taken into account at all.

Here are the wife and four children of a man who was just about to earn £12 a week. That was a considerable step up for him; he would have risen in the scale by something just over £2 a week. That, in turn, would be an uplift for her. The elder children did not contribute; the son was not yet supporting himself; he was earning money, but his tools and lunches, and one thing and another, more than offset what he was giving to his mother; and there was some very small sum from the elder daughter. But if the father's wages had gone up to £12 a week that would have put the widow in a very much more comfortable position when the children did become self-supporting.

In these cases the number of years' purchase that a judge can reasonably take is entirely arbitrary, and entirely a matter of speculation. If one finds a basic wage and multiplies it by a certain number of years it may be actuarially possible to calculate the amount by which to reduce that to its present value; but what the court really has to do is to find a sum of money which in its view will fairly compensate this family. One judge may arrive at it in one way: another judge may arrive at it in another way. If this court comes to the conclusion that the judge has taken an unduly high multiplier, or an unduly low one, it can interfere; but this court could not interfere unless it thought that the

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amount was really arrived at on a wrong principle. We have shown that in our opinion there are two deductions made by the judge which cannot be justified, and it does seem that for a family of this sort, which has lost a father in the prime of life, £3,250 is a very, very low award. Under the Law Reform Act £400 was awarded, and, therefore, any sum that may be awarded under the Fatal Accidents Act has to be diminished by that amount. This court, giving the best consideration it can to this case, thinks that the fair amount to have awarded was £6,000, less the £400 awarded under the Law Reform Act, as to which there is no appeal.

*Appeal allowed. Damages increased to £6,000, £400 and £35 15s. 6d. for funeral expenses being attributed to damages under the Law Reform Act. Apportionment to the children increased from £800 to £1,000.*

Solicitors: *Russell Jones & Walker; Helder, Roberts & Co. for Roger Williams & Son, Swansea.*

M. M. H.

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[CHESTER ASSIZES.]

1953
*Feb.* 5, 6
Devlin J.

* ORMROD AND ANOTHER *v.* CROSVILLE MOTOR SERVICES LD. AND ANOTHER. MURPHIE, THIRD PARTY.

*Negligence — Vicarious liability — Agency — Driving of motor-car — Accident—Car driven for owner for purpose of holiday with him—Request followed by social or moral obligation.*

Damage was caused to a motor-bus by the negligent driving of a motor-car. The car was being driven by a friend of the owner from Birkenhead to Monte Carlo with the intention that the friend, his wife (who was in the car), and the owner should all three later use the car for the purpose of a holiday in Switzerland. The owner, meanwhile, was attending, as a competitor, a motor-car rally at Monte Carlo in another car:—

*Held*, that the owner of the motor-car was vicariously liable for the damage caused to the bus by his friend's negligence, since the arrangement amounted to a request by the owner to the friend to drive the car, the owner had an interest in that being done, and the friend was under a social or moral obligation to do it.

*Hewitt* v. *Bonvin* [1940] 1 K.B. 188; 56 T.L.R. 43 distinguished.

ACTION.

The plaintiffs, husband and wife, brought the action for damages for personal injuries to them both caused by the alleged negligent driving of a motor bus owned by the first defendants

[Reported by D. T. LLOYD-JONES, Esq., Barrister-at-Law.]

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and driven by their servant or agent the second defendant. The first defendants counterclaimed in respect of damage to their motor bus, alleging negligent driving of the motor car by the male plaintiff. They also took third party proceedings against the owner of the car, alleging that he was vicariously liable for the male plaintiff's negligence.

The plaintiffs left Birkenhead just before mid-day on January 20, 1952, in a Healey motor-car belonging to the third party who, with another person, was driving from Glasgow in a Standard Vanguard car as a competitor in the Monte Carlo motor-car rally. It was agreed between the plaintiff Ormrod and the third party that Mr. and Mrs. Ormrod should use the Healey car to drive to Monte Carlo, and that thereafter all three would holiday together in Switzerland, using the Healey car for this purpose. A suitcase belonging to the third party was being carried in the Healey car, and it was agreed that Mr. and Mrs. Ormrod should make the journey to Monte Carlo by driving the Healey car in their own time and manner, and they were to visit friends at Bayeux en route. It was the intention of all that Mr. and Mrs. Ormrod should arrive with the Healey car at Monte Carlo before the end of the rally.

Soon after leaving Birkenhead the plaintiffs in the Healey car came into collision with the first defendants' motor bus in thick fog, and both plaintiffs sustained personal injuries and both vehicles were damaged. Devlin J. found that the accident was caused by the negligence of the plaintiff driver, and the case is reported only on the issue of third party liability.

*Edmund Davies Q.C.* and *Emlyn Hoosen* for the plaintiffs and third party.

*W. L. Mars-Jones* and *Esyr Lewis* for the defendants.

DEVLIN J., after stating the facts in relation to the question of third party liability:—I have now to decide the question of the liability of the owner of the Healey car for the damage arising from the negligent driving of Mr. Ormrod. *Hewitt* v. *Bonvin* [1] is concerned partly with the question of a servant, and there is no question of Mr. Ormrod being a servant in this case, but du Parcq L.J. deals with the question of agency.[2] It is clear that there must be something more than the granting of mere permission in order to create liability in the owner of a motor-car for the negligence of the driver to whom it has been lent. But I do not think that it is necessary to show a legal contract of agency. It is in an area between the two that this case is to be found, and it may be described as a case where, in the words of du Parcq L.J., there is a "social or moral" obligation to drive the owner's car.[3] Mr. Ormrod was under such

[1] [1940] 1 K.B. 188; 56 T.L.R. 43.
[2] [1940] 1 K.B. 194.
[3] Ibid. 196.

a duty as this; for if he had not driven the car as arranged, then the third party would have had a legitimate grievance. I think that the arrangement amounted to a request to Mr. Ormrod to drive the car. He who complies with such a request is the agent of the other, since he who makes the request has an interest in its being done. In this case the car was wanted for the purpose of a joint holiday; that was enough to give the third party an interest in the arrival of the car, so that the driving became an act done for his benefit. In the case of mere permission the person permitting has no interest in whether the act is done or not.

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*Judgment for first defendants against third party.*

Solicitors: *Berkson & Berkson, Birkenhead; A. W. Mawer & Co., Liverpool.*

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[QUEEN'S BENCH DIVISION.]

## * REGINA *v.* INDUSTRIAL DISPUTES TRIBUNAL AND OTHERS. *Ex parte* KIGASS LD.

1953
*Feb.* 3, 4.

Lord Goddard C.J., Lynskey and Pearson JJ.

*Trade Dispute—Reference to Industrial Disputes Tribunal—Claim by union to implement award to union members—Workers subsequently becoming members of union—Existence of dispute—Award retrospective to date before dispute arose—Jurisdiction of tribunal—Industrial Disputes Order,* 1951 (*S.I.* 1951, *No.* 1376), *arts.* 1, 8, 10.

*Jurisdiction—Certiorari—Dispute between workers in Scottish factory and English employers—Award by Industrial Disputes Tribunal sitting in England—Jurisdiction of Scottish courts—Jurisdiction of English courts—Comity.*

A company registered in England employed female engineering workers in a factory in Scotland. On January 18, 1952, the Industrial Disputes Tribunal issued award No. 88 in a dispute which had arisen between similar workers, members of trade unions, and an employers' federation, awarding a wage increase of 10s. 1d. a week to the workers with effect from November 23, 1951. At that time none of the company's female workers were members of a trade union, nor were they, or the company, members of the organizations concerned in that dispute. But by February 11, 1952, some of the workers had become members of a union which claimed that the workers should receive an increase of 10s. 1d. a week. The company refused the claim. On May 3, 1952, the union reported a dispute to the Minister, who referred it to the tribunal. The tribunal issued an award on July 8, 1952, describing the dispute as arising out of a claim by the workers for an increase of 10s. 1d. a week operative as from November 23, 1951, as provided for in award No. 88. By the award the tribunal found in favour of the claim and awarded accordingly. On an

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application by the company for an order of certiorari to bring up and quash the award of July 18, 1952, on the grounds (1) that no dispute capable of being reported to the Minister or referred to the tribunal had ever existed and, therefore, the tribunal had no jurisdiction to make the award; and alternatively (2) that the award, in that it was retrospective to a date before the dispute had arisen, was ultra vires and bad:—

*Held*, (1) that there was a dispute properly referred to the tribunal, who consequently had power to inquire into that dispute, since whether or not the workers wanted the claim put forward was immaterial, as a claim made by the union on behalf of some of the workers who were members of that union had been refused, and the union, on behalf of its members, reported the dispute to the Minister, who had the power to refer it to the tribunal; but (2) that the earliest date from which the tribunal could have awarded a wage increase was the date when the dispute arose, which must have been after January 18, 1952, when award No. 88 was issued, and, since the award gave a wage increase from November 23, 1951, the award was bad, and must be quashed.

As the factory where the dispute arose was situated in Scotland the courts of Scotland had jurisdiction to entertain the matter, but as the company was registered in England and the tribunal had sat in England the English courts also had jurisdiction. Although there could be no objection in point of law or in point of comity to the matter being determined by an English court, it would be better, where the whole subject-matter of a dispute arose in Scotland, that proceedings should be taken in the Scottish courts.

APPLICATION for order of certiorari.

The applicants, a company registered in England, carried on the business of the manufacture of aircraft component parts at a factory at Paisley, in Scotland, where they employed a number of female workers.

The following facts appeared from affidavits filed on one side or the other:—

On November 23, 1951, a dispute arose between members of associations federated with the Engineering and Allied Employers' National Federation and certain workers employed by them, being members of, among other unions, the Amalgamated Engineering Union, over the question of the wages of women workers in the engineering industry. On December 19 this dispute was reported to the Minister of Labour and National Service who, on December 31, 1951, referred it, under article 8 [1] of the Industrial Disputes Order, 1951, to the Industrial Disputes Tribunal for settlement. On January 18, 1952, the Industrial Disputes Tribunal issued award No. 88, providing "that all female workers 18 years of age and over shall receive "an increase of 10s. 1d. per week of 44 hours, with proportionate "increases for those under 18 years of age. . . . This award "shall have effect as from the beginning of the first full pay "period following November 23, 1951."

[1] Industrial Disputes Order, 1951, art. 8: "Where a dispute has been "reported to the Minister . . . the "dispute shall, if not otherwise "settled, be referred to the tribunal "for settlement."

The applicant company were not members of the Engineering and Allied Employers' National Federation or of any federated association nor, between November 23, 1951, and the beginning of February, 1952, were any female workers employed by them members of the Amalgamated Engineering Union, or any union concerned in that dispute.

The secretary of the Paisley district of the Amalgamated Engineering Union explained the terms of award No. 88 to some of the female workers employed by the company. By February 11 some of those workers appeared to have become members of the union, which negotiated with the company, but no conclusion satisfactory to both parties was reached.

On May 3, 1952, the union reported a dispute to the Minister which, on May 30, 1952, the Minister referred to the Industrial Disputes Tribunal under article 8 of the Industrial Disputes Order, 1951. On July 8, 1952, the tribunal issued award No. 193, containing the following particulars of the dispute:

"A. *The Parties.*—Employers: Kigass Ld., 90 Glasgow "Road, Paisley. Workers: Members of the Amalgamated "Engineering Union in the employment of the said employers.

"B. *Description of the Dispute.*—The dispute arises out of "a claim made by the workers for an increase of 10s. 1d. to "female workers (18 years and over) with a proportionate "increase for those under 18 years of age, operative as from "the first full pay period following November 23, 1951, as "provided for in the Industrial Disputes Tribunal award No. 88.

"C. *Nature of the Dispute.*—The dispute was reported to "the Minister on the third day of May, 1952, by the Amalgamated "Engineering Union . . . on behalf of the workers." By the award: "They [the tribunal] find in favour of the claim and "award accordingly."

The company applied for an order of certiorari to bring up and quash the award on the grounds that the tribunal had jurisdiction under the Industrial Disputes Order, 1951, only where a dispute which existed in a trade or industry was reported to the Minister under article 1 [2] of the Order, and that, as no such dispute had existed between the company and any of its workers there was no dispute capable of being reported to the Minister and, therefore, no dispute capable of being referred to the tribunal who had, accordingly, acted without jurisdiction.

During the hearing leave was given to add, as a further ground of the application, that, in that the award was retrospective to a date at which the dispute did not exist, it was

[2] Industrial Disputes Order, 1951, art. 1: "Where a dispute exists in "a trade or industry . . . and that "dispute is reported to the Minister "in accordance with this order by "(iii) a trade union, on behalf "of workers who are parties to the "dispute; . . . that dispute shall be "dealt with in accordance with the ". . . provisions of this order."

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ultra vires and bad, being outside the jurisdiction conferred on the tribunal by article 10 [3] of the Order.

*Charles Lawson* for the applicants.

*Sir Frank Soskice Q.C.* and *John Thompson* for the union.

*Sir Reginald Manningham-Buller Q.C., Sol.-Gen.*, and *S. B. R. Cooke* for the Minister.

The following cases were referred to in argument: *Rex* v. *National Arbitration Tribunal, ex parte Imperial Tobacco Company Ld.*[4]; *Logan* v. *Bank of Scotland*[5]; *Egbert* v. *Short*[6]; *St. Pierre* v. *South American Stores (Gath & Chaves) Ld.*[7]

LORD GODDARD C.J. In this case Mr. Lawson moves for an order of certiorari to bring up and quash an award of the Industrial Disputes Tribunal dated July 8, 1952, which purported to be an award following on a reference by the Minister of Labour and National Service of a dispute in which the parties were said to be Kigass Ld., of 90 Glasgow Road, Paisley, and certain workers of the Amalgamated Engineering Union in the employment of the said employers.

Yesterday we considered the question whether it would be right for this court to deal with the matter or whether it ought to have gone to the Court of Session, and we came to the conclusion that, although it would no doubt be within the competence of the Court of Session to hear the case, the company had their registered office in this country and the tribunal had sat in this country, and therefore there would be no objection on a point of law or point of comity to this court hearing and determining the motion. At the same time, speaking for myself, I cannot help thinking that it would be much better, where the whole subject-matter of the dispute has arisen in Scotland, that the proceedings should be taken in the Scottish and not the English courts but, as I have said, we hold that, from the point of view of comity, there is no objection to our going into the matter.

The application was originally made simply on the ground that no dispute existed between the employers and the workers. On that point the court, for reasons I will give in a moment, determines that a dispute clearly did arise. At a very late stage

[3] Industrial Disputes Order, 1951, art. 10: "Where an award on a "dispute . . . has been made by the "tribunal then as from the date of "the award or from such other date, "not being earlier than the date on "which the dispute . . . to which the "award relates first arose, as the "tribunal may direct, it shall be an "implied term of the contract "between the employer and workers "to whom the award applies that the "terms and conditions of employment "to be observed under the contract "shall be in accordance with the "award. . . ."

[4] [1943] W.N. 137; 59 T.L.R. 295; [1943] 2 All E.R. 162.

[5] [1906] 1 K.B. 141; 22 T.L.R. 187.

[6] [1907] 2 Ch. 205; 23 T.L.R. 558.

[7] [1936] 1 K.B. 382.

yesterday, Mr. Lawson sought for and obtained leave to put forward another ground for quashing the order, namely, that the dispute did not exist until about the end of the month of January, 1952, whereas the award purports to date back to a date in November, 1951. The court thinks that that point must be determined equally clearly in favour of the employers.

The matter arises in this way: In January of 1952 the Industrial Disputes Tribunal had heard another case which affected the same class of workers, women workers in the engineering industry, and awarded an increase of wages of 10s. 1d. per week of 44 hours with proportionate increases for those under 18 years of age. In January of 1952 the workers employed by Kigass Ld. were not members of the union. The union, of course, desire to see that all employers pay the same rates of wages, and they managed to persuade or to get—it does not matter which—certain of the women employees of Kigass Ld. into the union. The real complaint that is made here is that, as it was put, the union butted into the affairs of the company and persuaded the workers to become members of the union, and to put forward this claim, which they had not thought of putting forward before; indeed, Kigass Ld. claim that they were paying a higher rate of wages than other employers, but that is not a matter with which we are concerned. The fact is that certain of their women employees had by February 11 become members of the union, and the district organizer then approached the company on their behalf.

The tribunal which made the award in this case is set up by the Industrial Disputes Order, 1951, which by paragraph 1 provides: "Where a dispute exists in a trade or industry or "section of trade or industry or in an undertaking and that "dispute is reported to the Minister in accordance with this "Order by—(i) an organization of employers, on behalf of "employers who are parties to the dispute; (ii) an employer, "where the dispute is between that employer and workers in "the employment of that employer; or (iii) a trade union, on "behalf of workers who are parties to the dispute," then the Minister can refer the matter to the tribunal.

There is no question here but that the trade union did report to the Minister on May 2 that a difference had arisen between Kigass Ld. and their female employees and that "the dispute "arises out of a claim made by the said workers for (i) an "increase of 10s. 1d. to female workers (18 years and over) with "a proportionate increase for those under 18 years of age." Whether or not the workers wanted that matter put forward is immaterial. The union had recruited certain of the women workers as members, and on their behalf did report this dispute to the Minister; having read the affidavits filed on behalf of the company as well as the affidavits filed on behalf of the union, it appears to the court that it is indisputable that a difference had arisen. This claim was being made on behalf of some of the

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Lord Goddard C.J.

workers for 10s. 1d. a week extra on the wages which they were already receiving, and it is perfectly clear that the company were saying that they declined to pay those wages; the Minister, therefore, clearly had power, to refer this matter to the tribunal. Therefore, the first ground which Mr. Lawson put forward is unsound. There was here, in my opinion, a dispute; it was properly referred, and the tribunal consequently had jurisdiction to inquire into that dispute.

The second point that was taken was that the award that was made by the tribunal was ultra vires because they purported to back date it to a date earlier than that at which the dispute in this case had arisen. Article 10 of the Order provides: "Where "an award on a dispute or issue has been made by the tribunal "then as from the date of the award or from such other date, "not being earlier than the date on which the dispute or issue "to which the award relates first arose, as the tribunal may "direct, it shall be an implied term of the contract between the "employer and workers to whom the award applies that the "terms and conditions of employment to be observed under the "contract shall be in accordance with the award until varied by "agreement between the parties or by a subsequent award of "the tribunal."

The tribunal set out in their award the reference to them of the dispute, and the description of the dispute is: "The "dispute arises out of a claim made by the said workers for an "increase of 10s. 1d. to female workers (18 years and over) with "a proportionate increase for those under 18 years of age, "operative as from the first full pay period following Novem-"ber 23, 1951, as provided for in the Industrial Disputes "Tribunal award No. 88"—that is the award to which I have already referred, and the increases in those cases arose on November 23, 1951.

It is quite obvious that there was no dispute between the employers and the workmen in Kigass Ld. on November 23, 1951. No dispute in fact seems to have arisen till February 11, 1952—certainly not until after January 18—and the workers concerned did not become trade unionists, and the trade union official was not acting on their behalf, until February 11.

The award which the tribunal made was that they found in favour of the claim and awarded accordingly. They awarded that Kigass Ld. had to pay these wages as from November 23. There is no question about that, because it is set out earlier in the terms of the award: "And that the company should be "required to pay the increases provided thereunder as from "November 23, 1951." We can only read that as meaning that the wages are to be increased as from November 23, 1951, but in my opinion the tribunal had no jurisdiction to award an increase from that date. The earliest date from which they could have made an award was from the date when the dispute arose;

it was for the tribunal no doubt to determine that date and to have awarded from that date, and they should have so awarded.

In these circumstances, as we cannot amend the award, the award is bad and an order of certiorari must go and the award must be quashed.

LYNSKEY J. I agree.

PEARSON J. I agree, and I only want to mention one or two points. I do not think that it is necessary to decide at what date the dispute arose. Different views might be taken as to whether the dispute which took place after the intervention of the union officer was the same dispute as the one which had been going on before; but what is quite plain on the face of the award itself and the evidence given by affidavit is that the dispute in question here could not have been before January 18; it must have begun afterwards. I say that because the origin of the dispute was that workers in the employment of these employers, Kigass Ld., asked that they should have the advantage conferred on other workers by the award No. 88, and the award No. 88 was issued on January 18, 1952. The dispute could not have started until after that award had been issued, and therefore the origin of it cannot be put at any earlier date than some time in January, 1952, and it may be that it should be put at some date in the month of February, 1952.

The other point is that it was contended by Sir Frank Soskice on behalf of the union that the award did not contain any direction ante-dating the effect of the award to some time in November, 1951. It is perfectly true that the award does not contain any words such as "we hereby direct," but I think for the reasons which have been given such a direction must be implied in order to effectuate the manifest intention. Therefore, there is an implied direction by necessary implication that the award shall operate as from the first full pay period following November 23, 1951.

I entirely agree with the order to be made.

*Order of certiorari.*

Solicitors: *Simon, Haynes, Barlas & Cassels; W. H. Thompson; Solicitor, Ministry of Labour and National Service.*

J. F. L.

[LEEDS ASSIZES.]

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*Dec.* 2, 19.

Donovan J.

# *MORGAN *v.* ASHMORE, BENSON, PEASE & CO. LD., AND SAMUEL FOX & CO. LD.

*Limitation of Action—Negligence—Joint tortfeasors—Contribution—Action against one tortfeasor statute barred—"Who . . . would if sued have been, liable"—Law Reform (Married Women and Tortfeasors) Act,* 1935 (25 *&* 26 *Geo.* 5, *c.* 30), *s.* 6 (1) (*c*)—*Fatal Accidents Act,* 1846 (9 *&* 10 *Vict. c.* 93), *s.* 3.

On July 3, 1948, a workman was killed as a result of an accident alleged to have been caused by the negligence of his employers. His administratrix issued a writ against the employers claiming damages under the Law Reform Act and the Fatal Accidents Acts within 12 months of his death. On July 4, 1949, the administratrix added as second defendants the occupiers of the factory where the accident had taken place, but the claim against them under the Fatal Accidents Acts was later struck out because the action against them had been commenced outside the period of limitation of 12 months prescribed by section 3 of the Fatal Accidents Act, 1846. On February 9, 1950, the first defendants by notice claimed contribution in respect of the claim under the Fatal Accidents Acts from the second defendants under section 6 (1) of the Law Reform (Married Women and Tortfeasors) Act, 1935. The second defendants contended that, as the plaintiff had brought no action against them within the time prescribed by section 3 of the Fatal Accidents Act, 1846, the first defendants' claim for contribution must fail:—

*Held*, that section 6 (1) (*c*) of the Law Reform (Married Women and Tortfeasors) Act, 1935, required the court to determine whether the second defendants would have been liable assuming that they had been sued in the past; that the second defendants would have been liable if sued in the 12 months after the workman's death, and that it was no answer for them to say that they were not sued within that period, and they were accordingly liable to make contribution under section 6.

*Merlihan* v. *A. C. Pope Ld., Pagnello Third Party* [1946] K.B. 166; 61 T.L.R. 508; [1945] 2 All E.R. 449 considered.

ACTION.

On July 3, 1948, the late James Frederick Morgan was killed as the result of an accident while employed by the first defendants in a factory owned and occupied by Samuel Fox & Co. Ld., the second defendants. In consequence the widow brought an action against the first defendants claiming damages under the Law Reform Act and the Fatal Accidents Acts. She began that action within 12 months of the death. On July 4, 1949, she added Samuel Fox & Co. Ld. as the second defendants. Later the claim against them under the Fatal Accidents Acts was struck out on the ground that the action against them was commenced after the lapse of 12 months from the death, and so was

[Reported by G. M. SMAILES, Esq., Barrister-at-Law.]

outside the period of limitation prescribed by section 3 of the Fatal Accidents Act, 1846.

On February 9, 1950, however, the first defendants, by the appropriate notice, claimed contribution from the second defendants in respect of any damages and costs which the first defendants might have to pay to the widow under the Fatal Accidents Act, on the ground that the second defendants were in this respect joint tortfeasors.

*R. Withers Payne* for the plaintiff.
*G. Norman Black* for the first defendants.
*G. F. Leslie* for the second defendants.

*Cur. adv. vult.*

December 19, 1952. DONOVAN J., reading his judgment, stated the above facts and continued: The second defendants do not now dispute that they were joint tortfeasors, but claim that, inasmuch as the widow herself brought no action against them under the Fatal Accidents Act within time, the claim for contribution must necessarily fail. That is the issue which I have to try. Section 3 of the Fatal Accidents Act, 1846, provides as follows: "Provided always, that not more than one action "shall lie for and in respect of the same subject matter of "complaint; and that every such action shall be commenced "within twelve calendar months after the death of such deceased "person." The claim for contribution is made by the first defendants under the provisions of section 6 of the Law Reform (Married Women and Tortfeasors) Act, 1935. So far as is material, subsection (1) of that section reads: "(*c*) any tortfeasor "liable in respect of that damage may recover contribution from "any other tortfeasor who is, or would if sued have been, liable "in respect of the same damage, whether as a joint tortfeasor "or otherwise." The second defendants contend that they are not within section 6 (1) (*c*) inasmuch as they are not persons who are, or would, if sued, have been, liable in respect of the same damage, since the plaintiff let 12 months go by without suing them under the Fatal Accidents Act.

The purpose of the words "who is, or would if sued have "been, liable" is to identify the joint tortfeasor against whom contribution may be sought. He may be either (a) a person who is liable, for example, because he has been sued already, or (b) a person who is not so liable but who, if sued, would have been liable. Why are the second defendants not liable as falling within the second category? Because, they say, they cannot be sued now, or because when they were in fact sued it was too late, the period of limitation having expired. Section 6, however, does not ask whether the other tortfeasor can be sued now or whether he was in fact sued in time in the past. What it does ask is this: first, is the other tortfeasor liable in respect of the same damage? The second defendants in the present case can

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Donovan J.

answer that question in the negative, not having been sued in time. Next, would the other tortfeasor *have been* liable if sued? This question obviously requires one to make the assumption that the other tortfeasor was sued in the past and to determine on that hypothesis whether he would have been liable. If, in obedience to this direction, I assume that the second defendants were sued in the past, the answer is that they would have been liable in respect of the damage in question. They would have been liable if sued in the past, namely in the 12 months after Mr. Morgan's death. Accordingly, in my view they are liable to make contribution under section 6, and it is no answer to say, "Yes, but in fact we were not sued within that 12 months." Section 6 is dealing in part with the case of joint tortfeasors not sued in fact.

It can, of course, be urged, and is, that it is anomalous that the second defendants, safe behind the shield of limitation afforded by the Fatal Accidents Act, are nevertheless open to attack, almost from the rear, under the Law Reform Act in respect of the same damage. On the merits that consideration is not very moving. The 12 months' limit in the Act of 1846 is an arbitrary one, and in the present case was exceeded by only one day. But the true answer is that the anomaly, if it be such, cannot alter the construction of section 6 of the Law Reform Act if the words be plain, as I think they are. Reference was made, however, to *Merlihan* v. *A. C. Pope Ld., Pagnello third party.*[1] I am uncertain as to the exact ground of that decision. The third party proceedings brought against Pagnello were in the nature of a separate action (see *Hordern-Richmond* v. *Duncan*[2]), and they were brought outside the period of limitation of 12 months prescribed in favour of public authorities by section 21 (1) of the Limitation Act, 1939. Pagnello being a Canadian soldier engaged as such at the time of the accident was able to rely on section 21 (1). That being so, it was enough for the disposal of the case, unless the cause of action arose, not at the date of the accident, but at the date when judgment was given against the defendants in that case. If that were so, the third party proceedings would have been in time. This was the central argument in the case, and Birkett J. decided that the cause of the action arose at the date of the accident, so that the third party proceedings were out of time.

In a later case, *Hordern-Richmond* v. *Duncan*,[2] Cassels J., speaking obiter, was inclined to take the view that the cause of action in such cases arises when judgment is given against the defendants. This does not concern me in the present case. In the *Pagnello* case Birkett J. gave his judgment in favour of the third party,[3] "on the express ground that the third-party is

[1] [1946] K.B. 166; 61 T.L.R. 508; [1945] 2 All E.R. 449.

[2] [1947] K.B. 545; 63 T.L.R. 193; [1947] 1 All E.R. 427.

[3] [1946] K.B. 166, 170.

" protected by the Limitation Act, 1939, because the cause of " action in fact, accrued on March 15, 1943 " (the date of the accident in that case). But then Birkett J. added these words [3]: " The Law Reform (Married Women and Tortfeasors) Act, 1935, " certainly made a great change in the law and, apparently, this " particular difficulty was not foreseen. In my opinion, it would " not be a proper interpretation of section 6 (1) (*c*) to read it as " if the material words were ' who if sued *in time* would have " ' been liable.' " It is this last sentence which puzzles me. It seems to me to suggest that the third party proceedings were not themselves an action subject to section 21 of the Limitation Act, and what had to be considered was whether the third party could presently be sued by the plaintiff. In that case he could not. If that were the crucial question, then the parties seeking contribution would succeed only if, alternatively, the words in section 6 (1) (*c*) could be construed as if they meant, " Would the joint tortfeasor have been liable if sued *in time*?" Birkett J. declined to read the words " in time " into the section. I approach section 6 (1) (*c*) rather differently, and I have already set out my view as to its construction. But supposing in the *Pagnello* case [3] the words " in time " had been written into section 6 (1) (*c*), what difference would it have made? The third party proceedings themselves would still have been out of time in view of section 21 (1) of the Limitation Act. The truth is, I think, that the case before Birkett J. did not require section 6 to be construed as the present case does, and that I am therefore free to express my own view. There will be no conflict between his actual decision in that case and my decision in this. For there is nothing in the present case barring the present claim for contribution as there was in the *Pagnello* case [3] barring the third party proceedings, namely, section 21 of the Act of 1939. If there is any limitation on the present claim for contribution, it may be the six-year period prescribed by the Act of 1939, though I do not decide this, for it is not necessary to do so, and I gather that there is professional doubt upon the matter. Clearly, section 3 of the Fatal Accidents Act does not require the present claim for contribution to be brought within 12 months of the death, for it refers to " such action," and when read in conjunction with section 1 of the Act means an action under that Act.

For these reasons I decide that the first defendants are entitled to claim contribution from the second defendants. I understand that the amount has already been otherwise settled.

*Judgment for first defendants against second defendants.*

Solicitors: *W. H. Thompson; Harold Jackson & Co., Sheffield; Raworth & Co., Harrogate.*

[QUEEN'S BENCH DIVISION.]

1953
*Feb.* 10.

Parker J.

# * SWALLOW AND PEARSON *v.* MIDDLESEX COUNTY COUNCIL.

*Town and Country Planning—Enforcement notice—Form of notice defective—Invalidity—Appeal against notice to Minister on other grounds — Whether approbated — Estoppel — Town and Country Planning Act,* 1947 (10 & 11 *Geo.* 6, *c.* 51), *ss.* 23 (1), (2), (3), (4); 75 (5).

On May 17, 1949, the defendants, the local planning authority for the county of Middlesex, served on the plaintiffs a notice under section 23 of the Town and Country Planning Act, 1947, requiring them to discontinue work on their premises. The notice did not specify the period after which it was to take effect. The plaintiffs applied to the local planning authority under section 23 (3) (*a*) for permission to continue their use of the land. That application and a subsequent appeal to the Minister of Town and Country Planning were dismissed. In June, 1950, the plaintiffs instituted proceedings against the defendants claiming declarations that they were entitled to use the land for light industrial purposes, and that the notice was invalid and ineffective as not complying in a material respect with the statutory form. The defendants denied that the notice was invalid, and further contended that even if it was defective in form the plaintiffs, by reason of their conduct after the receipt of the notice, were estopped from denying its validity:—

*Held*, first, that on the principles laid down in *Burgess* v. *Jarvis* [1952] 2 Q.B. 41; [1952] 1 T.L.R. 580; [1952] 1 All E.R. 592 and *Mead* v. *Chelmsford Rural District Council* [1953] 1 Q.B. 32; [1952] 2 T.L.R. 700; [1952] 2 All E.R. 723 the notice was invalid, since, in breach of section 23 (3) of the Act of 1947, it had failed to lay down the period after which it was to take effect.

*Held*, secondly, that, since the particular form of the notice was laid down by Act of Parliament and non-compliance with such a notice, when issued in its proper form, was a criminal offence, no amount of so-called waiver or approbation could make it into a valid document, and, accordingly, the plaintiffs were not estopped from disputing its validity.

The plaintiffs, a firm of building contractors, owned and occupied land at the rear of two houses in Nightingale Road, Wood Green, Middlesex. They used the land for light industrial purposes, namely, for joinery work and for their business. The plaintiffs' predecessor in title had also, for 47 years, used the land for light industrial purposes, namely, photographic engineering, joinery and woodwork, for which he had used machinery which included circular saws, centre lathes and drilling machines.

On May 17, 1949, the defendants, as the local planning authority for the county of Middlesex, served on the plaintiffs,

[Reported by Mrs. E. M. WELLWOOD, Barrister-at-Law.]

through the Wood Green Borough Council, a notice purporting to be made under sections 23 and 75 of the Town and Country Planning Act, 1947,[1] directing the plaintiffs to discontinue the work on the premises, which work, the defendants alleged, contravened the provisions of the Act. The notice did not specify the period after which it was to take effect.

Pursuant to the provisions of section 23 (3) (*a*) of the Act, the plaintiffs thereupon applied for permission to continue to use the land, and upon the defendants' refusal to grant such permission, appealed to the Minister under section 16 (1) of the Act. The appeal was dismissed on March 8, 1950.

[1] Town and Country Planning Act, 1947, s. 23:

"(1) If it appears to the local planning authority that any development of land has been carried out after the appointed day without the grant of permission required in that behalf under this Part of this Act '. . . then, subject to any directions given by the Minister, the local planning authority may within four years of such development being carried out, . . . if they consider it expedient so to do having regard to the provisions of the development plan and to any other material considerations, serve on the owner and occupier of the land a notice under this section.

"(2) Any notice served under this section (hereinafter called an 'enforcement notice') shall specify the development which is alleged to have been carried out without the grant of such permission as aforesaid . . . and may require such steps as may be specified in the notice to be taken within such period as may be so specified for restoring the land to its condition before the development took place. . . .

"(3) Subject to the provisions of the next following subsection, an enforcement notice shall take effect at the expiration of such period (not being less than 28 days after the service thereof) as may be specified therein: Provided that—(*a*) if within the period aforesaid an application is made to the local planning authority under this Part of this Act for permission for . . . the continuance of any use of the land, to which the enforcement notice relates, the notice shall be of no effect pending the final determination of that application, and if such permission as aforesaid is granted on that application, the notice shall not take effect; . . .

"(4) If any person on whom an enforcement notice is served under this section is aggrieved by the notice, he may, at any time within the period mentioned in the last foregoing subsection, appeal against the notice to a court of summary jurisdiction for the petty sessional division or place within which the land to which the notice relates is situated; and on any such appeal the court—(*a*) if satisfied that permission was granted under this Part of this Act for the development to which the notice relates, or that no such permission was required in respect thereof, or, as the case may be, . . . shall quash the notice to which the appeal relates."

S. 75: "(1) Where any works on land existing at the appointed day were carried out, . . . in contravention of previous planning control, then, subject to the provisions of this section, the provisions of Part III of this Act with respect to enforcement notices shall apply in relation thereto . . . : Provided that an enforcement notice shall not be served by virtue of the provisions of this section in respect of any works or use . . . at any time after three years from the appointed day.

. . . . . .

"(5) In relation to an enforcement notice served by virtue of this section, subsection (4) of section 23 of this Act shall have effect as if for paragraph (*a*) thereof there were substituted the following paragraph:—'(*a*) if satisfied that the works or use to which the notice relates are not works or a use to which section 75 of this Act applies, shall quash the notice to which the appeal relates.'"

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SWALLOW AND PEARSON v. MIDDLESEX COUNTY COUNCIL.

On June 8, 1950, the plaintiffs issued a writ against the defendants, seeking a declaration that they were entitled to use the land for the purposes for which it had been used hitherto. In their amended statement of claim, dated April 25, 1952, they alleged that the notice served by the defendants on May 17, 1949, was invalid, as it did not include all the terms prescribed by the Act.

The defendants denied that the notice was invalid and alleged that the plaintiffs had not challenged its validity when it was served on them. They contended that there were two statutory courses open to the plaintiffs on receipt of the notice, to take action either under section 23 (3) or under section 23 (4).

The plaintiffs had elected to take action under section 23 (3). The defendants therefore alleged that by their conduct the plaintiffs had approbated the notice and were estopped from impugning its validity and from denying the rights of the defendants to proceed upon the notice.

Pursuant to an order of Master Burnand made on November 10, 1952, the following points of law were set down for hearing before the trial of the action: (1) whether the notice of May 17, 1949, was a valid enforcement notice; (2) if it was not valid, whether the plaintiffs were estopped from disputing its validity.

*N. N. McKinnon* and *J. D. James* for the plaintiffs.
*G. D. Squibb* for the defendants.

The cases cited in argument were referred to in the judgment.

PARKER J. These proceedings are brought by the plaintiffs claiming, amongst other things, a declaration that they are entitled to use their premises for light industrial purposes, and a declaration that a document purporting to be an enforcement notice served on them on May 17, 1949, by the Wood Green Borough Council under the Town and Country Planning Act, 1947, is invalid. Pursuant to an order made by a master on November 10, 1952, two points of law are referred to me for decision. The first is whether that document of May 17, 1949, is a valid enforcement notice; and, secondly, if it is not, whether the plaintiffs in these proceedings are estopped from disputing its validity.

The document of May 17, 1949, in the light of the recent decisions of *Burgess* v. *Jarvis* [1] and *Mead* v. *Chelmsford Rural District Council* [2] is clearly invalid. Those two decisions make it clear that section 23 of the Town and Country Planning Act, 1947, on its true construction, requires two periods to be set out in the notice: one a period pursuant to section 23 (2), under

[1] [1952] 2 Q.B. 41; [1952] 1 T.L.R. 580; [1952] 1 All E.R. 592.

[2] [1953] 1 Q.B. 32; [1952] 2 T.L.R. 700; [1952] 2 All E.R. 723.

which a period is to be laid down for the doing of the work or the discontinuance of the use or the restoration of the land, or whatever the matter required to be done consists of, and the other is a period under subsection (3) of that section, which is the period after the expiration of which the notice itself is to take effect.

The document of May 17, 1949, which is in a form probably used by numbers of local authorities before the decision in *Burgess* v. *Jarvis*,[3] is clearly invalid as failing to lay down the period after which the enforcement notice is to take effect. Mr. Squibb has argued, though I think rather faintly, that in this particular case that defect is overcome by certain notes which are attached to the notice and to which on the face of the notice attention is drawn in these words: "Your attention is "particularly drawn to the notes accompanying this notice as to "the rights of the person upon whom a notice is served." It is true that those notes, which set out and to some extent paraphrase sections of the Act, do draw the attention of the addressee of the document to his rights in regard to appeals and such matters, but nowhere do they say within what period those rights accrue to him. Incidentally, it is to be observed in passing that even the notes themselves are not accurate, because on the facts of this case section 75 (5) applies in the place of section 23 (4) (*a*).

Accordingly, I answer the first question by holding that the enforcement notice is invalid.

With regard to the second point, namely, whether the plaintiffs are estopped from disputing the validity of the notice, Mr. Squibb, upon whom the burden rests, drew attention to the fact that only two days later, on May 19, 1949, the plaintiffs, as they were entitled to do—one of the steps, indeed, contemplated by section 23 of the Act—applied to the local planning authority for permission to continue the use, and on July 13, 1949, that application was refused. Not content with that, the plaintiffs then appealed to the Minister of Town and Country Planning from the decision of the local town planning authority, and finally, on March 8, 1950, that appeal was refused.

It was pointed out by Mr. Squibb, and it was undoubtedly true, that those applications and appeals were on the basis that the document of May 17, 1949, was a valid enforcement notice. He accordingly argued that, having treated that document as a good notice, the plaintiffs were estopped from denying its invalidity. He further pointed out that, so far as the pleadings were concerned, the plaintiffs did not take the point affirmatively that the notice was a bad notice until an amendment of the pleadings on April 25, 1952, whereas under the proviso to section 75 (1) the time for serving an enforcement notice in such a case as this expired three years after the appointed day, namely, on July 1, 1951.

[3] [1952] 2 Q.B. 41; [1952] 1 T.L.R. 580; [1952] 1 All E.R. 592.

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In that connexion Mr. Squibb referred me to *W. Davis (Spitalfields) Ld.* v. *Huntley and Others.*[4] In that case it was held that a tenant, having applied for a new lease under the Landlord and Tenant Act, 1927, on the basis of his existing lease having been determined, could not thereafter as against the landlord set up that a notice given to him by the landlord was invalid and had not terminated the lease. I am not in my own mind quite clear how far those principles apply when one is considering something which is prescribed by Act of Parliament. There is no doubt that a man in such a case is entitled to waive, or to agree to waive, the advantage of the law or rule made solely for his benefit and protection. It is equally clear that no person can waive a provision or a requirement of the law which is not solely for his benefit but which is for the public benefit. In my view, however, in this case, if one looks at it more closely, the plaintiffs are not waiving some irregularity for their benefit, but, it is said, are estopped from denying that a particular document is valid. This enforcement notice is one which Parliament has said must be in a particular form, and when it is in that particular form its non-observance is a criminal offence, not only on the part of the person on whom it is served but, in some cases, on others, and I cannot think that in such a case a person can make a document which is patently unenforceable on its face into a valid document carrying the consequences which I have described. I do not think that any amount of so-called waiver or approbation can make a document such as this, which is patently and wholly invalid, into a valid document with the consequences that would follow.

In those circumstances I hold that the plaintiffs are not estopped.

*Declaration accordingly.*

Solicitors: *Craigen, Hicks & Co.; C. W. Radcliffe.*

[4] [1947] 1 All E.R. 246.

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[QUEEN'S BENCH DIVISION.]

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*Jan.* 26, 27, 28, 29.

Parker J.

## * LITTLEWOOD *v.* GEORGE WIMPEY & CO. LD. AND BRITISH OVERSEAS AIRWAYS CORPORATION.

[X 1951 L. 999.]

*Limitation of Action—Public authority—Action against British Overseas Airways Corporation—Injury to employee of corporation while disposing of waste oil drained from aircraft—Corporation a public authority performing function incidental to their public duty—Limitation Act,* 1939 (2 *&* 3 *Geo.* 6, *c.* 2), *s.* 21 (1)—*Civil Aviation Act,* 1946 (9 *&* 10 *Geo.* 6, *c.* 70), *ss.* 2 (1), 17, 18.

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*Limitation of Action — Negligence — Joint tortfeasors — Contribution — Action against one tortfeasor statute barred—Any tortfeasor "who "is . . . liable in respect of the same damage"—"Liable"—No right of contribution — Law Reform (Married Women and Tortfeasors) Act*, 1935 (25 & 26 *Geo.* 5, *c.* 30), *s.* 6 (1) (*c*)—*Limitation Act*, 1939 (2 & 3 *Geo.* 6, *c.* 21), *s.* 21 (1).

On July 28, 1949, while standing on a mechanical stacker or fork-lift, the plaintiff, who was employed by the second defendants at their aerodrome, was injured in a collision between the fork-lift and a lorry owned by the first defendants. The fork-lift was being used for carrying drums of waste oil, which had been drained from aircraft, to a tank into which it was emptied and from which it was collected from time to time by a contractor to whom the oil was sold by the corporation. On April 26, 1951, the plaintiff issued a writ against the first defendants claiming damages for negligence, and the corporation was subsequently joined as defendants in the action. Parker J. held that both defendants were prima facie liable to the plaintiff. The corporation, however, claimed to be a public authority and, the action not having been brought within a year of the injury, that they were entitled to the protection of section 21 (1) of the Limitation Act, 1939:—

*Held*, that by virtue of the provisions of the Civil Aviation Act, 1946, the corporation were constituted a public authority; the disposal by them of the waste oil into the tank was incidental to and necessarily part of the performance by them of their public duty notwithstanding that the oil was sold under contract; and that, therefore, the plaintiff's claim against the corporation was statute barred.

*Griffiths* v. *Smith* [1941] A.C. 170; 57 T.L.R. 185; [1941] 1 All E.R. 66, and *Firestone Tire and Rubber Co. (S.S.) Ld.* v. *Singapore Harbour Board* [1952] A.C. 452; [1952] 1 T.L.R. 1625; [1952] 2 All E.R. 219 applied.

*Bradford Corporation* v. *Myers* [1916] 1 A.C. 242; 32 T.L.R. 113 distinguished.

Semble: the fork-lift was both a place of work and a means of access within section 26 of the Factories Act, 1937.

By section 6 (1) of the Law Reform (Married Women and Tortfeasors) Act, 1935, "Where damage is suffered by any person as a "result of a tort . . . (*c*) any tortfeasor liable in respect of that "damage may recover contribution from any other tortfeasor who "is, or would if sued have been, liable in respect of the same "damage . . ."

In an action against two defendants for damages for negligence, both defendants were held to have been negligent, but the claim against the second defendants, a public authority, not having been brought within a year of the cause of action, was held to be statute barred. On a claim in third party proceedings by the first defendants under section 6 (1) (*c*) of the Act of 1935, against the second defendants for contribution:—

*Held*, that the word "liable" in section 6 (1) (*c*) meant "held "liable" on being sued to judgment, and, therefore, the claim as between the plaintiff and the second defendants having been held to be statute barred, they had not been held "liable" and the first defendants were not entitled to contribution from them.

*Quaere:* whether in a claim for contribution, time starts to

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run from the date when the original cause of action accrued or the date when the defendant claiming contribution has been made liable to the plaintiff.

*Merlihan* v. *A. C. Pope Ld., Pagnello Third Party* [1946] 1 K.B. 166; 61 T.L.R. 508; [1945] 2 All E.R. 449 considered.

ACTION for damages for negligence.

The plaintiff was employed by the second defendants, British Overseas Airways Corporation, as an aeroplane cleaner at London Airport. On July 28, 1949, he was instructed by the foreman, one Hubbard, to empty drums of waste oil, which had been drained from aircraft, into a tank situated on the aerodrome. To do this a mechanical stacker or fork-lift was used. The machine, which was driven by Hubbard, was run up to a trailer containing the drums of oil, and two drums were rolled on to the forks of the machine which were then elevated to some eight feet with the plaintiff standing on the forks and holding on to the edge of one of the drums. The machine was then driven to the tank and the drums emptied into it from the elevated position. There was no ladder on the tank, and neither Hubbard nor the plaintiff had been instructed on how the job should be done.

While carrying out this work, and at a time when the forks of the machine were elevated, a lorry owned by the first defendants, George Wimpey & Co. Ld., and driven by one Swadling, ran into the machine, knocking the plaintiff to the ground and injuring him. On April 26, 1951, the plaintiff issued a writ against the first defendants claiming damages for the negligence of their driver. On June 8, 1951, the first defendant served a third party notice on the corporation claiming contribution or indemnity. On February 1, 1952, the plaintiff obtained leave to join the corporation as parties, against whom he alleged negligence by Hubbard, breach of duty by the corporation in failing to provide a safe system of working, and breach of section 26 of the Factories Act, 1937, in failing to provide the plaintiff with a safe means of access to his place of work.

Both defendants denied negligence, and, in the alternative, pleaded contributory negligence. The corporation further denied breach of statutory duty, and pleaded, both as against the plaintiff and the first defendants, that, as a public authority, they were entitled to the protection of section 21 (1) of the Limitation Act, 1939.[1]

*F. W. Beney Q.C.* and *Michael Hoare* for the plaintiff.

*W. J. K. Diplock Q.C.* and *Stanley Rees* for the first defendants.

[1] Limitation Act, 1939, s. 21 (1): "No action shall be brought against any person for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any neglect or default in the execution of any such Act, duty or authority, unless it is commenced before the expiration of one year from the date on which the cause of action accrued."

*Melford Stevenson Q.C.* and *Leslie Scarman* for the corporation.

The cases referred to in argument are stated in the judgment.

PARKER J. stated the facts, held that the first defendants were guilty of negligence, and that there was no evidence of negligence on the part of Hubbard, but that in sending the plaintiff and Hubbard to do the work without instructions, and in failing to provide a ladder to the tank, the corporation were guilty of providing an unsafe system of work. He continued: The claim against the corporation is also based on a breach of section 26 of the Factories Act, 1937, in failing to provide safe means of access to the plaintiff's place of work. The matter has not been fully argued before me, and it is unnecessary for me to express an opinion although, as at present advised, I am inclined to think that the fork-lift was both a place of work and a means of access, according to its use at the moment, and that the corporation are in breach of their duty following the decision in *Dorman Long & Co. Ld.* v. *Hillier*.[1]

Prima facie, both Wimpeys and the corporation are liable to the plaintiff. Both, however, raise a plea of contributory negligence. So far as the corporation is concerned, I think that it is put forward in a half-hearted fashion. Mr. Melford Stevenson said that the plaintiff could have held on, and that if he had done so he would not have fallen. It is difficult to see how he could have held on except in the way in which he did.

Mr. Diplock said that as against Wimpeys the plaintiff cannot rely on the fact that his employers ordered him to be in that unsafe position. He put forward this proposition: if a man on orders from his employer does something which, to any reasonable man is dangerous, he is at fault in failing to take reasonable steps for his own safety. I feel unable to accept that proposition. The test, as it seems to me, is: was the plaintiff, in all the circumstances, taking reasonable care for his own safety? He was doing what he had seen others do before him. He was doing the only thing that he could do with the apparatus and appliances which his employers had provided, and I think that it is going much too far to say that a man fails to take reasonable care for his own safety if he agrees to do what his employers want him to do without, in effect, going on strike. Certainly, in the present case, I think that the plaintiff was, in all the circumstances, taking reasonable care for his own safety. Accordingly, the pleas of contributory negligence fail.

The corporation, however, rely on section 21 (1) of the Limitation Act, 1939. That section, which replaced section 1 (*a*) of the Public Authorities Protection Act, 1893, provides: "No "action shall be brought against any person for any act done in

[1] [1951] 1 All E.R. 357.

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" pursuance, or execution, or intended execution of any Act of " Parliament, or of any public duty or authority, or in respect of " any neglect or default in the execution of any such Act, duty " or authority, unless it is commenced before the expiration of " one year from the date on which the cause of action accrued." If that section applies the claim against the corporation is clearly barred.

It has long been held that before a person, to use a neutral term, can claim the benefit of that section, he must show that he is a public authority because, although the words are " No " action shall be brought against any person," it has always been construed as meaning any person in the position of a public authority. Secondly, it must be proved that, assuming he is a public authority, the neglect or default complained of was the neglect or default in the execution of a public duty or authority.

As regards the first question, whether the corporation is a public authority, the matter is not easy, because no court, advisedly, has attempted to lay down any test or definition as to what is and what is not a public authority. It is clearly not enough that it is a body created by statute required to do things for the public benefit, for example, a railway company. It is equally clear that a commercial company, albeit, set up by a statute, which is entitled to trade for the benefit of its incorporators, is not a public authority. See in this connexion *Swain* v. *Southern Ry.*[2] and *Att.-Gen.* v. *Margate Pier and Harbour Proprietors.*[3] At the same time, the fact that a company is entitled to make a profit for itself does not prevent it from being a public authority. In *Griffiths* v. *Smith*,[4] to which I must refer again hereafter, Lord Porter said[5]: " In the first place, though " the word ' person ' is used, not every person is protected. It " is a ' Public Authorities Protection Act ' and not a ' persons " ' protection Act ' and therefore the body to be protected must " be a public authority: see *Myers* v. *Bradford Corporation*[6] " and *The Johannesburg.*[7] What, then, is a public authority? " As Sir Gorell Barnes says in the latter case, the phrase is not " confined to municipal corporations. There are many other " bodies which perform statutory duties and exercise public " functions, and examples of such bodies are given by the learned " president. The distinction which he draws is between a body " carrying out transactions for private profit and those working " for the benefit of the public. Profit they may undoubtedly " make for the public benefit: see *The Ydun*[8] and *Lyles* v. " *Southend-on-Sea Corporation*,[9] but they must not be a trading " corporation making profits for their corporators: see *Att.-Gen.* " v. *Margate Pier and Harbour Proprietors.*[10] "

[2] [1939] 2 K.B. 560; 55 T.L.R. 805; [1939] 2 All E.R. 794.
[3] [1900] 1 Ch. 749.
[4] [1941] A.C. 170; 57 T.L.R. 185; [1941] 1 All E.R. 66.
[5] [1941] A.C. 170, 205.
[6] [1916] 1 A.C. 242; 32 T.L.R. 113.
[7] [1907] P. 65, 72.
[8] [1899] P. 236; 15 T.L.R. 361.
[9] [1905] 2 K.B. 1; 21 T.L.R. 389.
[10] [1900] 1 Ch. 749.

In determining whether the corporation is or is not a public authority, I must consider the duties imposed as opposed to the powers given; the degree, if any, of public control; and to whose benefit any profit earned is going to accrue.

The corporation was set up by the British Overseas Airways Act, 1939, under which it took over the undertakings and assets of what were undoubtedly trading companies. By its constitution the corporation was to consist of such members not being less than nine or more than 15, but it was not a company with shareholders in the ordinary way.

Under the Civil Aviation Act, 1946, two new corporations, British European Airways and British South-American Airways, were formed, and the Act lays down the functions of the corporations including those of B.O.A.C. By section 2 (1) it was provided: "Each of the three corporations shall, subject to the "provisions of this Act, have power to provide air transport "services and to carry out all other forms of aerial work, and "may provide such services and carry out such work, whether "on charter terms or otherwise, in any part of the world; and "it shall be the duty of each of the said corporations to exercise "those powers so as to secure that the air services which they "may provide are developed to the best advantage, and, in "particular, to exercise those powers so as to secure that the "services provided by the corporation are provided at reasonable "charges." By section 2 (3) the Minister may define the powers conferred upon the corporations, and by section 7 the corporations were given power to borrow money by the issue of stock.

By sections 17 and 18, the Minister was given, in effect, and, through the Minister, Parliament, the control of the corporations' revenue. By section 17 each of the corporations is to establish a reserve fund, and the Minister has power to give to the corporation directions on "any matter relating to the "establishment or management of the said fund, the carrying "of sums to the credit thereof, or the application thereof, notwithstanding that the directions may be of a specific character."

By section 18 (1) it is provided: "Any excess of the revenues "of any of the three corporations for any financial year over the "total sums properly chargeable by the corporation to revenue "account for that year, including in such sums (without prejudice "to the generality of that expression) sums credited under the "last preceding section to the reserve fund of the corporation, "shall be applied by the corporation in such manner as the "Minister, with the approval of the Treasury and after consultation with the chairman of the corporation, may direct." Provision is then made that if there is any excess of revenue, it is to be used to repay Exchequer grants. There, as it seems to me, the Minister has absolute authority to say what is to be done with any surplus revenue, and how it is to be applied in the public interest.

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There are elaborate provisions in sections 11 to 16 for Exchequer grants and for the Exchequer bearing any losses incurred by a corporation. Under sections 21 and 22, the Minister is given powers with regard to accounts and audit, and the obtaining of periodical returns and being enabled to see each corporation's programme. It seems clear that the intention of this Act was to set up a company entrusted with certain duties in the public interest, and that those duties should be performed irrespective of whether it made a loss or a profit, and, further, that any loss should be made good by the Exchequer, and any revenues should be dealt with as the Minister thought fit. In all the circumstances I feel that under this Act the corporation is constituted a public authority.

An argument was addressed to me based on contemporary legislation. It has certainly been the tendency of the legislature in recent years to make it clear when a body is set up, whether or not it is intended that that body should be a public authority, and I was referred to the fact that under section 1 (1) of the London Passenger Transport Board Act, 1933, it is expressly provided that the Board shall be a public authority. Reference has also been made to the Coal Industry Nationalization Act, 1946, which was passing through Parliament at about the same time as the Civil Aviation Act, 1946, to the Transport Act, 1947, the Electricity Act, 1947, the Gas Act, 1948, and the Iron and Steel Act, 1949, in all of which an express provision was inserted to the effect that section 21 of the Limitation Act, 1939, was not to apply, but that the six year limit under sections 2 and 3 of the Act was to be reduced to three years. In other words it shows, it is said, that Parliament in those Acts made it clear that the bodies so set up were public authorities, and would attract the provisions of the Limitation Act, 1939, had they not been expressly excluded. It is observed that although the Civil Aviation Act, 1946, was passed more or less contemporaneously there is no similar provision in that Act, I do not think, however, that I can attach such weight to that argument as would prevent me from construing the effect of the Civil Aviation Act, 1946, as I have done.

Mr. Diplock also argued that if the corporation had been created a public authority it would have constituted a breach of the Warsaw Convention, 1929. I cannot attach much weight to that argument. In my view the corporation is a public authority.

There remains the difficult question, which arises in all these cases, whether, assuming that the defendant concerned is a public authority, he can claim the protection of section 21 (1) of the Act of 1939, because it is not every act which a public authority does as a result of its statutory powers which enables it to obtain protection. The act complained of must be an act done in the execution of the public duty of the authority. There is a great deal of authority on this matter, but I only propose

to refer to three cases. The matter was put very clearly in *Griffiths* v. *Smith.*[11] There Lord Simon L.C. said[12]: There is, "however, a second question connected with the construction of "the Act on which it is difficult to reach precision. Assuming "that the 'person' is a public authority in the sense required, "what kind of action by the public authority is to be regarded "as satisfying the conditions of the section that the act must "be 'done in pursuance, or execution, or intended execution of "'any Act of Parliament or of any public duty or authority,' "or that the neglect or default must be 'in the execution of "'any such Act, duty, or authority?' In one sense, every-"thing that is done by a public authority within the limits of "their statutory powers might be regarded as done in execution "of the statute. Even if a public corporation exist independently "of statute, all their actions within their powers might perhaps "be regarded as done in execution of their public authority. "But this House has decided in the *Bradford Corporation* case,[13] "that the statute ought not to be given so wide a construction. "'It is not because the act out of which an action arises is "'within their power,' said Lord Buckmaster, 'that a public "'authority enjoys the benefit of the statute. It is because the "'act is one which is either an act in the direct execution of a "'statute, or in the discharge of a public duty, or the exercise "'of a public authority.'"

Lord Maugham in the same case said[14]: "My Lords, the "decision may be more easily understood if it is realized that, "if the argument for the corporation had prevailed, it would "seem to follow that the Act would apply for the benefit of "every public authority if it could be shown that the act done "or intended to be done was intra vires the authority. Thus "every contract entered into for the purpose of carrying out any "such act, however unwise and whatever the neglect or default "of the public authority in carrying out the contract, would "have the protection of the Act of 1893. Moreover, such a "view would have involved the overruling of a number of "decisions, including earlier cases of high authority decided "before the passing of the Act of 1893 relating to similar condi-"tions contained in other Acts of Parliament."

Later Lord Maugham said[15]: "My Lords, since the decision "of this House in the *Bradford Corporation* case[16] and the tacit "or express approval of the cases I have referred to, it has been "impossible to doubt (if it was doubtful before) that it is not "essential that a public authority seeking to rely on the Act of "1893 must show that the particular act or default in question "was done or committed in discharge or attempted discharge of "a positive duty imposed on the public authority. It is sufficient "to establish that the act was in substance done in the course

[11] [1941] A.C. 170.
[12] Ibid. 177.
[13] [1916] 1 A.C. 242.
[14] [1941] A.C. 170, 183.
[15] Ibid. 185.
[16] [1916] 1 A.C. 242.

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" of exercising for the benefit of the public an authority or a " power conferred on the public authority not being a mere inci- " dental power, such as a power to carry on a trade." Lord Porter pointed to the difficulties which sometimes arose and said, as indeed is true, that there was no absolute test that could be applied.

In the latest case on this matter, *Firestone Tire and Rubber Co. (S.S.) Ld.* v. *Singapore Harbour Board*,[17] Lord Tucker, in giving the advice of the Judicial Committee, set out the considerations to be applied. Having referred to *Griffiths* v. *Smith*[18] and the *Bradford Corporation* case,[19] he said[20]: " In this state " of affairs it will not perhaps cause surprise if their Lordships do " not attempt to accomplish what the noble Lords referred to " above found well nigh impossible, but content themselves with " examining the two cases cited with a view to extracting there- " from certain matters and considerations that are relevant to, " though not necessarily always decisive of, this issue." He set out the considerations in this way[21]: " 1. It is essential to the " protection afforded by the statute that the act or default in " question should be in the discharge of a *public* duty or the " exercise of a *public* authority. This assumes that there are " duties and authorities which are not public. (See *per* Lord " Buckmaster in the *Bradford Corporation* case.[22]) 2. In " deciding whether the duty or authority has this public quality " it is sometimes relevant to consider whether it arises out of or is " imposed by a contract voluntarily entered into by the public " authority with an individual with whom it is under no obliga- " tion to contract. 3. The mere fact, however, that in the dis- " charge of its duty or the exercise of its authority the public " authority may have made a contract does not of itself deprive " the duty or authority of its public quality. The existence or " absence of a contract is not a decisive test. (See *per* Lord " Shaw in the *Bradford Corporation* case.[23]) 4. Effect must be " given to the word ' authority.' This excludes the test of " obligatory, as opposed to permissive, powers."

Applying those considerations, it is argued here that the neglect complained of was not in the execution of a public duty or authority, but in doing something purely incidental thereto. In dealing with that contention, I think that one must be clear in one's own mind what is meant by the word " incidental." I think that it is clear that a public authority is not deprived of the benefit of the section because the act complained of was not done, as one might say, in the direct execution of a public authority or duty. The benefit, I think, is available if they are doing anything which is necessarily part of the performance of their duty, albeit trivial or incidental in that sense.

[17] [1952] A.C. 452.
[18] [1941] A.C. 170.
[19] [1916] A.C. 242.
[20] [1952] A.C. 452, 464.
[21] Ibid.
[22] [1916] 1 A.C. 242, 247.
[23] Ibid. 260.

In *Edwards* v. *Metropolitan Water Board*,[24] the position of a water board was considered, whose direct duty was to supply water. An accident occurred while a lorry was returning after carrying pipes for repair to the pipe system. Banks L.J. said[25]: "Mr. Shakespeare endeavoured to bring this case within *Bradford Corporation* v. *Myers*.[26] I think it is clear from that case that a public body does not necessarily enjoy the protection of the statute merely because it is acting under a leave or licence conferred upon it or under a permission granted to it by an Act of Parliament. To entitle it to protection it is necessary that it should be acting in pursuance or execution or intended execution of an Act of Parliament or of a public duty or authority. In my view it does not help much to say that the act must be in 'direct' execution of the Act of Parliament or public duty, because that word itself requires explanation. The question in this case is whether the act of sending this lorry on its journey was an act done in pursuance or execution or intended execution of the statutes which impose upon the respondents their duties, or in execution of a public duty. The main duty of the respondents is to supply water for the public living and carrying on business within their area; but there are many duties incidental to that main duty, and one of these is a duty to keep and maintain their pipes in proper working condition." I think that Lord Tucker had that use of the word "incidental" in mind when in the *Singapore Harbour Board* case,[27] having referred to the passage which I have read from the speech of Lord Maugham in *Griffiths* v. *Smith*,[28] where he talked of "a mere incidental power, such as a power to carry on a trade," Lord Tucker said[29]: "The word 'incidental' is here used in the sense of 'subsidiary.' It has in these cases sometimes been used as equivalent to 'necessarily incidental to.'" Then he said that to avoid confusion he preferred to use the word "subsidiary."

In the present case, I am satisfied that as part of their public duty the defendant corporation had to drain oil out of engine pumps of aircraft into containers. It is clearly impractical for them to have an unlimited supply of empty containers available, and it was part of the performance of their duty to dispose of the waste oil by emptying the receptacles. To that extent what they were doing was incidental to and necessarily part of the performance of their public duty. But it was argued forcibly by Mr. Beney that that was the position in *Bradford Corporation* v. *Myers*,[30] because in that case, he said, the corporation were disposing of their coke, which was being produced all the time in the manufacture of gas, under a particular contract, and the disposal of the coke was held to be purely subsidiary, merely done

[24] [1922] 1 K.B. 291; 38 T.L.R. 153.
[25] [1922] 1 K.B. 300.
[26] [1916] 1 A.C. 242.
[27] [1952] A.C. 452.
[28] [1941] A.C. 170, 185.
[29] [1952] A.C. 452, 465.
[30] [1916] 1 A.C. 242.

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in the performance of the corporation's powers and not incidental to their public duty as gas undertakers. So, here, it is said that this accident occurred while the oil was being delivered into a waste tank, which was the property of a contractor who was going to empty it and pay for the oil. I am not satisfied that that is the correct argument.

The whole basis of the *Bradford Corporation* case,[30] as I understand it, is that the act complained of was done purely in the course of implementing a specific contract. There was no evidence in that case of the type which I have had here, that what was being done was for the purpose of freeing the corporation's premises of coke, and that unless they were so freed the corporation would not be able to carry on their public duty as gas undertakers. Indeed, it seems to me that if there had been evidence to that effect in that case and the argument had been put on that basis, there might have been a different result. It is to be observed that in *Edwards* v. *Metropolitan Water Board*[31] Banks L.J. said[32]: "Mr. Shakespeare contended that if in *Brad-*
"*ford Corporation* v. *Myers*[33] the corporation had been moving
"coke from their gas works in order to get rid of it, and so
"remove an impediment in the way of executing their statutory
"duty of supplying gas, the decision of the House of Lords must
"still have been for the plaintiff. There I join issue. In my
"view if the corporation had been moving the coke in order to
"clear their gas works that they might better fulfil their statu-
"tory duty the decision of the House of Lords would have been
"the other way."

In the present case I am satisfied that on this particular morning these drums were being emptied to enable oil to be drained into the empty drums from aircraft coming in that afternoon or evening. Looked at in that way, what Hubbard and the plaintiff were doing was clearly, in my view, being done in the execution of the corporation's public duty or authority, and the act does not cease to be done in the performance of that public duty or authority merely because the oil at some later stage will be taken away by a contractor who is going to pay for it. Accordingly, I hold that the corporation can claim the benefit of section 21 of the Limitation Act, 1939, and therefore, the plaintiff's claim succeeds against the first defendants, Messrs. Wimpey, and fails as against the second defendants, the corporation.

Having dealt with the corporation's position as a public authority, I can deal quite shortly with the third party proceedings. Mr. Diplock, for the first defendants, said that, the court having held that the corporation are blameworthy, he is entitled to recover contributions under section 6 (1) of the Law Reform (Married Women and Tortfeasors) Act, 1935. He is met again by a plea of section 21 (1) of the Limitation Act, 1939. It is clear that before the first defendants can succeed as against the

[30] [1916] 1 A.C. 242.
[31] [1922] 1 K.B. 291.
[32] Ibid. 301.
[33] [1916] 1 A.C. 242.

corporation they must show two things: first, that the corporation is a tortfeasor against whom they are entitled to recover contribution under section 6 (1), and secondly, that the claim against the corporation is brought within one year of the cause of action arising against the corporation. The first difficulty in Mr. Diplock's way is a decision of Birkett J. in *Merlihan* v. *A. C. Pope Ld., Pagnello Third Party.*[34] In that case, which is somewhat similar to the present, Birkett J. held that the cause of action to be considered was that arising on the original accident. It was argued in that case that where a person was claiming indemnity or contribution under section 6 (1), the cause of action did not arise until, at any rate, judgment had been given against him so that he had become liable to the injured person. Birkett J. said[35]: "The conclusion to which I "have come is that it is not competent for the defendants to "claim contribution from the third party. I so hold on the "express ground that the third party is protected by the "Limitation Act, 1939, because the cause of action in fact, "accrued on [the date of the accident]."

In *Hordern-Richmond Ld.* v. *Duncan*[36] Cassels J. said[37]: "If it had not been for the decision of Birkett J. it may well be "that no such application would have been made. I find it "difficult to say that I should have arrived at the same con-"clusion as Birkett J. arrived at upon the same facts. I take "the view that the Limitation Act only starts to run in favour "of a third party in such circumstances as these when the "defendant has been made liable for the damages."

Mr. Diplock urged that the decision of Birkett J. was wrong, and that the time did not begin to run until this court had held that the first defendants were liable to the plaintiff. In support of that he referred to *Collinge* v. *Heywood*,[38] which decided that in the case of a contract to indemnify, the cause of action did not arise until the party to be indemnified was called on to pay, and *M'Gillivray* v. *Hope*,[39] which was dealing with contributions under the Workmen's Compensation Act, 1925, to be made by previous employers of a man to whom the last employer was bound by the statute to pay compensation. That was on appeal from the Court of Session, and Lord Tomlin said[40]: "I have no "doubt upon the true construction of clause 9 of the [Various "Industries (Silicosis) Scheme, 1928] (1) that the last employer "is the only person who is under liability to the workman for "the compensation; and (2) that the provision whereby the last "employer is able to recover something in respect of the com-"pensation from previous employers is for the benefit and "protection of the last employer, and not for the benefit of the

[34] [1946] 1 K.B. 166; 61 T.L.R. 508; [1945] 2 All E.R. 449.
[35] [1946] 1 K.B. 166, 170.
[36] [1947] K.B. 545; 63 T.L.R. 193; [1947] 1 All E.R. 427.
[37] [1947] K.B. 545, 552.
[38] (1839) 9 Ad. & El. 633.
[39] [1935] A.C. 1; 50 T.L.R. 475.
[40] [1935] A.C. 1, 9.

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" workman. I am also of opinion that the words ' such con-
" ' tributions as in default of agreement may be determined by
" ' arbitration ' do not mean ' contributions ' in the strict sense of
" that word, that is to say ' sums provided to make up the
" ' amount payable to the workman,' but mean such sums by
" way pro tanto of indemnity to the last employer for what he
" has paid for compensation as in default of agreement may be
" determined by arbitration. Further, under the English law,
" where one who is liable to pay a sum of money to another is
" entitled against a third party to be indemnified in whole or in
" part against what he has so to pay, he cannot recover on the
" indemnity against this third party where he himself has made
" no payment in respect of his own liability. . . ." Neither of those two cases was referred to in *Merlihan's* case.[41]

I share with Cassels J. doubts concerning the decision in *Merlihan's* case.[41] Certainly, if I were approaching this matter apart from authority, I should take the same view as Cassels J. I appreciate that the cases to which I have referred were not before Birkett J.

Although I accede to Mr. Diplock's argument on the first point, there is a further difficulty which faces him. He has to show that the corporation is a tortfeasor who either is liable or would have been liable at suit. It is clear that where the word " liable " occurs in section 6 (1) (*c*) it means " held liable," and a person cannot be held liable without being sued to judgment. It seems to me that the ordinary meaning of the word here is that if the other tortfeasor has been sued, and sued to judgment, and held liable, contribution can be obtained from him. Also that if he has not been sued at all, but if he had been sued, and sued to judgment, he would have been held liable, recovery can also be made against him. The distinction which is made in paragraph (*c*) is between the tortfeasor who has been sued to judgment and the tortfeasor who has not been sued at all, or sued to judgment.

Mr. Diplock pointed out quite rightly the absurd and arbitrary results which follow in the case of a person protected as against the injured party by the Public Authorities Protection Act, 1893, and section 21 (1) of the Limitation Act, 1939. He also quite rightly pointed out that section 6 (1) (*c*) is intended to deal only with the position as between the joint tortfeasors, and that it would be ridiculous if one tortfeasor's right of recovery against another depended on the whim of the plaintiff as to when he brought the action, whether he allowed his case to be dismissed for want of prosecution, or whether he entered into a bargain with one of the other tortfeasors not to proceed against that tortfeasor. Mr. Diplock would have me read the section as giving him a right to recover against any tortfeasor who is at fault, whether he has been held liable by being sued to judgment,

[41] [1946] 1 K.B. 166.

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or whether, although held not liable when sued to judgment, he would have been so held if the action had been brought at the time when the cause of action arose.

I find it impossible to read section 6 (1) (*c*) in this way. Paragraph (*c*) is drawing a distinction between somebody who has been sued and somebody who has not, and provides, in effect, that contribution may be recovered from any other tortfeasor who is sued and held liable or, if not sued, would, if sued, have been held liable. By "sued" I mean sued to judgment.

The result, as Mr. Diplock pointed out, on that construction, produced certain absurdities, and there is little doubt that the legislature had not got the point in mind that might arise under the Public Authorities Protection Act, 1893. But it would be wrong, and it is no part of the duty of this court, to supply gaps in legislation. In *Magor and St. Mellons Rural District Council* v. *Newport Corporation*,[42] Lord Simonds made it clear that in the construction of the statute "the duty of the court "is to interpret the words that the legislature has used," and it has no power to fill in any gaps disclosed. I feel that the wording here is so plain that, despite the results to which Mr. Diplock has referred, I am constrained to adhere to the plain construction of the section and not to fill gaps in it. For these reasons I think that his claim to recover contribution against the corporation fails, though not for the reason given by Birkett J. in *Merlihan's* case.[43]

If I were wrong, I would apportion the blame two-thirds to the first defendant and one-third to the corporation.

*Judgment for plaintiff against first defendant.*

Solicitors: *Owen White & Catlin; Stanley & Co.; J. H. Milner & Son.*

J. D. P.

[42] [1952] A.C. 189; [1951] 2 T.L.R. 1163; [1951] 2 All E.R. 839.

[43] [1946] 1 K.B. 166; 61 T.L.R. 508; [1945] 2 All E.R. 449.

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[CHANCERY DIVISION.]

* *In re* BROOKE. JUBBER *v.* BROOKE.

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*Feb.* 11, 12, 13.

[1952 B. No. 1956.]

Upjohn J.

*Will — Construction — Words of futurity — Gift "unto and equally "between all my brothers and sisters the children of any being then "dead taking the share their parent would have taken if living"— Substitution—Whether grandchildren entitled as joint tenants or tenants in common.*

A testator, after bequeathing to his wife the interest on £1,000 for her life, directed: "From and after the decease of my said

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" wife, I give and bequeath the said sum of £1,000 or the invest-
" ments representing the same . . . unto and equally between all my
" brothers and sisters the children of any being then dead taking the
" share their parent would have taken if then living " :—

*Held*, first, that the gift to the testator's brothers and sisters was a vested gift to those who survived the testator, subject to being divested in favour of their children, if they respectively died in the lifetime of the widow leaving children :—

*Greenwood* v. *Greenwood* (1939) 55 T.L.R. 607 followed.

*Held*, secondly, that the class of brothers and sisters, whose children were entitled to participate in the investments, included those who predeceased the testator, on account of the use of the words " the share their parent would have taken if then living," but consisted only of those who were living at the date of the will, but predeceased the widow, since the word " any " referred back to " all my brothers and sisters."

*Loring* v. *Thomas* (1861) 1 Dr. & Sm. 497; and *Miller* v. *Gerrard* [1947] A.C. 461; 63 T.L.R. 265 considered.

*Held*, thirdly, that the children of any brother or sister entitled to a share of the investments took that share as joint tenants.

*In re Froy* [1938] Ch. 566; 54 T.L.R. 613; [1938] 2 All E.R. 316 considered.

ADJOURNED SUMMONS.

By his will, dated January 16, 1919, William Brooke, who died on February 15, 1926, after bequeathing to his wife the interest on £1,000 for her life and after disposing of his residuary estate, directed as follows: " From and after the decease of my " said wife I give and bequeath the said sum of £1,000, or the " investments representing the same, . . . unto and equally " between all my brothers and sisters the children of any being " then dead taking the share their parent would have taken if " living."

The testator had two brothers and seven sisters, of whom (a) four sisters were dead at the date of the will; (b) the two brothers and another sister were living at that date, but predeceased the testator; and (3) two sisters survived the testator and of these one only survived the testator's widow.

The testator had 29 nephews and nieces, of whom 18 survived him and nine were known to be still living at the date of the commencement of these proceedings.

This summons was taken out by the legal personal representative of the testator. He was the executor and universal legatee of his mother, who was the only daughter of the testator, who survived the testator's widow. The questions raised by the summons were whether the class of brothers and sisters of the testator, whose children were entitled to participate in the distribution of the said investments, consisted of (a) brothers and sisters who survived the testator but predeceased his widow; or (b) those who were living at the date of his will but predeceased his widow; or (c) all his brothers and sisters who predeceased his widow and whether alive or dead at the date of his will.

The further question was raised whether the children of any brother or sister of the testator entitled to a share of the said

investments took the share as joint tenants or as tenants in common.

*R. S. Lazarus* for the plaintiff.

*M. J. Albery, E. M. Winterbotham, J. L. Eley,* for various defendants.

The following cases were referred to in argument: *In re Webster* [1]; *Miller* v. *Gerrard* [2]; *Tytherleigh* v. *Harbin* [3]; *Loring* v. *Thomas* [4]; *Barraclough* v. *Cooper* [5]; *In re Lambert* [6]; *In re Williams* [7]; *In re Birchall* [8]; *Greenwood* v. *Greenwood* [9]; *In re Froy.* [10]

UPJOHN J. This is a summons to determine the true construction of the will of William Brooke, who died on February 15, 1926. His will was duly proved on April 17 of that year and there has been a grant de bonis non to the plaintiff on August 11, 1949.

The testator, after appointing executors and giving two small legacies, said: "I also give and bequeath to my wife the interest "on £1,000, the one half part of the sum invested by us under "our marriage settlement, for the term of her natural life." Then he dealt with his residuary estate and directed his trustees "to pay and divide the balance then remaining unto and equally "between my three sisters, Thirza, Naomi, and Mahala in equal "shares and to whom I give and bequeath the same the children "of any sister being then dead taking the share their parent "would have taken if living." Then he continues: "and from "and after the decease of my said wife I give and bequeath the "said sum of £1,000, or the investments representing the same "and after payment of all expenses connected with the same "including any expenses of realization unto and equally between "all my brothers and sisters the children of any being then dead "taking the share their parent would have taken if living." It is the last bequest of the sum of £1,000 after the decease of the wife with which this summons is concerned. The wife died on February 9, 1945.

The testator's family was somewhat complicated. He had, in all, two brothers and seven sisters. I do not propose to set out all the facts in detail. It is sufficient to say that there was one sister, a spinster, who died before the testator and before the date of his will. That was Sarah Elizabeth Brooke. He also had a sister, Mary Brooke, who survived him and died a spinster on April 3, 1936. He had a large number of nephews and nieces.

The first question which I have to consider is whether the gift "equally between all my brothers and sisters" is a gift to such

[1] (1883) 23 Ch.D. 793.
[2] [1947] A.C. 461; 63 T.L.R. 265.
[3] (1835) 6 Sim. 329.
[4] (1861) 1 Dr. & Sm. 497.
[5] [1908] 2 Ch. 121n.
[6] [1908] 2 Ch. 117.
[7] [1914] 2 Ch. 61.
[8] [1940] 1 Ch. 424; 56 T.L.R. 408; [1940] 1 All E.R. 545.
[9] (1939) 55 T.L.R. 607.
[10] [1938] Ch. 566; 54 T.L.R. 613; [1938] 2 All E.R. 316.

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brothers and sisters contingently on their surviving the widow, or whether it is a gift which vested at the death of the testator. Mr. Lazarus, on behalf of the plaintiff, argues that it is a vested gift. His client is interested indirectly in the estate of Mary Brooke who, as I have said, survived the testator and subsequently died a spinster. On the other hand, Mr. Albery, for the first defendant, submits that, on its true construction, the gift is contingent on the brothers and sisters surviving the widow. The gift in terms is "equally between my brothers and sisters" and that prima facie would vest at the death of the testator. But it goes on, "the children of any being then dead taking "the share their parent would have taken if living." Mr. Albery submits that those words show that the real truth of the matter is that the gift to the brothers and sisters was intended to be contingent on their surviving the widow. I feel unable to accept that submission. In my judgment, the case is really governed by the decision of the Privy Council in *Greenwood* v. *Greenwood*.[1] Apart from that authority, I should have come to the same conclusion, namely, that this gift was prima facie vested and the subsequent words are not sufficient to turn that vested gift into a gift contingent on surviving the widow.

Much greater difficulty arises on that part of the gift which gave something to the children of the brothers and sisters who do not survive the widow. There are three claimants. The first class of claimant, represented by the plaintiff, submits that, on the true construction of this will, it is a gift to the brothers and sisters who survive the testator, with a gift in favour of the children of the brothers and sisters so surviving the testator but dying before the tenant for life; in other words, it is a true clause of substitution. The original class is the brothers and sisters who survive the testator, and the persons in that class are divested of their previously vested gifts if they die in the lifetime of the widow leaving children. That is the first contention.

The second contention, put forward by Mr. Albery on behalf of the first defendant, is that the gift should be read in this sense: that it is a gift to all the brothers and sisters alive at the date of the will, but that class is reduced in this way, that, in the case of those who are not alive at the date of the death of the tenant for life leaving children, their children step into their shoes. That is what has been called a clear substitutional gift.

Mr. Hawkins, in the third edition of his book on Wills, has described that type of gift at page 297 in this way. "Besides "gifts to issue purely substitutional, engrafted on a gift to "children as a class, and independent gifts to children and issue "of children concurrently, there is a third class of cases, in which "the substitution, if it can be called such, takes place before

[1] (1939) 55 T.L.R. 607.

" the members of the primary class are ascertained, but on the " other hand takes place only as regards those who at the date " of the will had the capacity of becoming members of the class. " Thus the issue of children dying in the testator's lifetime are " entitled, but the issue of children dead at the date of the will " are excluded."

The third contention, which is submitted by Mr. Winterbotham on behalf of the second defendant, is that on its true construction there are here two original gifts—that is to say, there is a gift to brothers and sisters alive at the death of the testator, and an independent gift to the children of those brothers and sisters who are not alive at the date of distribution, that class comprising brothers and sisters who have died at any time, whether before or after the date of the will or during the subsistence of the life interest. Those are the three contentions.

This type of gift has been the subject-matter of discussion in a very large number of authorities, several of which, very properly, have been cited to me. I think that it is only necessary to refer to one or two, and that it will be convenient to do so at this stage of my judgment before returning to the language of the will. The first case is the well-known one of *Loring* v. *Thomas*.[2] I do not propose to read the headnote, because I am referring to this authority solely for some observations of a general character which were made during the course of his judgment by Kindersley V.-C.: " Now, of course, the question is " one entirely of intention, and it is obvious that in cases of " this kind a testator may mean to include as objects of his " bounty, or he may mean to exclude, the issue of the pre-" deceased children."

He had already defined the term " predeceased children " as signifying those of the first generation, " who were dead at " the date of the will." Then he says: " When a testator directs " that issue shall represent or stand in the place of or be sub-" stituted for a deceased child, and take the share which their " parent would have taken if living, he may intend such " representation or substitution to apply only to the case of a " child dying subsequently to the date of his will and before the " time of his own death; or he may mean it to extend also to " the case of a child who was already dead at the date of the " will. The solution of the question, which of the two he intended, " must of course depend on the language he has used in directing " such representation or substitution. He may use language of " such restricted import as to be inapplicable to any children " but such as were living at the date of the will. But, if he " uses language so wide and general as to be no less applicable " to a predeceased child than to a child living at the date of " the will, then the direction as to such representation or sub-" stitution must be held to embrace both." The whole of that

[2] 1 Dr. & Sm. 497, 510.

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passage was cited with approval by Lord Macnaghten in the House of Lords in *Barraclough* v. *Cooper*,[3] that case being reported only as a note to the case of *In re Lambert*.[4] I will continue with the judgment of the Vice-Chancellor: "Before I "proceed to examine in detail the language of this will, I will "make one or two preliminary observations which (although "they are little better than truisms) it will be useful to bear in "mind, not only in considering the terms of this will but also "with reference to some of the decided cases bearing on the "question.

"And, first, I would observe that, with reference to a bequest "to the children of A, there is this obvious distinction between "a child of A living at the date of the will and a predeceased "child of A, that the former is one of those whom the testator "intends to benefit by the bequest, whereas the latter not only "cannot take under such a bequest but he is not intended by "the testator to benefit, for no one intends to make a bequest "in favour of a dead person. If, therefore, a testator, in "directing that the issue of a deceased child shall represent or "stand in the place of their parent, uses language importing "that they shall take the share which he intended for the "parent, of course the issue of a predeceased child cannot be "included, because the testator could not have intended to give "any share to a child then already dead.

"On the other hand, I would observe that a predeceased child "of A and a child of A living at the date of the will stand "upon the same footing in this respect: that not only they are "both equally children of A, but they both equally answer the "description of children of A who would, if they were living at "the testator's death, have been entitled to a share under a "bequest to the children of A. That description is merely "hypothetical it speaks not of what will happen, or even of what "may happen, but only of what would have happened upon a "certain hypothesis; and of course putting a hypothetical case "does not at all involve the assumption that the hypothesis is "true, or even that it is possible. Suppose a testator, having by "his will made a bequest to the children of A, were to add to "this: one child of A (Thomas) is already dead, and I direct that "his issue shall represent him and stand in his place, and shall "be entitled to the same share which Thomas would have been "entitled to if living at my decease. Surely that language "would be perfectly correct and appropriate. Thomas, though "already dead, and therefore incapable of taking a share, and "not intended to take a share, would, upon the hypothesis of "his being alive at the testator's death, have been entitled to "a share under the bequest to the children of A, and the "testator would be correctly speaking of the share which Thomas "would have been entitled to upon that hypothesis, although "the hypothesis is impossible."

[3] [1908] 2 Ch. 121. [4] [1908] 2 Ch. 117.

The only other authority to which I desire to refer on this part of the case is the more recent case in the House of Lords of *Miller* v. *Gerrard*.[5] The headnote reads: "A "testatrix died in 1944, having by her trust, disposition and "settlement, made in 1942, directed her trustees to divide the "residue of her estate 'equally between my sisters . . . ; And "'it is hereby declared that in the event of any of my said "'sisters . . . who may have predeceased me, leaving lawful "'issue, such issue shall be entitled to the share or shares "'original and accruing which their parent would have taken "'by survivance, and the share of any of my said sisters . . . "'dying without leaving lawful issue shall be divided among the "'survivors of them and the lawful issue of any of them as may "'have died before me leaving such issue in equal shares per "'stirpes.' At the date of the execution of this document the "testatrix had six sisters living; a seventh had died leaving a "daughter who survived the testatrix:—*Held*, (per Viscount "Simon, Lord Macmillan and Lord du Parcq, Lord Thankerton "and Lord Simonds dissenting) that the daughter of the deceased "sister was not entitled to a share of the residue, since, on the "true construction of the trust disposition and settlement, the "class referred to was that of the sisters alive at the date of its "execution." That was a Scottish case and a Scottish will, but the applicable law was treated in the House of Lords as being equally appropriate to a Scottish or English will. It appears that the majority of the House, influenced I think by the presence of the words "said sisters" in those two places, decided that the testatrix was intending to benefit a class of sisters alive at the date of the will, that class, of course, being subject to diminution by death before the death of the testatrix; that the gift over was only of those shares intended for the original class of sisters alive at the date of the will; that the testatrix did not intend to benefit any sisters dead at the date of her will; and that, therefore, the issue of sisters dead at the date of the will could not claim under the second branch of the gift.

Lord Macmillan read with approval the passage from the judgment of Kindersley V.-C., part of which I have already read. I think that the only other passage to which I need refer is that in the opinion of Lord du Parcq,[6] who, after referring to a passage in the seventh edition of Jarman on Wills, which, I may note, has been excised from the eighth edition, says: "I am "happy to think that no 'rule' is laid down in *Loring* v. "*Thomas*[7] which prevents a judge from arriving at a testator's "meaning by considering the words which the testator has used, "read as a whole, or from giving effect to clear language in "a will. My noble and learned friend Lord Macmillan has "already quoted from the judgment of Kindersley V.-C. the one

[5] [1947] A.C. 461; 63 T.L.R. 265.
[6] Ibid. 483.
[7] 1 Dr. & Sm. 497.

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" proposition for which *Loring* v. *Thomas* [8] is an authority. In the " case of *Wardlaw's Trustees* [9] the Lord President concisely and " accurately stated the effect of the Vice-Chancellor's judgment " when he said: ' The pith and substance of the observations of " ' the learned Vice-Chancellor are that you must take the " ' language of the testator in its natural sense and discover from " ' it whether the issue of a parent who predeceased the execution " ' of the will are excluded; or whether the language is wide " ' enough to include them.' So understood, the rule (if rule " it should be called) in *Loring* v. *Thomas* [10] need never strain " the judicial conscience, and will not conflict with what has so " often been declared to be the paramount rule of construction: " it is, as Lord Fleming said in *Wardlaw's* case,[11] ' just an " ' example of the more general rule that the intention of the " ' testator must be derived from the actual language used by " ' him.' I will only add that when the decision of your Lord- " ships' House in *Barraclough's* case [12] was cited to the Court " of Appeal in England, perhaps for the first time, and while it " was as yet unreported, in the case of *In re Cope; Cross* v. " *Cross*,[13] the court (Cozens-Hardy M.R. and Buckley and " Kennedy L.JJ.) rightly held themselves free to decide the " particular question before them upon the precise words of the " will, and reversed a decision founded upon a similarity of " language to that of the will in *Loring* v. *Thomas*.[14] ' It would " ' be erroneous,' said Buckley L.J., ' or misleading, to deal with " ' this case by reading first the will in *Loring* v. *Thomas* [14] and " ' then seeing how this will differs from that will.' "

With those observations of Kindersley V.-C. and the House of Lords to guide me, I return to a consideration of this will. It seems to me that there would have been much to be said for the contention of Mr. Lazarus, that this is really a gift to the brothers and sisters who survive the testator with a strictly substitutional gift in favour of the issue of those brothers and sisters who survive the testator but die before the tenant for life; but I have a difficulty about accepting this view, having regard to the words " the children of any being then dead," which plainly means dead at the date of distribution on the death of the widow, " taking the share their parents would have taken if then " living." If Mr. Lazarus' construction is right, it would have been quite unnecessary to use any words of condition. The words would have begun " if living," importing a hypothetical condition. If that be limited to brothers and sisters who survive the testator, there is no need to use those words. It would have been sufficient to say: " The children of any being then dead " taking their parents' share." Therefore, it seems to be clear, having regard to the use of those words—" the share that parent

[8] Ibid.
[9] 1940 S.C. 286.
[10] 1 Dr. & Sm. 497.
[11] 1949 S.C. 286.
[12] [1908] 2 Ch. 121n.
[13] [1908] 2 Ch. 1.
[14] 1 Dr. & Sm. 497.

" would have taken if living "—that the testator was bringing in as objects of his bounty a class of brothers and sisters who predeceased him, because it was only of them that it was said that they would have taken if living.

But the real problem—and it is a problem of great difficulty —which I have to consider is whether the class of predeceasing brothers and sisters includes those who die before the date of the will. I confine myself entirely to the language of this will, and it seems to me that that problem is answered entirely by the words of this will. This will means one of two things. It first may mean " equally between all my brothers and sisters, the " children of any of my said or before mentioned brothers and " sisters being dead taking their parent's share." That is one way of reading it. If it is so read, then, in my judgment, the answer must be that the issue of those dead at the date of the will do not take; because if the original class is " all my brothers and sisters " the testator cannot have been intending to benefit the brothers or sisters dead at the date of the will. Taking as the following words, " the children of any of the before mentioned class," it necessarily follows that no such children can predicate of themselves that their parent was in the former class and can come into the latter. Therefore, the children of brothers and sisters who die before the date of the will are necessarily excluded. That is one construction.

The alternative construction is to read it in this way: " Equally between all my brothers and sisters who survive me, " the children of any of my brothers and sisters who are dead " at the date of distribution taking the share which their parents " would have taken if they had been alive." In other words, the word " any " does not refer back to the word " all " in the former class but is a new and more comprehensive class, namely, the children of all my brothers and sisters regardless of when they die. Which of those two views is correct? I confess that commonsense would seem to direct that the testator probably intended to indicate the latter, for there seems no good sense in cutting out the nephews and nieces merely because their parents were dead before the date of the will. But I am not sure that that is a safe guide to the construction of this will. The words are ambiguous. The authorities show that the cases fall on one side or other of the line, and there are very fine distinctions in them. On the whole, I think that the true way of reading this is: " All my brothers and sisters the children of any of my " said or before mentioned brothers and sisters," and so on, for two reasons. First, I think that the word " any " grammatically refers back to the word " all," and that therefore the class of children who take can only be derived from the earlier class, that is the class of all their brothers and sisters, those being brothers and sisters in existence at the date of the will. That is only a slight indication. There is another indication, admittedly only slight, to be found in the earlier gift of

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residue. That gift is to three named sisters with a proviso to "the children of any sister being then dead," and so on. The word "any" in that context is used quite plainly as the words "said" or "before mentioned." In my judgment, the testator was using the word "any" in that sense in this will. Accordingly, in my judgment, the nephews and nieces of brothers and sisters dead at the date of the will do not take.

One further point remains to be decided, and that is whether the class of nephews and nieces who take take as joint tenants or as tenants in common. There is no doubt that the usual rule where there is a gift to a compound class is that double words of severance are required; and it is claimed that there are no double words of severance here. Reliance has been placed on the decision of Simonds J. in *In re Froy*.[15] After considering a number of cases, he said: "I must observe that Fry J. had "*Penny* v. *Clarke* [16] and *In re Sibley's Trusts* [17] before him when "he decided as he did the case of *Crosthwaite* v. *Dean*,[18] and "I think I am bound to hold, as he did, that double words of "severance are not necessary where you have a gift in shorthand "such as he had there, and as I have here. It is not a case in "which, a compound class being the object of the testator's "bounty, the testator has gone on to say that the children of "children, that is to say, the substitutionary class, are to take "between them their parents' share. Where that is said, the "testator has defined, and is presumed to have defined com-"pletely, what is the nature of the interest which they take. "He has said they are to take their parents' share; he has not "gone on to use words which import they are to take as tenants "in common and not as joint tenants."

Looking at the words of this will, I cannot come to the conclusion that these words can be described as in shorthand, in the manner meant by Simonds J. It is perfectly true that there is no direct gift to the children, although the word "taken," I think, imports a gift to them. It would have been perfectly easy for the testator to have said: "Equally between all my "brothers and sisters the children of any being then dead taking "equally between them the share their parents would have "taken." I can find no word of severance here in the gift to the children. Accordingly, in my judgment, they take as joint tenants.

Therefore, I shall declare that a share of the investments representing the sum of £1,000 has fallen into the estate of the testator's deceased sister, Naomi Brooke. I shall also declare that the class of brothers and sisters of the testator whose children are entitled to participate in the said investments consists of those who were living at the date of his will but predeceased the widow. Finally, I declare that the children of

[15] [1938] Ch. 566, 570; 54 T.L.R. 613; [1938] 2 All E.R. 316.
[16] (1860) 1 De G. F. & J. 425.
[17] (1877) 5 Ch.D. 494.
[18] (1879) 40 L.T. 837.

any brother or sister entitled to a share of the investments take such share as joint tenants.

*Declarations accordingly.*

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Solicitors: *Light & Fulton; Robbins, Olivey & Lake; Gardiner & Co., for Clabburns, Norwich; D. J. Smalley.*

J. L. D.

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[QUEEN'S BENCH DIVISION.]

## *WINGROVE *v.* PRESTIGE & CO. LD.

1953
*Jan.* 26, 27, 28, 29.

[1951 W. No. 1953.]

Hilbery J.

*Invitor and Invitee—Knowledge by invitee of danger—Lapse of time between that knowledge and occasion when danger re-encountered—Whether fresh warning necessary by invitor.*

*Building—Scaffold—Scaffold protruding across access to building site—Safe means of access to "every place at which any person . . . has "to work"—Duty limited to persons having to work on scaffold—Building (Safety, Health and Welfare) Regulations*, 1948 (*S.I.* 1948, *No.* 1145), *regs.* 4 (11), 5.

The plaintiff, a clerk of works at a building site where the defendants were erecting a school for his employers, was, in the course of his employment, hurrying down a narrow passage, when he struck his head on a scaffold pole, which protruded horizontally across the passage, and received a serious injury. The passageway was one of the means of access to the buildings and the plaintiff was aware of the presence of the scaffold and of the danger; although he had not been down the passage or had occasion to visit that part of the site for five or six weeks he knew that the scaffold had not been removed. In an action for damages by the plaintiff, in which it was conceded that the relationship between the plaintiff and the defendants was that of invitee and invitor, and in which the plaintiff alleged negligence at common law and breach of regulations 4 and 5 of the Building (Safety, Health and Welfare) Regulations, 1948:—

*Held*, that, assuming that the scaffold was an unusual danger, although there might be cases where there was such a lapse between the point of time when an invitee had full knowledge of a danger and when he next went on to the premises as an invitee that the knowledge of the invitee on the first occasion could not be relied upon by the invitor without any further warning, the question whether a fresh warning should be given must be a question of fact, depending on all the circumstances of the case; that, since the danger in the present case was so open and apparent, and the invitee had been well acquainted with it a mere five or six weeks before, it was impossible to say that an ordinary careful invitor would regard it as reasonably necessary to give the invitee a fresh warning; and that, therefore, the plaintiff's claim based on common law negligence failed.

*London Graving Dock Co. Ltd.* v. *Horton* [1951] A.C. 731; [1951] 1 T.L.R. 949; [1951] 2 All E.R. 1 considered.

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*Held*, further, that the duty imposed by the regulations on a contractor who erected or altered a scaffold did not give a right against the contractor to any person who suffered through a non-compliance of those regulations but was limited by the words of regulation 4, "having regard to the purpose or purposes for which "the scaffold is designed," to a duty towards persons using the scaffold; that the words "sufficient safe means of access shall be "provided to every place at which any person has . . . . to work" in regulation 5 accordingly meant access to a place of work by persons who had to work on a scaffold and not by persons whose work was unrelated to the purpose for which a scaffold was erected, and that, therefore, the defendants owed the plaintiff no duty under the regulations. The action accordingly failed.

ACTION.

The plaintiff, a man of 63 years of age who had 50 years' experience of the building trade, was employed by the Middlesex County Council as clerk of works at a building site where the defendants, building contractors, were erecting a primary school for the Middlesex County Council. On the south side of the buildings, all of which were in course of erection, there was a block of ancillary buildings between the walls of which and the playground wall a passageway, 9 ft. 9 ins wide and 9 ft. 5 ins. long, led from the kitchen and sloped up to level yards; this passageway was a way in and out of the building site, and beyond it there was a temporary service road. The whole site was small, the distance from the south wall of the ancillary building to the south side of the dining room in the main building being a little over 15 yards.

Two or three months before June 29, 1950, the defendants, in the course of the building operations, had erected a scaffold round the ancillary buildings; as the brickwork was completed the scaffold was taken down, but, to act as a support for further scaffolding which would be required later on, a bridle and a ledger pole, tubular scaffold poles, were left extending horizontally about 5 ft. 7½ ins. from the ground across the bottom of the passageway leading from the kitchen to the yards. When they had been put up the plaintiff noticed that these poles had been placed across the opening and that they were at the height at which somebody might bang his head, and he complained of the danger to the defendants' foreman. The poles were left in position and no steps, such as lagging or painting with white paint, were taken to minimize the danger. About five or six weeks before June 29, 1950, the builders were taken off the brickwork at the south side of the site and were put on to work at the north end of the main building.

On June 28 the builders returned to work at the south end of the site, and on June 29, in broad daylight, when the plaintiff was in the ancillary buildings looking at window frames he looked out and saw two of the workmen about, as he thought, to "sneak "off." He hurried out to intercept them, going by the passage-way, and having forgotten about the pole banged his left forehead

hard against it. Although the plaintiff had not been down that passageway, nor had occasion to inspect it, for about five to six weeks, he had frequently used the passageway when the builders were working on the south part of the site and was well acquainted with the danger, and, at the time in question, knew that the scaffold had not been removed.

The plaintiff was a one-eyed man, and as a result of the bang on his forehead his other eye was so injured that he lost the sight in it, and became totally blind.

He claimed damages against the defendants, alleging that his accident and the injury to his eye were caused by breaches by them of their statutory duty under the Building (Safety, Health and Welfare) Regulations—in particular that, in breach of regulations 4 and 5 [1] no sufficient safe means of access was provided to the place where he had to work, in that the passageway, owing to the presence of the scaffolding tube, was not a sufficient safe means of access to the kitchen block or from the kitchen block to those parts of the building site to which it afforded an access. He also alleged negligence at common law, in that, among other things, the defendants placed a dangerous obstacle, namely, the scaffolding pole, across the passageway which they knew or ought to have known was likely to be used by him in the course of his work, without giving any warning to him.

The defendants denied liability; they alleged that the plaintiff's injuries were solely caused or contributed to by his own negligence in failing to look where he was going.

*J. H. Bassett Q.C.* and *W. Granville Wingate* for the plaintiff.

*Montague Berryman Q.C.*, *Marven Everett Q.C.* and *H. Tudor Evans* for the defendants.

The following cases were cited in argument: *Sheppey* v. *Matthew T. Shaw* [2]; *London Graving Dock Co. Ld.* v. *Horton* [3]; *Pratt* v. *Richards.* [4]

HILBERY J. stated the facts and continued: The plaintiff brings this action against the contractors who placed this scaffolding where it was, claiming compensation from them. First, he bases his claim upon the Building (Safety, Health and

[1] Building (Safety, Health and Welfare) Regs. 1948, reg. 4 (ii): "... it shall be the duty of every "contractor and employer of workmen who erects or alters any "scaffold to comply with such of the "requirements of regulations 5–30 as "relate to the erection or alteration "of scaffolds having regard to the "purpose ... for which the scaffold "is designed at the time of erection or "alteration."

Reg. 5: "Suitable and sufficient "scaffolds shall be provided for all "work that cannot safely be done on "or from the ground ... and sufficient "safe means of access shall so far as "is reasonably practicable be provided to every place at which any "person has at any time to work."

[2] [1952] W.N. 249; [1952] 1 T.L.R. 1272.

[3] [1951] A.C. 737; [1951] 1 T.L.R. 949; [1951] 2 All E.R. 1.

[4] [1951] 2 K.B. 208; [1951] 1 T.L.R. 515; [1951] 1 All E.R. 90n.

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Welfare) Regulations, 1948, and, further or alternatively, at common law, claiming that his relationship to the contractors occupying the site was, as a matter of law, that of an invitee because he was engaged on matters of business common to him and to them. There can be no doubt that the relationship between the defendants and the plaintiff was that of invitor and invitee, and that the plaintiff was an invitee. There is, I suppose, no authority so often relied on and quoted as *Indermaur* v. *Dames* [1] and the statement there of the measure of duty of an invitor to an invitee. It has recently been considered by the House of Lords in *London Graving Dock Co. Ld.* v. *Horton*.[2] There it was laid down that where a man is an invitee claiming against an invitor who is not his employer, the invitee's knowledge of an unusual risk exonerated the invitor from liability for damage which the invitee might sustain, because, in short, the duty of the invitor was, as Lord Porter pointed out, to use reasonable care to prevent damage to an invitee through the presence of an unusual danger of which the invitor knew or ought to know, but of which the invitee would not know, he using reasonable care for his own safety. Lord Porter said [3]: "Even "if there is unusual danger, the duty to use reasonable care to "prevent damage may be performed by notice, lighting or "guarding, and the recognition that the invitor may fulfil the "obligations imposed upon him by notice or lighting indicates "that adequate warning to the invitee may be a compliance with "the duty which is owed by the invitor." Towards the end of his judgment, after dealing with a certain number of cases, Lord Porter said of them [4]: "None seems to me conclusive of "the matter under discussion, and though natural sympathy "must make the inclination lean towards a desire to compensate "the respondent for his injury, the true principle is, in my "opinion, that a full appreciation of the danger on the part of "the invitee and a continuance of his work with that knowledge "is sufficient to free the invitor from liability for damage "occasioned by the insecurity of the premises to which resort "is made."

Giving judgment to the like effect, Lord Normand said [5]: "When there is already knowledge, notice or warning will have "no effect and the omission of it can do no harm. . . . The "knowledge must, therefore, be full knowledge of the nature and "the extent of the danger." Then he went on: "In the present "case the judge has found that the plaintiff had full knowledge "of the nature and the extent of the peril, and the finding is "beyond doubt warranted by the evidence, which shows that the "plaintiff had before his accident complained of the same defects "in the staging as were proved at the trial." Lord Normand,

[1] (1866) L.R. 1 C.P. 274; (1867) L.R. 2 C.P. 311.
[2] [1951] A.C. 737; [1951] 1 T.L.R. 949; [1951] 2 All E.R. 1.
[3] [1951] A.C. 747.
[4] Ibid. 749.
[5] Ibid. 755.

when considering the question whether the principle in *Donoghue* v. *Stevenson* [6] was applicable to such circumstances as Singleton L.J. had certainly suggested,[7] said [8]: "And in any event "there was in the present case an opportunity for inspection, "both by the plaintiff's employers and by the plaintiff himself, "so that the plaintiff actually knew as the result of his inspection "the very defects of which he now complains."

Lord Oaksey, considering the matter as one between invitor and invitee, observed [9]: "The duty of an invitor to an invitee is, "in my opinion, to give him a fair warning of any danger on the "premises which he cannot be expected to foresee. Premises "inevitably contain a great variety of dangers, some great, some "slight, some usual, some unusual, and it is, in my opinion, a "question of fact whether the danger is so slight or so usual that "no warning is needed or so great or so unusual that the invitee "with the actual knowledge of the premises which he is known "by the invitor to possess ought, in the opinion of an ordinarily "careful invitor, to be warned of it. The words of Atkin J. "in *Lucy* v. *Bawden*,[10] approved by your Lordships' House in "*Fairman* v. *Perpetual Investment Building Society*,[11] appear "to me directly applicable mutatis mutandis to the facts "of the present case: 'The danger, if any, was patent to "'everyone, and the plaintiff gave evidence that she herself had "'complained to the defendant's agent about it.'" So it was held in that case that, invitee though he was, the plaintiff could not recover upon the law as between invitor and invitee.

Assuming for the moment that this ledger or bridle across the way (which was one of the ways into and out of the site) was an unusual danger, none the less two questions remain: (1) had the plaintiff himself full knowledge of it?; (2) was it, if unusual, so unusual that the invitee, with actual knowledge of the premises which he was known by the defendants to possess, ought in the opinion of an ordinarily careful invitor to be warned of it? It is perfectly clear that the plaintiff had full knowledge of the presence of these poles and had complained of them because of their situation and the height at which they were placed. That is undeniably the fact up to the time when, five or six weeks before, the bricklayers had gone to work at the north end, and for the time being had left this part of this small site. The argument addressed to me is that no doubt—and the plaintiff has told us so—he knew and appreciated the danger of those poles thus situate up to the time when the men were taken away from that portion of the site and moved to the north end to continue work there, but, it is said, because there was a lapse of five or six weeks, during which time he had no particular reason to go to the south end of the site and, according to him, did not go there to inspect any work, that knowledge was not knowledge

[6] [1932] A.C. 562.
[7] [1950] 1 K.B. 421, 431.
[8] [1951] A.C. 737, 757.
[9] Ibid. 757, 758.
[10] [1914] 2 K.B. 318, 326.
[11] [1923] A.C. 74, 81.

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which lasted or could be relied on six weeks later at the time of the accident. I agree with the argument to this extent, there may be cases where a lapse of time between the point of time when an invitee has full knowledge of a danger—and for the moment I will assume an unusual danger—and that when he next goes to the premises as an invitee, is such that the knowledge which he had on the first occasion cannot be relied on to protect the invitor without any further warning. To give an example: if I call for a plumber to come to my house to do some work this year in December, and I warn him of two stairs at the end of a passageway which are rather unapparent and may be dangerous if he does not know of their existence, and if he does not have any occasion to come to my premises again for another 12 months, notwithstanding that he had knowledge of that danger 12 months previously when he visited my house, as an ordinarily careful invitor I ought to give him a fresh warning. I agree that it must be a question of fact in each case, in all the circumstances, whether a fresh warning should be given by an ordinarily careful invitor.

I cannot think that that is so in this case, much as I should like to. The plaintiff was a highly experienced clerk of works. He had spent 50 years of his life on building sites. As a clerk of works it was his business to know what work was going on at any part of the site at any time and to go at any time and inspect work on any part of the site. He knew full well what part of the scaffold had been dismantled and what had not; he said himself that before the accident he knew that these poles had not been removed. I find that in those circumstances, where there was a mere lapse of such a period of time as five or six weeks and where the danger of such an accident as occurred was so open and apparent to all, it is impossible to say that an ordinarily careful invitor would regard it as reasonably necessary to give a further warning, the invitee being an experienced clerk of works who had complained in no uncertain terms about the presence of these poles, and who certainly for something like one-and-a-half to two months had daily been about this part of the site successfully stooping to pass under these poles. It would be unreasonable, it seems to me, to say that he required a fresh warning about their presence merely because for a few weeks he had been attending more particularly to work at the other end of this quite small site where, having regard to the state of the work, the poles must have been observable from many points.

I have assumed for this purpose that these poles constituted an unusual danger, but in my opinion it is impossible to say that the plaintiff had not full knowledge of this danger on the day and at the time of the accident. That for the moment he forgot it does not necessarily mean that he had not knowledge, a continuing and full knowledge. Every one of us, in just such circumstances, with full knowledge and familiarity with a danger like that, can on occasions absent-mindedly forget it and bang his

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head severely. I am bound to confess that I do it myself, and I venture to think it is a thing which might very easily be done by any one of us. For that reason I think that the plaintiff, unfortunately for him, cannot successfully claim at common law under the principle enunciated in *Indermaur* v. *Dames*.[12]

So far I have assumed that this is proved to be an unusual danger on a building site. [His Lordship considered the evidence on this matter and continued:] The only way in which it may be put that it was unusual is because the presence of the poles at the height at which they were was not sufficiently indicated, and attention was not sufficiently drawn to their presence by their being dabbed with white paint or lagged or having something hung from them to call attention to the fact that they were there. On the whole, the conclusion to which I have come about that part of the case is that such a precaution as dabbing with some white paint or lime to call attention to a pole, or hanging a piece of something from it, is certainly adopted in public places and is a usual precaution to take to warn people, such as ordinary passers-by unaccustomed to building sites, that there is a scaffold pole at this height, but I am left in considerable doubt whether it really is a thing which can be said to be usual on a building site. My final conclusion is that it is often done, even on a building site, and often not done.

I now turn to the claim under the Building (Safety, Health and Welfare) Regulations, 1948. Here various complaints were made originally, but what now remains is a complaint that there was a failure to comply with regulation 5, enforceable, it is said, against the defendants by virtue of regulation 4. This is a matter of construction of the regulations and by no means, it seems to me, an easy matter, although I think that what emerges is eventually plainly one way. In the definition provision (regulation 3 (2)) a scaffold is said to mean: "... any temporary "structure on or from which persons perform work in connexion "with an operation to which these regulations apply, and any "temporary structure which enables persons to obtain access to "or which enables materials to be taken to any place at which "such work is performed, and includes any working platform, "gangway, run, ladder or step-ladder (other than an independent "ladder or step-ladder which does not form part of such a struc-"ture) together with any guard-rail, toe-board or other safeguards "and all fixings, but does not include a lifting appliance or a "structure used merely to support such an appliance or to "support other machinery or plant."

Regulation 4 is headed "Obligations under Regulations." It reads: "It shall be the duty of every contractor and employer "of workmen who is undertaking any of the operations to which "these regulations apply (i) to comply with such of the require-"ments of regulations 5–30 ... as affect any workman employed

[12] L.R. 1 C.P. 274; L.R. 2 C.P. 311.

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" by him . . . ; (ii) . . . and it shall be the duty of every con-" tractor and employer of workmen who erects or alters any " scaffold to comply with such of the requirements of regulations " 5–30 as relate to the erection or alteration of scaffolds having " regard to the purpose or purposes for which the scaffold is " designed at the time of erection or alteration." It is, of course, conceded, as it is bound to be, that the plaintiff, not being employed by the defendants, was not a workman employed by the defendants who would be affected by a non-compliance by the defendants with the requirements of regulations 5 to 30 under paragraph (i). The plaintiff relies on paragraph (ii). It is said that the words of that paragraph, being in the form in which they are and not limited in a way which would confine their operation to the situation as it would exist between a contractor and his servant, give a right against a contractor who erects or alters a scaffold to any person who suffers through a non-compliance with any of the regulations 5 to 30.

Regulation 5 reads: " Suitable and sufficient scaffolds shall be " provided for all work that cannot safely be done on or from the " ground or from part of the building, or from part of a per-" manent structure or from a ladder or other available means of " support, and sufficient safe means of access shall so far as is " reasonably practicable be provided to every place at which any " person has at any time to work." Reliance is put upon the last words of that regulation, and it is said that the defendants in erecting this scaffold broke that regulation in so far as it requires that sufficient and " safe means of access shall so far as is " reasonably practicable be provided to every place at which any " person has at any time to work." I am afraid I cannot do justice to the way Mr. Bassett put it, but he said that those words have to be connected with the subject-matter of regulations 5 to 30, particularly with regard to the erection or alteration which is dealt with in the first part of regulation 5, that is to say, the scaffold must not be erected at a point where it is sited so as to result in its interfering with a safe means of access. I find myself quite unable to give that construction to these regulations as they are worded. In the first place, it appears to me that the words relied on in regulation 4 indicate the limit, and indeed define the limit, of the general duty imposed on the person erecting or altering a scaffold. Regulations 5 to 30 are regulations to protect from danger as far as possible a man using a scaffold. The words in regulation 5 " and sufficient safe means of access " shall so far as is reasonably practicable be provided to every " place at which any person has at any time to work," must mean, it seems to me, a safe means of access to a place where a person has to work on the scaffold; otherwise there would be no relation to the purpose or purposes for which the scaffold is erected or designed.

Furthermore, regulation 5 cannot be intended to put on a contractor who merely erects a scaffold on a site, which may be

a very extensive site with many means of access to work at various points, the duty to provide safe means of access to every form of work at every part of that site. He is there to construct a scaffold, and to construct a scaffold which shall comply with the regulations having regard to the purpose for which it is being erected. That is his positive duty. When it is said, if I may put it shortly, that he must site the scaffold so that he does not interfere with the means of access or obstruct the means of access, I call attention to the fact that these latter words of regulation 5 impose a positive duty; they are mandatory—"sufficient safe means of access shall so far as is reasonably "practicable be provided." They must be provided. Those words are inapt to provide that there is a duty not to interfere with what would otherwise be a safe means of access. The provision of a safe means of access is positive; the interference with what is a safe means and has been provided as a safe means is an act, and to forbid the doing of that is to forbid an interference with what is already provided; but these words do not do that. That may seem to be a nice point, but I am trying to discover what these words are really intended to mean and what is the extent of the duty which they are intended to impose.

Lastly, they are words which are embedded in and part of regulations which in detail deal with the construction of a scaffold. If they had been intended to put on the builder of a scaffold on any site the duty to provide safe means of access to work quite apart from the scaffold but adjacent to the scaffold, or in any way leading up to the scaffold—I do not know how they could have put a limit on that—section 26 of the Factories Act, 1937, is a model of how it can be done. I am not using that word in a laudatory sense, but in section 26 it is said: "There "shall, so far as is reasonably practicable, be provided and main-"tained safe means of access to every place at which any person "has at any time to work." If this regulation had been intended to extend the duty placed on a contractor erecting a scaffold in the way in which Mr. Bassett has argued it should be interpreted, then it could have been said quite simply that the scaffold must be so erected or placed as not to interfere with safe means of access to or from work on the site. The regulation does not say that, and I am quite unable to find in the circumstances that the plaintiff can succeed on either branch of the law upon which reliance has been placed.

As I said before, this is a hard case because of the disastrous consequences to the plaintiff. If I had held that there was a breach of the regulations or a failure on the part of the defendants to discharge the obligations placed upon them at common law on the principle of *Indermaur* v. *Dames*,[12] I should have assessed the plaintiff's damages in gross at £3,500; but I should have felt, in the face of his evidence, that it was impossible to

[12] L.R. 1 C.P. 274; L.R. 2 C.P. 311.

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say that he was not at least as much at fault in not looking out for what was plain and apparent right on his eye-line, and in not avoiding it as all the other men had done, and that at least he must take half of the responsibility. I should therefore have said, if I had been able to find for him, that he should recover £1,750. As it is, I am bound to give judgment for the defendants.

*Judgment for defendants.*

Solicitors: *Philcox, Sons & Edwards; Barlow, Lyde & Gilbert.*

J. F. L.

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[QUEEN'S BENCH DIVISION.]

1953
*Feb.* 3, 4.

Gerrard J.

## *KING *v.* T. AND W. FARMILOE LD.

*Legal Aid—Costs—Failure to serve notice by legally assisted person—Legal Aid and Advice Act*, 1949 (12 & 13 *Geo.* 6, *c.* 51)—*Legal Aid (General) Regulations*, 1950 (*S.I.* 1950, *No.* 1359), *reg.* 15 (2).

Failure of an assisted person to give notice to another party to the proceedings under the Legal Aid (General) Regulations, 1950, reg. 15 (2), does not disentitle him from receiving legal aid, and his liability for costs is limited by section 2 (2) (*e*) of the Legal Aid and Advice Act, 1949, notwithstanding his failure to give such notice.

APPLICATION for costs.

The plaintiff was a legally assisted person who brought an action for damages for personal injuries against the defendants, his employers. Although a legal aid certificate had been granted to the plaintiff on June 9, 1951, before he commenced proceedings (his disposable income being assessed at £238 a year and his contribution at £41), solicitors for the plaintiffs had failed to serve notice as required by regulation 15 (2) of the Legal Aid (General) Regulations, 1950.[1]

The plaintiff failed in his action and counsel for the defendants asked for judgment with costs.

*Barry Chedlow*, for the plaintiff, submitted that, although there had been a failure to serve the notice, the certificate had been granted, and the plaintiff was a legally assisted person within the meaning of the Act.

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[Reported by Mrs. E. M. WELLWOOD, Barrister-at-Law.]

[1] Legal Aid (General) Regulations, 1950, reg. 15 (2): "Whenever "an assisted person becomes a party "to proceedings, or a party to pro- "ceedings becomes an assisted person, "his solicitor shall forthwith serve all "other parties with notice in Form "VI and shall, if at any time there- "after any other person becomes a "party to the proceedings, forthwith "serve similar notice upon such "person."

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*John Thompson*, for the defendants, submitted that they had no knowledge that a legal aid certificate had been granted, and were therefore entitled to their costs. It was the duty of persons to whom legal aid certificates were granted to give notice.

GERRARD J. said that the plaintiff was entitled to legal aid under regulation 2 (1) of the regulations as he was a person to whom a legal aid certificate had been granted. Regulation 15 (2) provided that whenever an assisted person became a party to proceedings his solicitor should forthwith serve all other parties with notice in Form V1. There was, however, no sanction provided in the regulations and it appeared to him, looking at regulation 15 as a whole, that the real object of the notice was to enable a party opposed, who was not an assisted perton, to put in an affidavit exhibiting thereto a statement of his own means. A failure to serve the notice might entitle a party at some stage to say that he had had no notice, and had therefore been prevented from putting forward evidence with regard to his own means, or from cross-examining the other party with regard to his means. He did not see how failure to give a notice which seemed, on reading regulation 17, to be part of the machinery for operating an inquiry under section 2 (2) (*e*) of the Act, could invalidate the plaintiff's entitlement to legal aid. The plaintiff's liability for costs was accordingly limited by the terms of section 2 (2) (*e*) of the Legal Aid and Advice Act, 1949.

*Order against plaintiff for costs not to exceed £15 payable by instalments.*

Solicitors: *J. R. Spencer Young; Blount, Petrie & Co.*

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[PROBATE, ETC., DIVISION.]

## * PRACTICE DIRECTION (SPANISH WILLS).

1953 *Feb.* 12.

*Practice—Spanish wills.*

The Senior Registrar of the Principal Probate Registry states that the Practice Note of November 17, 1939,[1] which requires certain certificates from the Registry of Last Wills at Madrid has been cancelled. The Senior Registrar considers that the validity of a Spanish will should be adequately established by an affidavit of law. In ordinary circumstances the registrars will not look behind the affidavit of law.

[1] [1939] W.N. 394.

[CHANCERY DIVISION.]

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*Jan.* 12, 13, 14, 15, 16, 20, 21; *Feb.* 10.

Harman J.

## * SHEPHARD AND ANOTHER *v.* CARTWRIGHT AND ANOTHER.

[1951 S. 2626.]

*Advancement — Father's use of children's names to help business activities—Allotments to children of shares in companies of which father a promoter—Subsequent sale of same shares by father—Signature by children of documents on allotment and sale without knowing their nature—Children unaware both of allotment and of sale—Later purchase by father of properties and creation of accounts for children's benefit of which children told—Allotments of shares not advancements.*

Shares in companies promoted by a father were allotted to his two younger children without their knowledge—they unquestioningly signing whatever he told them to sign—and subsequently (also without their knowledge) sold by him, under authorities signed by them. They did not know what they were signing or realise what the transactions were or even that they had taken place. The father had for long used his children's names to help him in his business activities.

He also acquired in each child's name a number of house properties of which he informed them, indicating that they were intended as provisions for them: and he formed an estates company in the books of which each child was credited with about £50,000 on loan account. By his will he made specific bequests and left annuities and bequeathed the residue to his three children.

After the testator's death the two children learned, because of the investigation of his books and papers, of the original allotments of the shares to themselves and of his subsequent disposal of them: and they made claims against his estate which involved treating those allotments as advancements:—

*Held,* (1) that the objection that records of oral declarations subsequently made by a deceased father tending to negative a gift were not admissible in evidence, did not apply to subsequent events, as, *e.g.*, in the present case, the way in which the shares and the proceeds of their sale were subsequently dealt with: and that those subsequent events, in so far as they threw light on the father's state of mind when the allotments were made, were part of the original transaction because intimately connected with it and were therefore admissible; *Grey* v. *Grey* (1677) 2 Swanst. 594, *Marshal* v. *Crutwell* (1875) L.R. 20 Eq. 328 and *Bone* v. *Pollard* (1857) 24 Beav. 283 applied; *In re Gooch, Gooch* v. *Gooch* (1890) 62 L.T. 384; 6 T.L.R. 224; *Sidmouth* v. *Sidmouth* (1840) 2 Beav. 447 and *Christy* v. *Courtenay* (1849) 13 Beav. 96 considered.

(2) That since each child knew that he or she had provision made for him or her in the form of the house properties, and knew also of the loan accounts in the estates company, it was obvious that, after the estates company had come into existence and the loan accounts been created, the father could not have intended his children to be allowed to prefer further claims against him by raking back into his past transactions.

(3) That, on a consideration of the evidence as a whole and of the circumstances on both sides, the father did not, in the earlier allotments of shares any more than in the transactions with the businesses, intend to commit himself by way of out and out gifts; and that, accordingly, the two children kept what they had but could not, by appealing to earlier events, ask for more; *Devoy* v. *Devoy* (1857) 3 Sm. & G. 403 applied.

ACTION.

The following statement of facts is taken substantially from the judgment:—By his will, made in December, 1946, the testator, Philip Edward Shephard, bequeathed specifically a number of properties and left annuities amounting to £1,800 a year before bequeathing the residue to his three children. During the 1930s he made a great deal of money out of building and selling small houses. In the peak year, 1933, one of the companies in which he was interested, and which had a nominal capital of £1,000, made a profit of upwards of £340,000. He died in 1949, and at the time when he made his will he still passed for a rich man, being possessed of one or more yachts, several houses in England and an estate at Montego Bay in Jamaica. After his death, however, owing to investigations of the defendant, Hedley Spain Dunk, a chartered accountant, who had been connected with some of his business affairs, had made his income tax returns, and was appointed an executor, his estate was sworn for probate purposes at £94,000 gross with a net estate of nil, a result due to the claims of two of his children which were the subject of the present inquiry.

In April, 1950, two of the executors—namely, the defendant Dunk and Joseph Osmond Cartwright, the testator's son-in-law and husband of one of the claimants—issued an originating summons asking a number of questions and couched in a form which was quite irregular. That application came before Danckwerts J. in chambers, who refused to make any order on it except to forbid the executors to admit the children's claims. Thereafter, the present action was started by writ in which two of the children were plaintiffs and two of the executors defendants; it was in form as defective as the former originating summons, and Harman J. said that, though in these days points about form were out of fashion, he must register a protest against the growing practice of ignoring the proper way of bringing claims to trial, and observed that claims of the kind then before him, which would more than exhaust an estate, could be adjudicated on only in a creditors' administration suit unless the executors admitted assets and submitted to be personally liable. The present action was not entitled in the matter of the testator's estate, nor was administration asked for, nor did the defendants decline to admit assets, nor did they plead plene administravit praeter. Altogether, almost everything was wrong which could be wrong. In particular, it was proposed that these claims should be adjudicated on in the absence of the third child, who himself claimed to be a creditor of the estate, and whose share of residue would be completely absorbed if the claims were successful. His Lordship observed that, no doubt, executors properly represented an estate, but that it could not, in his judgment, be right that the only defendants in such a case as the present should be, first, the husband of one of the claimants, and, secondly, the accountant whose researches were the origins of the claims and without whom, indeed, it

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would never have occurred to the claimants that they had any claims against a father who had already treated them with great generosity.

It seemed to his Lordship, however, that the matter could be put right by causing the writ and statement of claim to be amended and by making a general administration decree together with a number of special accounts and inquiries designed to investigate the claims made or pending. Such of them as related to the plaintiffs he treated as having been adjourned to him before certificate under the usual power for that purpose. His Lordship also directed that the decree be served on the third son, Philip Edward Shephard junior, who attended the hearing by counsel in opposition to the claimants. All that was done.

The claims made were similar, and of a remarkable character. They rested on what was called "the presumption of advancement" existing between a father and his children, and were said to arise out of gifts made to each child in 1929, or thereabouts, the making of which had been disclosed only by a recent search through the father's books and papers after his death. Against the alleged gifts each claimant was willing to bring into account other sums or shares placed in his or her name from time to time, so that each claim was for the balance of a running account. [His Lordship observed that he had never seen the presumption of advancement called into that particular service.]

The testator had an insurance business registered under the Business Names Act in the name of "R. D. & P. E. Shephard." Those were two of his children, Philip, born in 1901 and David (one of the claimants), born in 1913. Also registered as a partner was his daughter Winifred (Mrs. Cartwright, the other claimant) born in 1906. The testator also started at least two other businesses, one called Townsend & Page, which stood in Winifred's name and a furnishing business registered as the property of David and one Grimes and subsequently converted into a limited company. Thus, the testator for long used his children's names to help his own business activities, about which David and Winifred were not consulted and knew nothing.

In 1918 the testator's first wife died, and in 1919 he married a woman by whom he had no issue and who was still living at the date of these proceedings.

In 1929 the testator went into the business of speculative building with one Leo Mayer. They promoted five small private companies, each having a capital of about £1,000 which the two promoters divided between themselves and their families. Philip, the eldest son, was by this time of age and helped his father in business; Winifred was of age, and David, an infant, had just left school and was employed in the building business. Neither Winifred nor David knew anything about the allotments made in their names.

By 1934 the venture was an immense success, and the testator and Mayer promoted a public company to acquire their interests, called the Ideal Building and Land Development Co. Ltd., which, by agreement dated May 16, 1934, agreed to acquire all the shares in the five private companies for £700,000, of which £300,000 was to be satisfied in cash and £400,000 in shares, the latter being entirely attributable to acquiring the shares in the main house-building company, New Ideal Homesteads, Ld. Half the consideration went to each family, so that there was payable, as the price of shares standing in Winifred's name, £26,737 10s. cash and 40,000 shares of £1, and, as the price of those in David's name, £45,937 10s. cash and 40,000 like shares. David and Winifred signed this agreement, David also witnessing Mayer's signature; but in these proceedings, each of them denied knowing of its existence, saying that they were accustomed to signing documents for their father and ready to sign anything that he put before them without inquiry. In connexion with this transaction, the testator procured each claimant to sign a power of attorney covering the sale of the shares, and an authority to the public company to pay direct to the testator the cash proportion of his half of the purchase consideration. The powers of attorney were not used, but the other documents were used to authorize the testator to receive from the new company £145,000 total cash consideration which he did on May 25, 1934. The remaining £5,000 in cash was payable in respect of shares registered in the name of his wife, who apparently did not receive it. On the same day the testator paid £157,000 through the Leadenhall Street branch of Barclays Bank to his current account at the Beckenham branch, and transferred £133,000 of that to a deposit account. On May 29, however, he re-transferred the money from the deposit account to his current account, and opened a deposit account in Winifred's name for £19,277 10s. and in David's name for £42,060 5s. In these proceedings it was pointed out that that credit to David's deposit account was short by £3,877 5s. of the £45,937 10s. expressed to be due under the agreement of May 16, which it was suggested, might be explicable by a cheque for that amount drawn on the previous day—May 28, 1934—in favour of " Shephard," the payee being unidentified, but not being David. Similarly, the amount paid to the credit of Winifred's deposit account was short by £7,460 10s. of the cash expressed to be due to her under the sale agreement, which was said to be accounted for by cheques amounting to that sum drawn by the testator in favour of two accounts at Lloyds Bank at Dartford, one of which was in Winifred's name and one in that of the business of Townsend & Page before mentioned. Both accounts had been used for that business, and the payments only sufficed to clear off overdrafts and thus to close down the business.

Next, the testator sold the share consideration passing to the children. David's shares were sold first for about £88,000, which

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was credited to his deposit account on June 15, 1934. Winifred's shares were sold in August at a lower price for just under £60,000, which was credited to her deposit account on August 2, 1934. At some time after the deposit accounts were created, and before 1935, the testator procured from each of the two claimants a further authority requesting the bank to honour the testator's signature for withdrawals from the deposit accounts. By these means, the whole of the sums to the credit of the deposit accounts were withdrawn by the end of 1935 and employed by the testator for his own purposes. It was out of these transactions that the claims arose.

In 1935 the testator promoted a new private company called "Philip Edward Shephard Estates, Ltd.," of which he had sole control, and most of the money withdrawn from the claimants' deposit accounts went to buy real or leasehold property in this company's name. The testator, in 1935 and 1936, caused to be made in this company's books entries showing Winifred a creditor to the extent of some £50,000 on loan account, in which position she remained *vis-à-vis* the company: and in these proceedings she offered to give credit for those sums against her claims. Similarly, David was credited between 1935 and 1939 with rather over £47,000 against the estates company, and he was willing to bring in that amount. His case, however, was further complicated, notably by dealings in the shares of a company called "Woodside Garden Suburb, Ltd." In March, 1935, about £47,000 was drawn from David's deposit account and credited to Philip, who used the money to buy 880 shares in that company at £45 a share. Those were first held in Philip's name apparently as the testator's nominee; of them, 580 were subsequently transferred by Philip to the testator and 300 were transferred gratuitously to David, representing a cost of £13,500, which he offered in these proceedings to bring into account. In addition, each claimant offered to bring into account £250, the price of shares of that nominal amount in the estates company, the whole of the capital in which, amounting to £1,000, was paid for, in effect, out of moneys standing to the credit of Winifred's deposit account. The remaining shares were registered as to 250 in Philip's name, as to 200 in the testator's name and as to 50 in that of his wife. Also £20,000 drawn out of David's deposit account in March, 1935, was deposited by the testator with the Eastbourne Mutual Building Society in four sums of £5,000, one in his own name and one in the name of each child including Philip. These three latter sums were repaid in 1936 and credited to the children in their accounts with the estates company. £750 out of David's deposit account was used to buy shares in his name in the furnishing business earlier mentioned, which had now been incorporated. That venture was a failure. Finally, £430 was paid to David himself in connexion with a small business in which the testator had set him up.

The resulting claim of Winifred was something over £36,000. That involved treating the original allotments of the shares in the private companies as advancements and showing the testator as discharging himself, except for the sums used for Townsend and Page, by the creation of her deposit account. Thereafter, appropriations out of the deposit account were debited to the testator who, on the other hand, was credited with the loan account created with the estates company and with the 250 estates company shares.

David's claim, based on similar lines, amounted to over £72,000 and the two claims more than sufficed to exhaust the estate, with the result that the claimants would divide it between them to the detriment of the annuitants and of their elder brother, and that the Crown would take nothing by way of estate duty.

Each claimant swore an affidavit in support of the originating summons [characterized by Harman J. as very uncandid documents], starting with a categorical statement which begged the whole question; namely, that before 1934 the testator made various gifts of shares to the deponent. The general tenor of the executors' evidence was followed [Harman J. stated that no one would guess that neither of these children had any knowledge whatever of the transactions up to the end of 1934 until after their father's death.] During the hearing each claimant went into the witness-box and testified to a complete state of ignorance about the whole matter. Each of them did, however, disclose what nowhere appeared in the filed evidence, namely, that the testator from time to time purchased houses in the name of each child and that, at any rate from the time when the child was 21, he or she was informed of these purchases and told that they were gifts. Mrs. Cartwright said that she had never received the rents of the houses in her name during her father's lifetime, and did not ask for them. She said that she thought that they were presents to come to her eventually. In fact, however, she did appear to have had the benefit of the rents, at any rate after the estates company was formed in 1935, they being credited to her loan account. She said that she was quite unaware that Dunk was preparing income tax returns on her behalf, and it appeared that he never consulted her on those matters, but acted on the testator's instructions. The testator apparently secured his daughter's signature to the returns without telling her what they were.

David's position was somewhat different. He was employed by New Ideal Homesteads Ld. on the road-making side, and drew a salary accordingly. He knew of the existence of the companies, but not that his name was registered as a shareholder. He remembered the testator talking of "selling his "business for a great deal of money." In 1935 the testator formed a small company, Richard Shephard Ld., for David, and

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the £430 paid out of his deposit account to him was connected with the affairs of that company. He said that the testator put in £3,000 or £4,000 on loan account but withdrew his claim when the business was sold, in 1943. A typical instance of their relations was that in 1936 the testator paid David about £5,000 to buy a property at Battle, which he did: but it was conveyed into the name of the estates company which later sold it to Winifred. David observed that the testator had thought of giving him this property, but had changed his mind. David knew that he was a shareholder in the estates company, and supposed that the testator had given him the shares. He also knew about the loan account in 1936 or 1937, and observed that he did not feel the money was really his. He was also a director from 1936 of Woodside Garden Suburb Ld. and knew of the shares in his name and did not inquire how they had been paid for.

There was one further relevant transaction of a different nature from the rest. In 1936, the testator needed cash, and withdrew £10,000 from the funds of Woodside Garden Suburb Ld. That he used for his own purposes, but debited it against David, and when asked by Dunk what the transaction represented, replied that it was "David's capital withdrawn from the company." Dunk, as auditor, interpreted this obscure statement as meaning that £10,000 had been lent to David by the company and entered his name as a debtor to that extent. He said that he supposed that David had had the money. When, therefore, the company went into voluntary liquidation, as it did in 1938, and the assets began to be realized (a process continuing at the time of these proceedings) money fell to be paid to the contributors, they being by this time only the testator and David. As David was shown as a large debtor, no money has been paid to him but £8,065 was paid to the testator. That was known to David, who was himself one of the liquidators, and he year by year passed the distribution accounts after explanations by Dunk why he was not receiving any part of the money distributed.

*Sir Andrew Clark Q.C.* and *Victor Coen* for the plaintiffs.

*A. de W. Mulligan* for the executors.

*Sir Lynn Ungoed-Thomas Q.C.* and *F. B. Alcock* for the eldest child.

The following cases, as well as those referred to in the judgment, were cited in argument: *Hepworth* v. *Hepworth* [1]; *In re Cooper* [2]; *Cochrane* v. *Moore* [3]; *Taylor* v. *Davies* [4]; *Redington* v. *Redington*.[5]

*Cur. adv. vult.*

[1] (1870) L.R. 11 Eq. 10.
[2] (1882) 20 Ch.D. 611, 628.
[3] (1890) 25 Q.B.D. 57; 6 T.L.R. 296.
[4] [1920] A.C. 636.
[5] (1794) 3 Ridgway Parl.Cas. 106, 190.

February 10. HARMAN J., reading his judgment, after stating the facts, considered the last transaction referred to above. He said that David's conduct in passing the distribution accounts was an extraordinary piece of acquiescence, but, when asked about it, he said that he supposed that all the money in the company was his father's and, therefore, saw no reason to question the payments. In these proceedings he claimed that those payments should be readjusted, and it was agreed that, had the distributions been made on the footing that the testator and not David was the debtor for £10,000, the £8,065 so far distributed should not have been allocated in whole to the testator but as to £6,347 to David and £1,718 to the testator. His lordship said that, in his judgment, there was no answer to that claim, and held that that adjustment must be made and further distributions carried out on a like footing. It was said that David's claim in that respect was barred by his acquiescence, but his lordship stated that, in his judgment, he did not know enough of the facts to debar him in law. The adjustment claimed by David must be made and further distributions carried out on the footing that the testator and not David was the debtor for £10,000. His lordship continued:— Apart from this apparently isolated transaction, the claims obviously require the most careful scrutiny. No inkling of the transactions before 1935 apparently reached the claimants during the father's lifetime, though both of them have always been directors of the Estates Company and have known of their loan accounts there. If, however, the original allotments of shares in their names with the private companies are to be treated as advancements to them, so that they became once for all the beneficial owners of those shares, the rest of the claims follow logically on. It is said that the allotments, being unexplained and unaccompanied by contemporary evidence, must be taken to be advancements and that no evidence of the events in and subsequent to 1934 is admissible. This is tantamount to asking the court to decide the matter blindfold, and I for one am unwilling to take this course unless compelled to it by authority.

What, then, is the presumption of advancement? It is merely, as is explained by Eyre C.B. in his judgment in the leading case of *Dyer* v. *Dyer*,[1] White & Tudor's Leading Cases, 9th ed., vol. 2, p. 749, a circumstance of evidence which may be used to rebut the contrary principle under which money or stocks or property placed by A without consideration in the name of B are held in the absence of other evidence to belong to A by way of resulting trust.

Eyre C.B. expresses himself as follows: "The clear result "of all the cases, without a single exception, is that the trust of "a legal estate, whether freehold, copyhold, or leasehold; "whether taken in the names of the purchasers and others jointly,

[1] (1788) 2 Cox 92.

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"or in the names of others without that of the purchaser; "whether in one name or several; whether jointly or successive— "results to the man who advances the purchase money. This "is a general proposition, supported by all the cases, and there "is nothing to contradict it; and it goes on a strict analogy to "the rule of the common law, that where a feoffment is made "without consideration, the use results to the feoffor. It is the "established doctrine of a court of equity, that this resulting "trust may be rebutted by circumstances in evidence. The cases "go one step further, and prove that the circumstance of one "or more of the nominees being a child or children of the "purchaser, is to operate by rebutting the resulting trust; and "it has been determined in so many cases that the nominee being "a child shall have such operation as a circumstance of evidence, "that we should be disturbing land-marks if we suffered either "of these propositions to be called in question, namely, that such "circumstance shall rebut the resulting trust, and that it shall "do so as a circumstance of evidence. I think it would have "been a more simple doctrine if the children had been considered "as purchasers for a valuable consideration. Natural love and "affection raised a use at common law. Surely, then, it will "rebut a trust resulting to the father. This way of considering "it would have shut out all the circumstances of evidence which "have found their way into many of the cases, and would have "prevented some very nice distinctions, and not very easy to be "understood. Considering it as a circumstance of evidence, "there must be, of course, evidence admitted on the other side. "Thus it was resolved into a question of intent, which was "getting into a very wide sea, without very certain guides."

Where the relationship between the person who provides the property and him (or her) in whose name it is placed is that of father and child, that circumstance will lead the court in the absence of all other evidence to assume that an advancement was intended. But both the doctrine of resulting trust and its converse are only expedients designed to get at the truth where there is no other way of doing so; and presumptions of this sort are rather like the burden of proof in any ordinary cause which ceases to have any great importance where both sides can appear and adduce evidence.

Lord Eldon L.C. in *Finch* v. *Finch*,[2] cited in White & Tudor's Leading Cases, 9th ed., vol. 2, p. 766, said: "I remember "the case of *Dyer* v. *Dyer*[3]; which was very fully considered; and "the court meant to establish this principle; viz., admitting the "clear rule, that, where A purchases in the name of B, A paying "the consideration, B is a trustee, notwithstanding the Statute "of Frauds, that rule does not obtain, where the purchase is in "the name of a son: that purchase is an advancement prima "facie; and in this sense; that this principle of law and presumption is not to be frittered away by nice refinements."

[2] (1808) 15 Ves. 43, 50.

[3] (1788) 2 Cox 92.

It is, I think, one thing to read a warning against nice refinements, but quite another to detect what is nice in the many different circumstances that arise. For myself, I should not be inclined to consider the evidence so strong in the case of a speculator engaged in making his own and his family's fortune as in that of a man of great property under the old dispensation "advancing" his several children in the way then customary. The difficulty, of course, is that the alleged donor is dead. If he were alive he could go into the witness box and tell the court what his intention was in 1929 or 1934. See *Devoy* v. *Devoy*.[4]

I read the observations of Stuart V.-C. who said: "The only "question is whether the evidence of the father is admissible. "The transfer by the father into the names of himself, and his "wife and child, jointly, of a sum of stock, raises a presumption "that he intended it as an advancement. That presumption "may be rebutted by evidence. But in order to rebut it the "evidence must show the real nature of the transaction. Here "the evidence shows that the father intended to confer only a "qualified interest and not to make an absolute gift. From the "state of his circumstances at the time of the transfer he thought "he might be able to afford this sum of stock as separated from "the rest of his property, so as to secure it for the benefit of "himself and wife and child. But he considered it prudent to "preserve a dominion over it for himself, if his circumstances "should make it necessary for him to resort to it. It has been "said that the statement now made, at the end of nine years "after the transfer, is a mere parol declaration of his intention "at that time, and therefore not sufficient to rebut that pre-"sumption, which, according to the doctrine of the court, would "arise from the nature of the transaction as it appeared, without "explanation. In support of that argument it has been said "that if the father had died before he gave evidence of the nature "of the transaction no record would have been preserved of the "transaction, and the court must then have given effect to it "as an advancement to the child. The circumstance that if the "father had died the evidence would have been lost cannot in "the slightest degree affect the truth of the case where the "evidence is not lost. The only question now is whether the "court can disregard the evidence of the father altogether, as "if there had been no record of it at all. Where the conduct "of the father only raises a presumption, and the question is as "to the amount of evidence necessary to rebut the presumption, "it is too much to say that the evidence upon oath of the actor, "although subject to the qualification with which it must be "received as that of an interested witness, is to be wholly "rejected. If it be admissible at all, it rebuts the presumption."

[4] (1857) 3 Sm. & G. 403, 405.

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Therefore, if it be left there, there would be no need to have recourse to any presumption, and this is well stated in *Ex parte Cooper, In re Foster* [5] only reported, as far as I can make out, in the Weekly Notes. That is a case about advances by a father to a son. The facts are not stated, but Lindley L.J. says: "When the "parties to such a transaction are alive, and give evidence, there "is no occasion to resort to any presumption; the question is one of "fact."

It is clear enough that records of oral declarations subsequently made by the deceased father tending to negative a gift are not admissible in evidence, and the reasons for this are obvious, first that such statements are mere hearsay, and, secondly, the father cannot be cross-examined upon them. They are, therefore, inadmissible under the ordinary rules of evidence. There are similar objections to written statements of subsequent date, though perhaps they could now be got in under the Evidence Act, 1939, a consideration not present in the reported cases.

It does not seem to me that the same objection applies to subsequent events, as for instance the way in which the shares and their proceeds were dealt with in 1934 and 1935. These, so far as they throw light on what the father's state of mind was when the allotments were made, are, in my judgment, to be treated as part and parcel of the original transaction because intimately connected with it and therefore admissible. It is clear from the leading case of *Grey* v. *Grey* [6] that subsequent acts or events are admissible. In that case Lord Nottingham decided that the fact that the son had allowed his father to continue to take the rents and manage the property for the rest of his life ought not to rebut the presumption because of the filial duty owed by a son to his father, but he did not suggest that the subsequent perception of the rents by and the other acts of the father were not circumstances admissible in evidence.

The well-known case of *Marshal* v. *Crutwell* [7] is another instance. Sir George Jessel M.R. in his judgment, put its in this way: "As I understand it, the law is this: The mere circum-"stance that the name of a child or a wife is inserted on the "occasion of a purchase of stock is not sufficient to rebut a "resulting trust in favour of the purchaser if the surrounding "circumstances lead to the conclusion that a trust was intended. "Although a purchase in the name of a wife or a child, if "altogether unexplained, will be deemed a gift, yet you may "take surrounding circumstances into consideration, so as to say "that it is a trust, not a gift. So in the case of a stranger, you "may take surrounding circumstances into consideration, so as "to say that a purchase in his name is a gift, not a trust." He then proceeds to review the facts, and I find the words "What "afterwards occurred was this" and a reference to payment of

[5] [1882] W.N. 96.
[6] (1677) 2 Swans. 594.
[7] (1875) L.R. 20 Eq. 328, 329.

subsequent sums. Sir George Jessel M.R. then treats himself as a juryman "taking into view all the circumstances" and that includes subsequent circumstances, as the report shows.

In *In re Gooch*[8] Kay J. seems to go further in taking notice of subsequent written statements of the father. I feel some doubt about that case.

*Bone* v. *Pollard*[9] is another authority for considering the subsequent mode of dealing with a fund when deciding a question of advancement.

I think that statements, such as those to be found in *Sidmouth* v. *Sidmouth*,[10] that only contemporary acts of the father are admissible are too widely stated, if by "acts" it be meant to include circumstances. I observe that in *Christy* v. *Courtenay*,[11] Lord Langdale, the judge who decided *Sidmouth* v. *Sidmouth*,[12] says that the evidence must consist "mainly if "not exclusively" of contemporary circumstances.

It seems to me, therefore, that I am at liberty to look at the picture as a whole and to come to a conclusion on a consideration of all the circumstances.

The claimants, however, on the assumption that subsequent events might be held to be admissible, did not rely only on the original allotments, but in addition on certain circumstances: (1) Immediately before the shares in New Ideal Homesteads, Ld., were sold to the public company it suited the testator and his partner Mayer to declare a dividend at the rate of £25 10s. a share free of tax. This was the only dividend declared by any of these companies. This, so far as the testator was concerned, was money which he required to repay a debt which he owed to the company, and he did receive half of this dividend on the footing that he was the owner of half of the shares in the company, 300 of which were registered in his children's names. He repaid it at once to the company and so discharged his indebtedness. When, however, in February, 1936, inquiries were made of Dunk by the Revenue Authorities about the right to take this dividend and he applied to the testator for information, he was told that each of the children had "a beneficial interest "in the one dividend paid." The testator's motive in saying this was obvious. Add this dividend to his income, and nearly all of it would be payable by way of surtax, but in his children's hands only a small claim resulted. Nevertheless, this is no doubt a quasi-admission by the testator and one which it may be could not be impugned by a beneficiary under his will on the ground that it was made in order to defraud the Revenue. (See *Gascoigne* v. *Gascoigne*.[13]) It seems to me, however, that the principle of this case does not preclude another creditor, as Philip Shephard affects to be, from making this answer. No

[8] (1890) 62 L.T. 384.
[9] (1857) 24 Beav. 283, 286.
[10] (1840) 2 Beav. 447.
[11] (1849) 13 Beav. 96, 99.
[12] 2 Beav. 447.
[13] [1918] 1 K.B. 223; 34 T.L.R. 168.

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Harman J.

claim to this dividend appears in the statement of claim, nor is it mentioned in the evidence filed on the originating summons. This I do not understand, for though it relates to income and not to capital very large claims for interest have been included. Indeed, as first postulated compound interest was demanded. Even the claim to simple interest ignores the elementary rule that in calculating debts against an insolvent estate interest is ignored.

(2) The defendant Dunk testified that at the time of the sale to the public company the testator told him that he had received the whole purchase money and put it on a deposit account, with a view to re-investment and that he, the witness, then suggested to the testator that, as, to his knowledge, some of the shares in the private companies had stood in the children's names, deposit accounts should be created in their names also. To this advice the witness attributes the fact that the testator did create deposit accounts in the children's names for the bulk of the proceeds of these sales, so far as they represented shares in their names. I cannot think that there is any great weight in this consideration in view of the fact that the testator at the same time procured from each of the claimants the authorities which enabled him to treat the accounts as his own.

(3) In the recitals to the sale agreement occurs a statement that members of Mayer's family held their shares as nominees for him; no similar recital is included to deal with the Shephard family. I am asked to infer from this acknowledgment by the testator that he had no interest in the claimant's shares. I do not think this inference can be drawn, though the omission is a circumstance of evidence tending against the testator and to be taken into account.

(4) Money from Winifred's deposit account was used as already mentioned to pay the debts of Townsend and Page: this is only an inference drawn by Dunk from the equality of the figures. Anyhow, Winifred never claimed that she was anything but a nominee so far as this business was concerned. A like consideration applies to the money from David's deposit account used to finance or buy shares in the furniture business.

Neither of these children was ever told anything of the 1934 transactions, and they remained throughout the testator's life ignorant of the existence of the original allotments of the sale agreement, and of the deposit accounts. The testator did, on the other hand, acquire a number of house properties in the names of each of these children, and he told them about these as soon as they were of age, or as soon as the properties were bought, and indicated that these were intended to be provisions for them: each child knew he or she had provision made for him or her in this form and also knew about the loan accounts in the estates company. It is obvious that, after the estates company came into existence and loan accounts were created as they were, the testator cannot have intended that his children should be allowed

by raking back into his past transactions to prefer further claims against him. Each had been provided with some £50,000, and one can suppose that if in his lifetime a child had suggested that he or she was his father's creditor a very different will would have been left. This does not, of course, prove that the testator had not originally the intention of making a gift; but it seems to me that it makes it unlikely that he intended to commit himself at a time when his fortune was not made and his future was wholly nebulous.

It was not until 1934 that he was in a position to make substantial gifts to anyone, and the transactions of that year speak loudly against any intention to advance; for instance: (i) the whole of the estates company's shares were paid for out of Winifred's deposit account. These were distributed among the family, including some to her step-mother and to her elder brother. I cannot believe that if the testator had thought that the money in this deposit account was hers he could have felt free to use it in this way. (ii) The Woodside Park Estate transaction is another of the same kind. The testator cannot be supposed to have used £37,000 which he supposed to be David's money in buying shares in this company in the name of his brother Philip and, apparently, in fact for himself.

Considering the evidence as a whole, and doing my best to weigh the circumstances on both sides, I feel obliged to come to the conclusion that the testator did not in the earlier allotments of shares any more than in the transactions with the businesses intend to commit himself irrevocably by way of out-and-out gifts. I take the view, as indeed Stuart V.-C. did in *Devoy* v. *Devoy*,[14] quoted above, that these were only provisional arrangements not intended to remove his freedom of action, and I find no principle of law which prevents me from giving effect to that view. When the loan accounts in the estates company were created, the position was very different. Here the testator intended provision for the claimants, and he told them so, just as he did in the cases of the houses bought for them. If this be right, the claimants retain what they have, but cannot by appealing to earlier events ask for more.

On the view that I take, the question raised on the executors' plea of the Statute of Limitations does not arise, and I need not embark on it except to say that I do not see how, if I had taken a different view, the statute would, having regard to the claimant's ignorance, have afforded a defence.

*Order accordingly.*

Solicitors: *Douglas & Co.; MacDonnell; Sidney Pearlman.*

K. R. A. H.

[14] 3 Sm. & G. 403, 405.

[PROBATE, ETC., DIVISION.]

1953 *Feb.* 13.

## * PRACTICE DIRECTION (SUMMONSES).

*Practice—Summons—Counsel summons to registrar in London.*

On and after March 9, 1953, all summonses at which counsel appear will normally be heard during sittings before a registrar sitting at the Royal Courts of Justice, Strand, W.C.2, on Monday, Tuesday, Wednesday, Thursday and Friday afternoons in each week from 2.15 p.m. onwards. Any summons the hearing of which is estimated to last over half an hour may, if the solicitor so wishes, be referred to the Clerk to the Senior Registrar for a special appointment at the Divorce Registry, Somerset House. In vacation counsel summonses will be heard at the Divorce Registry, Somerset House. Solicitors are reminded that if either side intends to appear by counsel, the summons lodged in the Registry must be so marked, and the other parties notified.

B. LONG,
Senior Registrar.

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[PRIVY COUNCIL.]

J. C.† 1953 *Feb.* 23.

* EDGAR STAINES . . . . . Appellant;

AND

VICTOR LA ROSA . . . . . Respondent.

ON APPEAL FROM THE COURT OF APPEAL, MALTA.

*Malta—Trade mark—Registration—"Bata"—Printed in large cursive style—Particular and distinctive manner—Distinctive device or a fancy word—Industrial Property (Protection) Ordinance, Laws of Malta,* 1942 *Rev., c.* 48, *s.* 83 (*a*) (*c*).

On a claim by the respondent, on behalf of Bata National Corporation of Zlin, Czechoslovakia, to register the word "Bata," depicted by cursive writing, as a trade mark in respect of five of their productions, of which the principal was shoes:—

*Held*, that the word was not registrable as a trade mark in Malta under either section 83 (*a*) of the Industrial Property (Protection) Ordinance, as "a name of an individual or a firm name "of a commercial partnership, printed or impressed . . . in some "particular and distinctive manner" or section 83 (*c*) as "a "distinctive device . . . or fancy word . . . not in common use." [Those statutory provisions were identical with those contained in the British Patents, Designs, and Trade Marks Act, 1883.]

While it is doubtful whether a surname alone can be registered under section 83 (*a*) of the Ordinance (*In re Benz et Cie* (1913)

† *Present*: Lord Porter, Lord Tucker, and Lord Cohen.

29 T.L.R. 295; 30 R.P.C. 177; *Teofani & Co. Ld.* v. *Teofani* [1913] 2 Ch. 545; 29 T.L.R. 674; 30 R.P.C. 446), it may be that if it be shown in an individual case that a person is known in the trade by his surname only, that designation can be regarded as "a name" within the meaning of the Ordinance, but even assuming that "Bata" is a name within the meaning of section 83 (*a*), the method of imprinting the name "Bata" adopted in this case could not be regarded as particular or distinctive. To constitute printing in a particular and distinctive manner more is required than a small variation from the name printed in block capitals or in cursive writing or in the form of a signature.

*In re British Milk Products Company's Application* [1915] 2 Ch. 202; *In re Fanfold Ld.'s Application* (1928) 45 R.P.C. 325, and *Registrar of Trade Marks* v. *W. & G. Du Cros Ld.* [1913] A.C. 624; 29 T.L.R. 772; 30 R.P.C. 660, referred to.

*In re H. G. Burford & Co. Ld.'s Application* [1919] 2 Ch. 28; 35 T.L.R. 319; 36 R.P.C. 139, and *Teofani & Co. Ld.* v. *Teofani* [1913] 2 Ch. 545; 29 T.L.R. 674; 30 R.P.C. 446, which were decided under section 9 (5) of the English Trade Marks Act, 1905, had no bearing on a case where the special provisions of that subsection did not prevail.

Further, the word "Bata" was neither a fancy word—it was a name well known in Malta—nor a distinctive device—it was a name printed in ordinary lettering with slight immaterial variations.

Although the objection to registration to which the Board had acceded was not taken, or not taken clearly, in the Court of Appeal, it was a plain case where the mark was not registrable, and the Board felt it their duty to have regard to the purity of the register and, in conformity with the views expressed in *Paine & Co.* v. *Daniells & Sons' Breweries Ld.* [1893] 2 Ch. 567; 9 T.L.R. 457; 10 R.P.C. 217, 232, to reject the respondent's application.

Judgment of the Court of Appeal, Malta, reversed.

APPEAL (No. 2 of 1952) from a judgment of the Court of Appeal, Malta (Camilleri and Harding JJ., Borg C.J. dissenting) (December 13, 1950) which affirmed a judgment of Gauci J. in the Commercial Court, Malta (March 31, 1950).

The question for decision before the Commercial Court and in the Court of Appeal was whether the word "Bata" should be registered as a trade mark in Malta in the name of the Bata National Corporation of Zlin, Czechoslovakia, in respect of "tyres" and tubes," "technical rubber," "footwear and stockings," "shoe polish" and "shoe laces" pursuant to five applications made by the respondent to the Comptroller of Industrial Property, Malta.

Those applications for registration were opposed by the appellant, who was the Custodian for Enemy Property of Malta, and who in pursuance thereof began proceedings in the Commercial Court in that capacity, representing the Bata Overseas Shoe Co. Ld. of Valetta, Malta. The respondent, who was the defendant in those proceedings, was a member of the firm of La Rosa Company of Malta, and represented the Bata National Corporation.

Both the Commercial Court and the Court of Appeal decided in favour of registration.

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EDGAR STAINES
*v.*
VICTOR LA ROSA.

1953. January 13, 14, 15, 19 and 27. *Quass Q.C.* and *Guy Aldous* for the appellant.

*P. Stuart Bevan* for the respondent.

February 23. The judgment of their Lordships was delivered by LORD PORTER.—This is an appeal from a judgment of the Court of Appeal, Malta, which dismissed an appeal by the appellant from a judgment of the Commercial Court. In the Court of Appeal the Chief Justice dissented from the decision of his brethren and would have allowed the appeal.

The matter which the court had to determine was whether the word "BATA" should be registered as a trade mark in Malta on behalf of Bata National Corporation of Zlin, Czechoslovakia, in respect of five of their productions, of which the principal is shoes. No distinction, however, need be made between the five since the same considerations apply in each case.

Under section 85 of the Industrial Property (Protection) Ordinance of Malta (Laws of Malta, 1942 Rev., c. 48): "Any "person may have the exclusive use of a trade mark provided "he complies with the provisions of the following sections of this "Part." And section 86, so far as is material to the question at issue, prescribes:—"Any person who is desirous of securing for "himself the exclusive use of any trade mark, must present to "the Comptroller an application in the form annexed hereto, and "accompanied by: (*a*) two representations of the trade mark."

The prescribed form is in the following terms:—

"You are hereby requested to register the accompanying trade "mark, (.....) in the name of (*a*)....., who claims to "be the proprietor thereof."

The applicant is told under a note to (*a*) (above) to insert the name, address and business of the individual or firm on whose behalf his application is made.

Under these provisions Mr. Victor La Rosa, on behalf of Messrs. La Rosa Company, representing the Bata National Corporation of Zlin, Czechoslovakia, applied to register the word "Bata" as a trade mark of various goods produced by the Bata National Corporation. And in November, 1946, the application was duly advertised by the Comptroller as prescribed by section 90 of the Ordinance.

The type of mark which it is permissible to register in Malta is prescribed by section 83 of the Ordinance, which is in the following terms:—

"83.—Marks intended to distinguish the produce of any "industry or articles of trade are considered to be trade marks, "provided they contain at least one of the following particu-"lars:—

"(*a*) a name of an individual or a firm name of a commercial "partnership, printed, impressed, or woven in some particular "and distinctive manner; or

" (*b*) a written signature or copy of a written signature of the " individual applying for registration thereof as a trade mark; or

" (*c*) a distinctive device, mark, brand, heading, label, ticket, " or fancy word or words not in common use."

These provisions are identical with those contained in the British Patents, Designs, and Trade Marks Act of 1883. The right of registration is, however, qualified in some degree by section 84, which provides:—

" 84.—The marks and words referred to in the last preceding " section must be different from those already legally used by " other persons."

Section 91 of the Ordinance sets out the method by which the registration can be opposed. Anyone may do so by giving notice of opposition at the Office of the Comptroller and giving the grounds of his objection. In reply, the applicant may make a counterstatement, and if both statement and counterstatement are persisted in the objector must then bring an action before the Commercial Court. In the present case these steps were taken by the parties and a writ of summons was duly issued by the appellant on September 29, 1947, and served on the respondent. Ultimately, in the action which followed, both the Commercial and Appellate Courts gave their decision in favour of registration.

The facts with regard to the respective cases appear to be as follows, and are with sufficient accuracy summed up in paragraph 6 of the respondent's case. About 30 years ago a company registered in Czechoslovakia under the name Bata a.s. Zlin began to export to Malta goods of the type now sought to be protected under the mark " BATA," and continued to do so until the outbreak of war in 1939. Until 1932 the goods were supplied to a number of traders, but in that year a company at Tilbury, in England, known as British Bata Shoe Co. Ld., opened first one shop and gradually opened others in Malta where they sold goods manufactured by Bata a.s. Zlin wholesale and retail to the public under the mark " BATA."

By an agreement in writing dated August 3, 1938, Bata Tilbury sold as from January 1, 1939, the whole of the undertaking and assets of their business in Malta to a company known as Bata Shoe Company Overseas Ld. The agreement provided by clause 8: " 8. The vendors hereby agree that subject to the due per- " formance by the purchasers of their obligations under this " agreement the vendors will not at any time hereafter so long " as the said businesses are carried on by the purchasers do any " business on the Isle of Malta or in British West Africa. The " vendors undertake (subject as aforesaid) to cease all activities " there and not during the period aforesaid to sell or supply any " goods in either of the said territories unless authorized by the " purchasers in writing." And from that date the latter company carried on the business previously carried on by Bata Tilbury, using the name " Bata " in the head board of their shops.

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From 1924 until the outbreak of war all shoes sold in Malta under the mark BATA, whether sold by the Tilbury or Overseas Company or other retailers, were manufactured by Bata a.s. Zlin and were marked "Bata made in Czechoslovakia" and were imported direct from Bata Zlin. No evidence was adduced establishing that goods manufactured by any other firm had been sold in Malta under the mark Bata between the outbreak of war and the application in respect of the trade marks now in question, though apparently at some time under agreement with the appellant goods were sent after the end of the war by the Tilbury Company to Malta subject to a royalty of 2 per cent. on their c.i.f. value.

After the outbreak of war the Overseas Company was declared an enemy company and the appellant was appointed Custodian of Enemy Property in Malta, and in that capacity opposed the registration of the name. He said: "The word 'Bata' has been "used in Malta over a number of years to distinguish the pro- "ducts of the Bata Shoe Company of Tilbury and after 1938 "those of the plaintiff firm (*i.e.*, Bata Overseas) from other "similar goods sold by other firms. It follows, therefore, that "the registration of the word 'Bata' by another firm would "necessarily create confusion on the local market."

The respondent replied by asserting that the Bata firm at Zlin had been exporting to Malta goods of its own manufacture long before the formation of the Tilbury and Overseas Companies. It is therefore, he said, the plaintiff firm and the firm at Tilbury that, importing goods made by the Bata firm at Zlin, have been competing with that firm.

It appears that up to the date of the appellant's declaration the dispute or, at any rate, the main dispute, centred round the question whether the Bata National Corporation of Zlin was the successor or assignee or in some other way representative of Bata a.s. Zlin, and as to what was the position of the Tilbury and Overseas Companies vis-à-vis that body. The evidence appears to establish that, at any rate so far as shoes are concerned, the goods were obtained direct from Zlin whether the sales were effected through the Tilbury or Overseas Companies, and that no goods other than those manufactured at Zlin were ever put on the market at Malta under the mark "BATA." On the other hand, the evidence also establishes that the Overseas Company exhibited the words "Bata shoes" on its sign boards and sold them both wholesale and retail under that designation, and that the shoes were sold allegedly as British goods though marked "Made in Czechoslovakia."

Their Lordships, however, will assume that the name "Bata" had become descriptive of goods which were manufactured by Bata a.s. Zlin. In this state of facts the appellant made submissions to the Commercial Court that: (1) Since 1932 all Bata goods were sold in Malta first by the Tilbury Company and after 1938 by the Overseas Company and, therefore, if the

defendant firm ever had any rights in the mark they had lapsed. (2) That under the terms of a letter of June 22, 1939, Bata a.s. Zlin appointed the Tilbury Company their exclusive representatives for the British Empire except the Far East and Canada, and undertook not to sell in the representatives' territory or transact business in the name of Bata there up till December 31, 1949. (3) That the Bata Corporation should not be recognized as the successor of any or every right formerly enjoyed in Malta by Bata a.s. Zlin considering that Bata a.s. Zlin had been nationalized and the nationalization decrees were of a confiscatory nature; and (4) that the mark was no more than a surname and therefore not registrable.

To those submissions the respondent in substance replied that the Tilbury and Overseas Companies used the mark "Bata" as representative of Bata a.s. Zlin and in no other capacity, and that even if the mark "Bata" denoted no more than a surname yet it was impressed with characteristic features so as to render it easily distinguishable.

The judge agreed with the respondent upon both points. Of the form of the mark he said: "Since it is printed and impressed "in a particular and distinctive manner such as to render it dis- "tinguishable from others, the trade mark is acceptable for "registration."

In his submission to the Court of Appeal the appellant contended firstly that the facts established that the two companies acted on their own account and never as representative of Bata a.s. Zlin, and further that the Bata National Corporation could not be recognized as the successor of the original company inasmuch as it had been nationalized and such nationalization was of a confiscatory nature. In answer the respondent submitted that the rights of the Tilbury and Overseas Companies came to an end under the agreement of June, 1939, on December 31, 1949, and that the evidence established that those companies were in fact the representatives of Bata a.s. Zlin when selling its goods. Those contentions were stated to be "without prejudice to "other submissions."

On those submissions the Court of Appeal, by a majority, found, in agreement with the judge of first instance, that the two companies sold the products of Bata a.s. Zlin as its representatives, and further, that no evidence had been produced to show that Bata a.s. Zlin had been nationalized or, if nationalized, that the nationalization was of a confiscatory character. The Chief Justice differed on the ground that the respondent had not shown that he was the representative of Bata a.s. Zlin or that that firm actually existed at Zlin. He also held the respondent had not complied with the obligations imposed on him by sections 101 and 102 of the Industrial Property (Protection) Ordinance and had not put Bata a.s. Zlin in a position to be registered.

As regards this last matter their Lordships need only say that it is at least doubtful whether the provisions contained in those

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sections and in the section dealing with patents have any application to a case where the person applying to have a trade mark registered claims as being the original user of the mark or as his successor and not as an assignee, but in the view which their Lordships take of other questions it is not necessary to decide this point.

Their Lordships are conscious that they have set out at length a number of matters which are not strictly germane to the issue on which they propose to rest their judgment. They have done so in part in order that the parties may be assured that they have taken into consideration all the points presented to them and in part because an extreme economy of fact and submission appears in the record which has been presented to the Board, so that they have had, as best they could, to search out what had been proved and what had been contended. In this unsatisfactory nature of the record it is undesirable to reach a conclusion upon any matter in respect of which there may be doubt as to what was and what was not proved. The Board, in coming to a decision, have therefore confined themselves to a matter in which there was ultimately no dispute as to the facts.

On the evidence as finally established they are of opinion that the mark is not registrable under either of the headings put forward by the respondent, viz.:—(1) Under section 83 (*a*) as a name of an individual or a firm name of a commercial partnership, printed or impressed in some distinctive manner; or (2) under (*c*) as a distinctive device. Even in this matter the material presented to their Lordships when the hearing began was inaccurate.

The trial judge, as has been pointed out, found: "The word "'Bata,' however, has now acquired goodwill value and is well "known in connexion with shoes manufactured at Zlin; and "since it is printed and impressed in a particular and distinctive "manner, such as to render it distinguishable from others, the "trade mark is acceptable for registration."

Their Lordships found it difficult to appreciate upon what evidence this finding was based, since the only representation of the mark sought to be registered was depicted in block print which plainly lacked distinction. However, at a later stage, an accurate copy of the mark was produced, from which it appears that what may be described as a large cursive hand was adopted as the name or device which was sought to be registered, and if one were looking for slight differences between this and an ordinary printed or cursive hand, it would be possible to find them. But in their Lordships' opinion such an approach is not justified by the Act or by the decided cases.

It was contended before their Lordships, as stated above, that the view of the judge and of the Court of Appeal ought to be supported on one of two grounds, viz.:—(1) As in accordance with the opinion of the Commercial Court "Bata" was the name of an individual "printed . . . in a particular and distinctive

" manner "; or (2) as " Bata " was " a distinctive device or a " fancy word not in common use."

(1) Having regard to the observations in such cases (to quote two only) as *In re Benz et Cie* [1] and *Teofani & Co. Ld.* v. *Teofani*,[2] it is doubtful whether a surname alone can be registered under section 83 (*a*) of the Ordinance. It was argued, however, in the first place, that the word " Bata," though a surname, was the name under which Bata a.s. Zlin was known in Malta and could accordingly be described as its name; in the second place, that *Teofani & Co. Ld.* v. *Teofani* [2] was an authority for the proposition that a surname was not necessarily incapable of being registrable; and finally, that decisions generally upon this point were reached upon the terms of the English Trade Marks Act of 1905, which uses the phrase " the name " not " a name," and that under that Act the use of the definite article indicated that the actual name and not that by which the individual or firm was generally known must be used, whereas the use of the indefinite article did not warrant such an inference. In their Lordships' view such a distinction overstresses a slight and immaterial change in the wording of the Acts. But the line of demarcation between what is imprinting in a particular and distinctive manner and what is not requires further consideration, and it may be that if it be shown in an individual case that a person is known in the trade by his surname only, that designation can be regarded as " a name " within the meaning of the Ordinance. For the purpose of this part of the argument, therefore, their Lordships will assume that Bata is a name within the meaning of section 83 (*a*).

Nevertheless, it has to be shown that it is printed in a particular and distinctive manner. The judge has found that it was so printed, and there is nothing to indicate in the judgment of the Court of Appeal that the point was argued before it or, indeed, was ever brought to its notice. Furthermore, there is no reference in either court to the decided cases, and it may well have been thought in the courts in Malta that any difference between the lettering in use for this mark and ordinary block capitals or an ordinary cursive hand was sufficient. There is, however, a series of decisions in this country to the opposite effect. Such cases as *In re British Milk Products Company's Application* [3] (where a name written as a signature was held insufficiently distinctive), *In re Fanfold Ld.'s Application* [4] (in which registration of curved block characters with a scroll at either end was rejected), and *Registrar of Trade Marks* v. *W. & G. Du Cros Ld.*[5] (where a particular type of signature was not accepted)—to quote but three of the relevant cases—show that to constitute printing in a particular and distinctive manner more

[1] (1913) 29 T.L.R. 295; 30 R.P.C. 177.
[2] [1913] 2 Ch. 545; 29 T.L.R. 674; 30 R.P.C. 446.
[3] [1915] 2 Ch. 202.
[4] (1928) 45 R.P.C. 325.
[5] [1913] A.C. 624; 29 T.L.R. 772.

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is required than a small variation from the name printed in block capitals or in a cursive writing or in the form of a signature.

It is true that the decisions in *In re H. G. Burford & Co. Ld.'s Application* [6] and in *Teofani & Co. Ld.* v. *Teofani* [7] might be urged as giving some support to the respondent's argument, but both cases were decided not under the wording contained in the Ordinance or the English Act of 1883, but under section 9 (5) of the Act of 1905, which provided that: "A registrable trade mark "must contain or consist of at least one of the following essential "particulars . . . (5) any other distinctive mark, but a name, "signature, or word or words, other than such as fall within the "descriptions in the above paragraph (1), (2), (3) and (4), shall "not, except by order of the Board of Trade or the court, be "deemed a distinctive mark," and in each case a special application was made and granted under that section.

Those cases have therefore no direct bearing on a case where the special provisions of that subsection do not prevail, and in their Lordships' opinion, having regard to the cases decided upon the provisions of Trade Marks Acts apart from that subsection, the method of imprinting the name "Bata" adopted in this case cannot be regarded as particular or distinctive.

(2) If, however, he fails on this contention, the respondent maintains that the mark may be regarded as a distinctive device or mark or a fancy word not in common use.

A fancy word it is not—it was a name well known in Malta, whether it be regarded as used by the respondent or by the Tilbury or Overseas Companies. Nor does the fanciful use of a word make it a fancy word, e.g., "Melrose" of a hair restorer or "Electric" of velveteen (see *In re Van Duzer's Trade Mark* [8]).

Nor is it a distinctive device; it is a name printed in ordinary lettering with slight immaterial variations. To permit it to be registrable as a device would result in allowing the registration of names, which are not distinctive as names, under the assertion that they were distinctive as devices, and would throw open a wide extension of a field which has been carefully limited.

Their Lordships have, however, felt some difficulty in rejecting the respondent's contention, not because they feel any doubt as to the true interpretation of the Ordinance, but because the objection to which they have acceded, though taken in the Commercial Court, was not taken or, at any rate, not taken clearly, in the Court of Appeal. Indeed, it is not even mentioned in any of the judgments. But in a plain case where in the Board's opinion the mark is clearly unregistrable, they feel it their duty to have regard to the purity of the register and in conformity with the views expressed in *Paine & Co.* v. *Daniells & Sons' Breweries Ld.* [9] to reject the respondent's application and will humbly advise Her Majesty to allow the appeal.

[6] [1919] 2 Ch. 28; 35 T.L.R. 319.
[7] [1913] 2 Ch. 545; 29 T.L.R. 674; 30 R.P.C. 446.
[8] (1887) 34 Ch.D. 623.
[9] [1893] 2 Ch. 567; 9 T.L.R. 457; 10 R.P.C. 217, 232.

As, however, the argument which has succeeded appears to have either not been taken or, at least, not urged in the Court of Appeal, each party must pay its own costs of the proceedings in the courts of Malta and before their Lordships' Board.

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*Appeal allowed.*

Solicitors: *Ashurst, Morris Crisp & Co.; Thomas Cooper & Co.*

C. C.

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[CHANCERY DIVISION.]

## * *In re* F. G. (FILMS) LD.

1953
*Feb.* 12, 18.
Vaisey J.

[1952 F. 2397.]

*Cinematograph Film—British film—"Maker"—Sole maker—Person by whom arrangements for making undertaken—Agreement with American company to produce film with finance and all facilities from American company—Cinematograph Films Act,* 1938 (1 *&* 2 *Geo.* 6, *c.* 17), *ss.* 25 (1) (*a*), 44 (1)—*Cinematograph Films Act,* 1948 (11 *&* 12 *Geo.* 6, *c.* 23), *Sch. I.*

The applicants were incorporated under the Companies Act, 1948, with a capital of £100 in £1 shares, 90 of which were held by one director, J., an American citizen, 10 by the second, who was British, and none by the third, who also was British. The applicants' sole place of business was their registered office, and they did not employ any staff. They agreed to produce a film based on a story the film rights in which were in an American company of which J. was president, and which agreed to provide the finance and whatever facilities the applicants might require. The film was made in India, and the applicants applied to the Board of Trade to register it as a British film, which the Board of Trade, while admitting that the applicants were a British company as defined in the Act, declined to do on the ground that the applicants were not the "maker" of the film within the meaning of sections 25 (1) (*a*) and 44 (1) of the Cinematograph Films Act, 1938. On a summons by the applicants pursuant to section 31 of the Act:—

*Held*, (1) that to satisfy the requirement of section 25 (1) (*a*) the applicants must establish that they were the sole makers of the film; (2) that it was contrary to all sense and reason and to the proved and admitted facts to say that the applicants undertook the arrangements for the making of the film, as their participation in any such undertaking was so small as to be practically negligible, and as they had acted, in so far as they acted at all, merely as the nominees of the American company. The applicants' intervention was purely colourable, and they were brought into existence for the sole purpose of being put forward as having undertaken the arrangements necessary for the making of the film and of enabling it to qualify as a British film, and the Board of Trade's decision not to register the film as a British film was right.

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Adjourned summons.

On May 29, 1951, the applicants were incorporated under the Companies Act, 1948, with a capital of £100 divided into 100 shares of £1 each. There were three directors: one, an American citizen, who held 90 of the shares, and the other two British subjects, one of whom held the remaining 10, the other having no shareholding. The applicants had no place of business apart from their registered office, and did not employ any staff. They agreed to produce a film entitled "Monsoon," based on a story the film rights in which had been acquired by an American company called Film Group Incorporated, of which the American citizen who was the principal shareholder in the applicant company was president. Film Group Incorporated agreed to and did provide the necessary finance for the film and all the facilities required by the applicants for the production which took place in India. Pursuant to section 23 of the Cinematograph Films Act, 1938, as amended by the schedule to the Cinematograph Films Act, 1948, the applicants applied to the Board of Trade for the registration of the film as a British film. The Board of Trade admitted that the applicants were a "British company" as defined by the Act, being, within section 25 (2) thereof, "a company incorporated under the laws "of any part of His Majesty's dominions, being a company the "directors of which, or a majority of the directors of which, were "British subjects"; that the studio used in making the film was within Her Majesty's dominions, namely, in India; and that the statutory requirement concerning the labour costs had been fulfilled: but the Board refused to register the film as a British film on the ground that it was not made by the applicants.

By this summons the applicants sought a declaration (1) that they were the "maker" of the film "Monsoon" within the meaning of the Act and of the amending Act of 1948; (2) that throughout the time when the film was being made they were a British company within the meaning of the Act; and (3) that the maker of the film was, throughout the time that it was being made, a British company, namely, the applicants.

*Cyril Salmon Q.C.* and *Claude Duveen* for the applicants.

*Sir Reginald Manningham-Buller S.-G.* and *Denys Buckley* for the Board of Trade.

*Cur. adv. vult.*

February 18. Vaisey J., reading his judgment, after referring to sections 22, 23 and 25 of the Act of 1938 [1] and stating some of the facts continued:

[1] Cinematograph Films Act, 1938 (as amended by Sch. I to the Cinematograph Films Act, 1948), s. 22: "No person shall . . . deliver to an "exhibitor in Great Britain for "public exhibition therein any film "to which this Act applies, unless, "at the time of the delivery, the film "is a registered film; and no person "shall . . . exhibit to the public at a

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The sole question, therefore, which I have to decide is whether the applicants were the "maker" of the film. This is what they claim to be, but the respondent has decided that they were not and has, on that ground, refused to register the film "Monsoon" as a British film. The applicants, being aggrieved by that decision, are, in accordance with section 31 of the Act making the present application to the court. In substance, I am asked to reverse the respondent's decision and to say that "Monsoon" is a British film under the Act.

In section 44 of the Act the expression "maker" is defined as meaning, "in relation to a film, the person by whom the "arrangements necessary for the making of the film are under-"taken. . . ." This is perhaps a strange collocation of words which might in other circumstances give rise to some difficulty of interpretation. "Undertake" means, I think, "be responsible "for," especially in the financial sense, but also generally. So far as the present case is concerned, I think that it plainly suggests the following problem: was it the applicants alone who undertook the arrangements necessary for the making of the film, or did they do so in co-operation with some other person, firm or company, reading as including the plural number (in accordance with the Interpretation Act, 1889) the words "maker," "British "subject" and "British company" in section 25 and the words

"theatre in Great Britain any film to "which this Act applies, being a film "which he knows, or ought to have "known, not to be a registered film. ". . ."

S. 23: "(1) Upon application duly "made to them . . . for the registra-"tion of a film to which this Act "applies, the Board of Trade shall, "subject to the following provisions "of this Part of this Act, register the "film under this Part of this Act in "a register to be kept by the Board "for the purpose."

"(2) The register shall be so kept "as to record, in relation to each film "registered therein—(*a*) . . . the fact "that it is a British film or a foreign "film, as the case may be. . . ."

S. 25 (1): ". . . a film shall . . . "be deemed to be a British film if, "and only if,—(*a*) the maker of the "film was, throughout the time "during which the film was being "made, either a British subject or a "British company, and (*b*) the "studio, if any, used in making the "film was within His Majesty's "dominions, and (*c*) not less than "the requisite amount of labour costs "represents payments paid or pay-"able in respect of the labour or ser-"vices of British subjects or persons "domiciled in some part of His "Majesty's dominions."

S. 31 (1): "Any person who is "aggrieved by any decision taken by "the Board of Trade for the purpose "of the performance of their duties in "relation to the register, may, subject "to rules of court, make application "in the matter to the High Court, "and the decision of that court on "any such application shall be final "and not subject to appeal to any "other court."

S. 35: "The films to which "this Act [and the Act of 1948] "apply are all cinematograph films "other than—(*a*) films consisting "wholly or mainly of photographs "which, at the time when they were "taken, were means of communicat-"ing news, or (*b*) films made wholly "or mainly for the purpose of com-"mercial advertisement, or (*c*) films "certified under subsection (2) of "section 7 of the Finance Act, 1935, "as being entitled to exemption from "customs duties under the convention "for facilitating the international "circulation of films of an educational "character which is referred to in "that subsection."

S. 44 (1): "In this Act . . . "'maker,' in relation to a film, "means the person by whom the "arrangements necessary for the "making of the film are under-"taken. . . ."

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F. G. (Films) Ld., *In re.*

Vaisey J.

" maker " and " person " in the definition ? Here the applicants can succeed only if they establish themselves as the sole statutory makers of the film, for, if they were (as may well be the case) one of several makers, the other " maker " or " makers " certainly cannot, in the circumstances of this case, be brought within the description of " British subject " or " British company." Their claim is to be, or to have been, the sole exclusive maker of the film.

The applicants have a capital of £100, divided into 100 shares of £1 each, 90 of which are held by the American director and the remaining 10 by a British one. The third director has no shareholding. I now understand that they have no place of business apart from their registered office, and they did not employ any staff. It seems to me to be contrary, not only to all sense and reason, but to the proved and admitted facts of the case, to say or to believe that this insignificant company undertook in any real sense of that word the arrangements for the making of this film. I think that their participation in any such undertaking was so small as to be practically negligible, and that they acted, in so far as they acted at all in the matter, merely as the nominee of and agent for an American company called Film Group Incorporated, which seems (among other things) to have financed the making of the film to the extent of at least £80,000 under the auspices and direction of the said American director, who happened to be its president. The suggestion that this American company and that director were merely agents for the applicants is, to my mind, inconsistent with and contradicted by the evidence, and a mere travesty of the facts, as I understand and hold them to be.

The applicants' intervention in the matter was purely colourable. They were brought into existence for the sole purpose of being put forward as having undertaken the very elaborate arrangements necessary for the making of this film and of enabling it thereby to qualify as a British film. The attempt has failed, and the respondent's decision not to register " Monsoon " as a British film was, in my judgment, plainly right.

In lieu of the declarations for which the applicants ask, I will declare that the applicants were not the makers of the film called " Monsoon " and that that film is not a British film within the meaning of the Cinematograph Films Acts, 1938 and 1948.

*Judgment for respondent.*

Solicitors: *Edwin Arthur Davis; Solicitor, Board of Trade.*

K. R. A. H.

[QUEEN'S BENCH DIVISION.]

## *GREEN *v.* PORTSMOUTH STADIUM LD.

1953
*Feb.* 10, 19.

Parker J

*Gaming and Wagering—Racing track—Bookmaker's entrance fee—Permitted charge exceeded—Illegal contract—Action for money had and received—Betting and Lotteries Act*, 1934 (24 & 25 *Geo.* 5, *c.* 58), *s.* 13 (1) (2).

A bookmaker, who for many years had regularly attended a race-track under the management and control of the defendants, and who had on each occasion paid an entrance fee in excess of the charge authorized by section 13 of the Betting and Lotteries Act, 1934, brought proceedings against the defendants as occupiers of the race-track for the recovery of the excess. The defendants claimed, inter alia, that if any payments in excess of the charge authorized by the Act had been made, such payments had contravened section 13 of the Act and were irrecoverable, or alternatively, that such excess payments had been made under a mistake of law and were illegal and irrecoverable:—

*Held*, first, that section 13 of the Act was a penal section and the contract made between the defendants and the plaintiff on each occasion of his admission to the stadium for an excess fee was an illegal contract, but that the parties were not in pari delicto, on the principle laid down in *Browning* v. *Morris* (1778) 2 Cowp. 790, at p. 792, and an action to recover the money could be brought.

*Held*, secondly, that, although the plaintiff by his claim for money had and received might be said indirectly to be enforcing the obligations laid down by section 13 of the Act, it was not a claim under the Act, and he was not debarred, even though the section did not create obligations enforceable in civil proceedings, from putting forward his claim.

*Cutler* v. *Wandsworth Stadium* [1949] A.C. 398; 65 T.L.R. 170; [1949] 1 All E.R. 544, distinguished.

ACTION.

The plaintiff was a bookmaker and the defendants were the occupiers of a dog race-track known as the Portsmouth Stadium Greyhound Racing Track, which was under their management and control. The race-track was licensed under the provisions of the Betting and Lotteries Act, 1934.[1]

The plaintiff claimed that he regularly attended the race-track during the years 1941–49 to carry on his business as a bookmaker, and on each occasion he paid an entrance fee of £2. The entrance

[Reported by Mrs. E. M. WELLWOOD, Barrister-at-Law.]

[1] Betting and Lotteries Act, 1934, s. 13: "(1) The occupier of any licensed track may make to a bookmaker . . . any charge for admission to any particular part of the track not exceeding . . . five times the amount . . . of the highest charge made to members of the public for admission to that part of the track: . . . .

"(2) If any charge other than a charge authorized by the preceding subsection is made to a bookmaker . . . . or if any payment, valuable thing or favour, other than a charge so authorized, is demanded or received by or for the benefit of the occupier of a track as a consideration for facilities being given to a bookmaker for the carrying on of his business, the person immediately responsible and also the occupier of the track shall be guilty of an offence."

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fee for members of the public was 2s. 3d., and the plaintiff said that he should have been charged no more than five times that fee, namely, 11s. 3d. He accordingly alleged that the £2 charged was in excess of the authorized fee laid down by section 13 of the Act, and claimed from the defendants the sum of £897, being the excess fees paid by him over the period, as money paid under a mistake of fact or as money had and received by the defendants to his use.

The defendants disputed the claim and pleaded the Limitation Act, 1939, in respect of part of the payments alleged to have been made, and also pleaded that if the plaintiff had made the payments as alleged they had been made in breach of the provisions of the Act of 1934 and were not recoverable, and that the statement of claim showed no cause of action. Alternatively, it was pleaded that, if the payments had been made, they had been made under a mistake of law and were illegal and irrecoverable.

By an order of the master, under Ord. 25, r. 2, the point of law that the payments had been made under a mistake of law was set down for hearing before the trial of the action, and at the hearing it was agreed by the parties that the point of law that the payments had been made in breach of the provisions of the Act of 1934 should also be heard and determined as a preliminary point.

*Robert Hughes* and *Denis Townsend* for the plaintiff.
*E. B. McLellan* for the defendants.

The cases cited in argument are referred to in the judgment.

*Cur. adv. vult.*

Parker J. This is a claim for money had and received. The plaintiff is a bookmaker who for many years has attended the Portsmouth Stadium Greyhound Racing Track, which is in the occupation and under the management and control of the defendants. The plaintiff claims that as a condition of obtaining admittance to the track he had to pay an admission charge which exceeded the amount permitted by section 13 of the Betting and Lotteries Act, 1934, and it is the excess so paid over a period which he claims as money had and received by the defendants to his use. [His Lordship stated the material terms of section 13 and continued:] A great number of defences were raised, and by paragraph 8 of the defence it is contended, inter alia, that any payment made by the plaintiff was made under a mistake of law and was illegal, and, therefore, irrecoverable. By an order of the master dated October 20, 1952, it was ordered that the issue so raised should be tried as a preliminary point under Ord. 25, r. 2. It is further alleged by paragraph 6 of the defence that any payments made are not recoverable by reason of any matter set out in the statement of claim or by reason of the Act or at all,

and that the statement of claim discloses no cause of action. It was agreed between the parties that it would be convenient if this issue also were determined as a preliminary point, and accordingly I consented to the master's order being amended to include this issue.

Section 13 of the Act of 1934 is a penal section, and accordingly, as the defendants contend, the contract made with the plaintiff on his admission on each occasion to the stadium was an illegal contract and, prima facie, any excess payment is irrecoverable. The plaintiff, in answer, contends that he was not in pari delicto, and in this connexion refers to *Browning* v. *Morris*,[1] where Lord Mansfield stated the principle as follows: "But, "where contracts or transactions are prohibited by positive "statutes, for the sake of protecting one set of men from another "set of men; the one, from their situation and condition, being "liable to be oppressed or imposed upon by the other; there, "the parties are not in pari delicto; and in furtherance of these "statutes, the person injured, after the transaction is finished "and completed, may bring his action and defeat the contract." I think that that principle applies in this case, and, indeed, Mr. McLellan, for the defendants, does not contend to the contrary. What, however, he maintains is that, even so, these proceedings do not lie because section 13 of the Act of 1934 lays down obligations which are enforceable only by criminal proceedings and not by civil proceedings; and he refers me to the comparatively recent case of *Cutler* v. *Wandsworth Stadium Ld.*[2] In that case, which was concerned with this very Act of 1934, Lord Simonds said: "Part II may perhaps be ignored, but Part I "and Part III must clearly be read as a whole. So reading it, "I have no doubt that the primary intention of the Act was to "regulate in certain respects the conduct of race tracks and in "particular the conduct of betting operations thereon. If in "consequence of those regulations being observed some book-"makers will be benefited, that does not mean that the Act was "passed for the benefit of bookmakers in the sense in which it "was said of a Factory Act that it was passed in favour of the "workmen in factories. I agree with Somervell L.J.[3] that "where an Act regulates the way in which a place of amuse-"ment is to be managed, the interests of the public who resort "to it may be expected to be the primary consideration of the "legislature. If from the work of regulation any class of persons "derives an advantage, that does not spring from the primary "purpose and intention of the Act."

In that case, however, it is to be observed that the proceedings were in effect an action to enforce a statutory duty. Section 11 of the Act obliges a person in the position of the defendants to provide a bookmaker with space on the track

[1] (1778) 2 Cowp. 790, 792.
[2] [1949] A.C. 398, 408–9; 65 T.L.R. 170; [1949] 1 All E.R. 544.
[3] [1948] 1 K.B. 291, 307.

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Parker J.

where he can conveniently carry on bookmaking, and the plaintiff in that case claimed injunctions and declarations, in effect, to make the defendants carry out that obligation. In the present case the plaintiff is not, as was the plaintiff in that case, seeking to enforce directly an obligation created by the section of the Act: his claim here is for money had and received, and although it can perhaps be said that he is indirectly enforcing the obligation laid down by section 13, I do not think that thereby he is debarred from putting forward his claim. It is not a claim under the Act.

For these reasons I think that these issues must be determined in the plaintiff's favour.

*Judgment for the plaintiff.*

Solicitors: *D. H. Browne, agent for H. F. E. Mathews, Portsmouth; Brash Wheeler & Co., agents for Glanvilles, Portsmouth.*

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[PROBATE, ETC., DIVISION.]

## *PRACTICE NOTE (NOTICE TO PRODUCE).

1953
*Feb. 24.*

Karminski J.

*Husband and Wife—Divorce—Practice—Undefended suit—Notice to produce.*

During the hearing of an undefended petition alleging desertion it came to light that notice to produce had not been given to the respondent in respect of certain relevant correspondence.

Karminski J. This business of giving notice to produce is not in my view an academic exercise. I am perfectly well aware that in nine cases out of ten it may not have any result whatsoever, but in the tenth case people do produce letters, and sometimes the complete correspondence is before the court, as in a defended case. Why should I not at any rate see whether the respondent was willing to produce any letters? I do not know what the petitioner was writing to her; I am not allowed to know.

[His Lordship, accepting counsel's statement that the correspondence had not been deliberately withheld, said:] I am sure that it was not. But those instructing you, let us be frank about it, have not done their duty. That is what it amounts to.

[His Lordship then heard further evidence and said:] Accepting the evidence of the last witness, as I do, I think that I can take a complete view of the case on the rather incomplete evidence before me. I want it to be clearly understood that but for the very helpful evidence of that witness I would have been compelled to adjourn this case and incur additional expense. However, I propose to grant a decree nisi.

1953

PRACTICE NOTE (NOTICE TO PRODUCE).

During the hearing of a later case on his Lordship's list that day it again transpired that notice to produce had not been given.

KARMINSKI J. I am worried again by the absence of the documents, and I hope that what I have said will be widely circulated. I am most reluctant to adjourn these cases but sometimes there is no alternative. However, in this case, having regard to the whole history and to the nature of the respondent's letters, which give me some idea of what the petitioner had been writing, I can properly act.

J. B. G.

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[COURT OF CRIMINAL APPEAL.]

## * PRACTICE NOTE (INDORSEMENT ON INDICTMENT).

1953
*Feb.* 23

Lord Goddard C.J., Byrne and Gerrard JJ.

*Criminal Law—Practice—Quarter sessions—Indictment—Transfer to another court—Indorsement—Assizes and Quarter Sessions (Convenient Court) Order*, 1926 (*S.R. & O.* 1926, *No.* 774).

ON an application for leave to appeal against conviction, the court stated that there was no ground for granting the application, but that it was desirable to state what had happened in the case and to give a ruling or direction to quarter sessions with regard to the practice where an indictment found at one quarter sessions was for any reason ordered to be tried at another quarter sessions.

The prisoner was originally indicted at the midsummer quarter sessions for the County Borough of Dudley and charged with obtaining money by false pretences. He was tried before the recorder and the jury disagreed. The recorder then made an order for the case to be retried at the West Bromwich Borough Quarter Sessions. The recorder at West Bromwich, according to a note which had been indorsed on the indictment, felt a difficulty about trying the case because he had been concerned professionally with the man on other occasions when he had been charged with crime, so that the recorder felt that it would not be very satisfactory for him to deal with the case. He accordingly ordered that the indictment should be tried at the Worcestershire County Quarter Sessions. No formal indorsement was made on the indictment, and, when it reached the Worcestershire Quarter Sessions, the chairman at Worcester refused to try the case because an indorsement had not been put on the indictment saying that it was to be tried at the Worcestershire Quarter Sessions. He accordingly sent it back to West Bromwich, and then the recorder of West Bromwich sent it to be tried at Wolverhampton, where it was eventually tried.

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[Reported by Miss C. J. ELLIS, Barrister-at-Law.]

1953

PRACTICE NOTE (INDORSEMENT ON INDICTMENT).

LORD GODDARD C.J. stated the facts set out above and continued: It is rather unfortunate that an indictment should be sent backwards and forwards in this manner merely because an indorsement has not been put on it. Section 14 of the Criminal Justice Act, 1925, which is the Act under which, if it is inconvenient or impossible for any reason that a case should be tried at one assizes or one quarter sessions, it may be sent for trial to another assizes or quarter sessions, does not say that the court which is sending the case for trial must indorse on it an order that the case is to be sent there. The proper course is for the clerk of the peace to forward all the documents in the case together with the indictment, and then the court can be informed that the case has been sent forward for trial from the foreign court. The only provisions with regard to the section are contained in the Assizes and Quarter Sessions (Convenient Court) Order, 1926, paragraph 1: "(*c*) all recognizances, inquisitions, "depositions (including exhibits thereto) and documents shall be "transmitted to the proper officer of the court at which the "person is to be tried or retried; (*d*) any commissions, writs, "precepts, indictments, recognizances, proceedings and docu- "ments may be altered so far as may be necessary for the "purpose of giving effect to the said section 14 and to this "Order."

The provision of that Order only says that indictments may be altered so far as necessary for the purpose of giving effect to section 14. Section 14 enables the foreign court to try the case, and there would be no reason why, when the matter was before the Worcestershire Quarter Sessions, and the Worcestershire Quarter Sessions were informed that the indictment had been received from West Bromwich, the court of trial in the indictment should not have been altered to the General Quarter Sessions of the Peace for the County of Worcester. They could have altered it themselves, and I think that quarter sessions should understand that neither the statute nor the order compels the remitting court to alter the documents, although, no doubt, it would often be very desirable that they should put some indorsement on the indictment saying: "Ordered to be tried at "such and such a court." When the Worcestershire Quarter Sessions received this indictment they could have been informed by counsel or the clerk of the peace that it had been received from another quarter sessions; that the recorder there had transferred the case, for whatever reason, for them to try; and they could have altered the place of trial in the indictment, which is really the only thing that need be altered, and the case might have proceeded. If that had been done, this case would have been disposed of very much sooner than it has been, but, in the circumstances of the case, there is no ground for giving leave to appeal against conviction.

[QUEEN'S BENCH DIVISION (COMMERCIAL LIST).]

## * ROTTERDAMSCHE BANK N.V. AND ANOTHER *v.* BRITISH OVERSEAS AIRWAYS CORPORATION AND ANOTHER.

1953
*Feb.* 6, 18.

Pilcher J.

*Carriage by Air—International carriage—Loss of goods—Damages—Jurisdiction—Carriers named in consignment note—Carriage on their behalf—Doctrine of deviation—Carriage by Air Act*, 1932 (22 & 23 *Geo.* 5, *c.* 36), *s.* 1; *Sch.* 1—*Warsaw Convention, arts.* 28 (1), 30 (1).

The first plaintiff bank delivered to a Dutch airline a case containing 2,000 gold sovereigns for carriage by air from Amsterdam to Djibouti and delivery there to the second plaintiff bank. The air consignment note, which was the document evidencing the contract of carriage, provided for the goods to be carried by the Dutch airline from Amsterdam to Cairo, and thence by another service to Asmara, and thence to Djibouti. It appeared from the air consignment note, and B.O.A.C.'s timetables which were incorporated therein, that while B.O.A.C. were to be paid as carriers from Cairo to Djibouti, that portion of the carriage was being undertaken by Aden Airways Ld., a wholly owned subsidiary of B.O.A.C. On arrival of the goods at Cairo they were loaded on a 'plane belonging to Aden Airways. The goods, instead of being transhipped at Asmara, were left on board the aircraft and carried on to Aden where, whilst still in the custody of the second defendants, they were stolen by some person or persons unknown and had never been recovered. A writ having been issued against B.O.A.C. and Aden Airways in respect of the loss, Aden Airways took out a summons to set aside the writ as against them on the ground that the court had no jurisdiction to entertain the claim against them:—

*Held*, that the carriage as described in the consignment note was, on the face of it, an international carriage to be performed by successive carriers, and it did not cease to be an international carriage merely because at Cairo the goods were transferred to an Aden Airways 'plane. Further, the over carriage or miscarriage of the goods did not deprive the carriage of its international character. The whole contractual carriage from Amsterdam to Djibouti was accordingly an international carriage by air and was subject to the provisions of the Carriage by Air Act, 1932, which, by section 1, made applicable the terms of the Warsaw Convention, which was itself scheduled to the Act. Article 30 (1) of the Convention provided the necessary contractual link between the plaintiffs and the second defendants in respect of that part of the carriage in fact performed by them, but since the second defendants were ordinarily resident in Aden, where they had their principal place of business, they could only be sued, pursuant to article 28 (1) of the Convention, either at Aden or at Djibouti, which was the contractual place of destination of the goods, and therefore the court has no jurisdiction to entertain the claim against that company, and the writ and all subsequent proceedings in the action against them must be set aside.

SUMMONS to set aside writ.

The two plaintiffs were, respectively, Rotterdamsche Bank N.V., who were a Dutch Bank incorporated under the laws of

[Reported by J. F. KINGHAM, Barrister-at-Law.]

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the Kingdom of the Netherlands, and whose registered office was in Rotterdam; and the Banque de L'Indochine of Djibouti in French Somaliland, which was a corporate body incorporated according to the laws of France, with its registered office in Paris. The first defendants, British Overseas Airways, were a British company registered in this country, and the second defendants, Aden Airways Ld., were a limited company registered under the Indian Companies Acts, which were apparently applicable in the colony of Aden. The second defendants carried on business as an air transport undertaking and were in fact a wholly owned subsidiary of the first defendants.

On March 22, 1950, the first plaintiffs delivered to K.L.M., a well-known Dutch airline, a case containing 2,000 gold sovereigns for carriage by air from Amsterdam to Djibouti, and delivery there to the second plaintiffs, the Banque de L'Indochine, upon the terms of an air consignment note numbered 279638. The first plaintiffs were the named consignors, and the second plaintiffs the named consignees of the goods in question.

The air consignment note, which was the document evidencing the contract of carriage of the goods, provided that the goods were to be carried to Djibouti in the following manner: by K.L.M. on Service K.L. 829 from Amsterdam to Cairo on March 25, 1950, and thence on Service B.O. 471 from Cairo to Asmara on March 28, 1950, and again on Service B.O. 477 from Asmara to Djibouti on March 29, 1950. The goods were duly loaded on board a K.L.M. 'plane and carried from Amsterdam to Cairo. In the result they were never delivered at Djibouti.

At Cairo the goods were loaded on an aircraft owned by the second defendants. That aircraft was operating, apparently on behalf of the British Overseas Airways Corporation, a service numbered on the British Overseas Airways Corporation's timetable of Speedbird World Air Routes as B.O. 471, which was the number of the service between Cairo and Asmara provided for in the air consignment note under which the goods were carried. The goods should have been transhipped at Asmara, but owing to some negligence or oversight they were left on board the aircraft and carried on in that same aircraft to Aden, that was to say, across the Red Sea from Africa to Arabia. The flying time allowed between Asmara and Aden on British Overseas Airways Corporation's published timetable was two hours and 50 minutes. The air consignment note provided that the goods should have been transhipped at Asmara and forwarded thence to Djibouti by Service No. 477, which was also operated by the second defendants. On arrival at Aden and whilst still in the custody of Aden Airways the goods were stolen by some person or persons unknown and were never recovered.

A writ was issued against the defendants and leave to serve Aden Airways Ld. out of the jurisdiction was granted. Aden Airways Ld. entered a conditional appearance and then took out a summons to set aside the writ and all subsequent proceedings

against them on the ground that the court had no jurisdiction to entertain the plaintiffs' claim against them. The defendants' summons was adjourned and a further summons taken out to transfer the case to the commercial list, which summons was treated as a summons issued in the Commercial Court to set aside the writ and all subsequent proceedings.

The terms of the air consignment note appear more fully from the judgment.

*Michael Kerr* for the plaintiff banks.
*Rodger Winn* for the defendants.

The following cases were cited in argument, which was heard in chambers: *Gill* v. *Manchester, Sheffield, and Lincolnshire Railway Co.*[1]; *Massey* v. *Heynes*[2]; and *Stag Line Ld.* v. *Foscolo, Mango & Co. Ld.*[3]; *Duder* v. *Amsterdamsch Trustees Kantoor.*[4]

February 18. PILCHER J., after stating the facts:—The air consignment note, which constituted the contract of carriage, was between the K.L.M. Company and the first plaintiffs. The carriage as described in the consignment note was, on the face of it, an "international carriage" and thus subject to the provisions of the Carriage by Air Act, 1932, which gives effect to the Warsaw Convention for the unification of certain rules relating to the international carriage by air. The Convention itself is scheduled to the Act. Section 1 of the Act of 1932 provides that the provisions of the Convention shall, so far as they relate to the rights and liabilities of carriers, consignors and consignees, have the force of law in the United Kingdom in relation to any carriage by air to which the Convention applies, irrespective of the nationality of the aircraft performing the carriage. Section 3 provides that Her Majesty may by Order in Council apply the provisions of the Act to any colony. I understand that appropriate action has been taken under this section to apply the provisions of the Act to the Colony of Aden. France and Holland are both signatories to the Convention.

One of the principal issues between the parties was whether the goods were in fact at the material time on an "international" carriage" and thus subject to the Convention. To render this judgment intelligible it is necessary that I should first set out the material articles of the Convention.

"Article 1—(1) This Convention applies to all international "carriage of persons, luggage or goods performed by aircraft for "reward. It applies equally to gratuitous carriage by aircraft "performed by an air transport undertaking. (2) For the "purposes of this Convention the expression 'international "carriage' means any carriage in which, according to the con-"tract made by the parties, the place of departure and the place

[1] (1873) L.R. 8 Q.B. 186.
[2] (1888) 21 Q.B.D. 330.
[3] [1932] A.C. 328; 48 T.L.R. 127.
[4] [1902] 2 Ch. 132.

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" of destination, whether or not there be a break in the carriage " or a transhipment, are situated either within the territories of " two High Contracting Parties, or within the territory of a single " High Contracting Party, if there is an agreed stopping place " within a territory subject to the sovereignty, suzerainty, man- " date or authority of another Power, even though that Power is " not a party to this Convention. A carriage without such an " agreed stopping place between territorities subject to the " sovereignty, suzerainty, mandate or authority of the same High " Contracting Party is not deemed to be international for the " purposes of this Convention. (3) A carriage to be performed by " several successive air carriers is deemed, for the purposes of " this Convention, to be one undivided carriage, if it has been " regarded by the parties as a single operation, whether it had " been agreed upon under the form of a single contract or of a " series of contracts, and it does not lose its international " character merely because one contract or a series of contracts is " to be performed entirely within a territory subject to the " sovereignty, suzerainty, mandate or authority of the same High " Contracting Party."

" Article 5—(1) Every carrier of goods has the right to require " the consignor to make out and hand over to him a document " called an ' air consignment note '; every consignor has the " right to require the carrier to accept this document."

" Article 8. The air consignment note shall contain the " following particulars . . . (c) The agreed stopping places, " provided that the carrier may reserve the right to alter the " stopping places in case of necessity, and that if he exercises " that right the alteration shall not have the effect of depriving " the carriage of its international character."

" Article 11—(1) The air consignment note is prima facie " evidence of the conclusion of the contract, of the receipt of " the goods and of the conditions of carriage."

" Article 18—(1) The carrier is liable for damage sustained in " the event of the destruction or loss of, or of damage to, any " registered luggage or any goods, if the occurrence which caused " the damage so sustained took place during the carriage by air. " (2) The carriage by air within the meaning of the preceding " paragraph comprises the period during which the luggage or " goods are in charge of the carrier, whether in an aerodrome or " on board an aircraft, or, in the case of a landing outside an " aerodrome, in any place whatsoever."

" Article 22—(2) In the carriage of registered luggage and " of goods, the liability of the carrier is limited to a sum of 250 " francs per kilogram, unless the consignor has made, at the " time when the package was handed over to the carrier, a special " declaration of the value at delivery and has paid a supple- " mentary sum if the case so requires. In that case the carrier " will be liable to pay a sum not exceeding the declared sum,

" unless he proves that that sum is greater than the actual value " to the consignor at delivery."

" Article 23. Any provision tending to relieve the carrier of " liability or to fix a lower limit than that which is laid down in " this Convention shall be null and void, but the nullity of any " such provision does not involve the nullity of the whole " contract, which shall remain subject to the provisions of this " Convention."

" Article 25—(1) The carrier shall not be entitled to avail " himself of the provisions of this Convention which exclude or " limit his liability, if the damage is caused by his wilful mis- " conduct or by such default on his part as, in accordance with " the law of the court seized of the case, is considered to be " equivalent to wilful misconduct. (2) Similarly the carrier shall " not be entitled to avail himself of the said provisions, if the " damage is caused as aforesaid by any agent of the carrier acting " within the scope of his employment."

" Article 28 (1) An action for damages must be brought at " the option of the plaintiff in the territory of one of the High " Contracting Parties, either before the court having jurisdiction " where the carrier is ordinarily resident, or has his principal " place of business, or has an establishment by which the con- " tract has been made or before the court having jurisdiction at " the place of destination. (2) Questions of procedure shall be " governed by the law of the court seized of the case."

" Article 29—(1) The right to damages shall be extinguished " if an action is not brought within two years, reckoned from the " date of arrival at the destination, or from the date on which " the aircraft ought to have arrived, or from the date on which " the carriage stopped. (2) The method of calculating the period " of limitation shall be determined by the law of the court " seized of the case."

" Article 30—(1) In the case of carriage to be performed by " various successive carriers and falling within the definition set " out in the third paragraph of article 1, each carrier who " accepts passengers, luggage or goods is subjected to the rules " set out in this Convention, and is deemed to be one of the " contracting parties to the contract of carriage in so far as the " contract deals with that part of the carriage which is performed " under his supervision. . . . (3) As regards luggage or goods, " the passenger or consignor will have a right of action against " the first carrier, and the passenger or consignee who is entitled " to delivery will have a right of action against the last carrier, " and further, each may take action against the carrier who " performed the carriage during which the destruction, loss, " damage or delay took place. These carriers will be jointly and " severally liable to the passenger or to the consignor or " consignee."

" Article 32. Any clause contained in the contract and all " special agreements entered into before the damage occurred by

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" which the parties purport to infringe the rules laid down by this " Convention, whether by deciding the law to be applied, or by " altering the rules as to jurisdiction, shall be null and void."

" Article 33. Nothing contained in this Convention shall " prevent the carrier either from refusing to enter into any con- " tract of carriage, or from making regulations which do not " conflict with the provisions of this Convention."

Whilst the contract of carriage made in the air consignment note was on the face of it between the first plaintiffs and the K.L.M. Company, article 30 (1) makes it clear that where international air carriage is undertaken by successive carriers, as in this case, each carrier who accepts goods is deemed to be one of the contracting parties to the contract of carriage in so far as the contract deals with that part of the carriage which is performed under his supervision.

Accordingly, it would seem on one reading of the air consignment note that British Overseas Airways Corporation were contractually bound under the terms of the Convention to perform their part of the contract of carriage evidenced by the air consignment note, namely, from Cairo to Djibouti. No mention, however, was made in this document of the second defendants, and these defendants were a separate legal entity. The plaintiffs contended that the second defendants were not contractually bound in any fashion, and that the portion of the air carriage conducted by them was not subject to the terms of the Convention. They pointed out that the consignment note made it clear that British Overseas Airways Corporation undertook the carriage from Cairo to Djibouti and that the whole freight from Cairo to Djibouti was payable to British Overseas Airways Corporation. They further said that article 30 (3) gave the consignee a right of action against the last carrier, and they pointed out that the last carrier named in the consignment note was the British Overseas Airways Corporation and not the second defendants.

The writ in the action was indorsed in the widest terms and claimed against the first and/or second defendants, as bailees or carriers, for damages for negligence, breach of duty, breach of contract, wilful misconduct, conversion, etc. The writ was issued on March 20, 1952, and served on the first defendants on the following day, just within the limitation period of two years provided by article 29 of the Convention. I was informed by counsel that the plaintiffs were out of time in regard to taking proceedings against the second defendants in the Aden courts.

Mr. Rodger Winn, who appeared on behalf of both defendants, admitted on behalf of the British Overseas Airways Corporation that they were liable for the limited sum of 250 francs per kilogram on the weight of the goods as provided by article 22 (2) of the Convention. I understand that on this basis the liability of British Overseas Airways Corporation would be somewhat over £100 on goods admittedly worth about £8,000. One of the issues to be determined between the plaintiffs and British Overseas

Airways Corporation on the trial of the action will be whether the loss was due to their " wilful misconduct " under article 25, in which case they would not be entitled to take advantage of the provisions of article 22 (2) referred to above.

As regards the second defendants, Mr. Rodger Winn conceded that they were " necessary " parties to the action under R.S.C., Ord. 11, r. 1 (*g*), and further conceded that if the courts of this country had jurisdiction to entertain the plaintiffs' claim against them they were also " proper " parties within that sub-rule. He contended, however, that the terms of the Convention, which have the force of law in this country, precluded this or any English court from entertaining a claim against the second defendants in this particular case. His argument ran along these lines. On the face of the air consignment note (which was the contractual document) there was no contract of carriage between the plaintiffs and the second defendants, so that the plaintiffs could not sue the second defendants in contract at common law. Article 30 (1) of the Convention, which enacted that every carrier who accepted goods for international carriage was deemed to be one of the contracting parties to the contract of carriage in so far as the contract dealt with that part of the carriage which was to be performed by him, provided the necessary contractual link between the plaintiffs and the second defendants in respect of that part of the carriage which was in fact performed by the second defendants. He also pointed to the fact that the Services B.O. 471, from Cairo to Asmara, and B.O. 477, from Asmara to Djibouti, which were the services specifically provided for in the air consignment note, were services advertised by British Overseas Airways Corporation in their timetable as being operated by Aden Airways Ltd., which was a wholly owned subsidiary of British Overseas Airways Corporation, and that whilst British Overseas Airways Corporation were described in the portion of the air consignment note devoted to " charges " as being the contemplated carriers from Cairo to Djibouti, that portion of the note was reserved for entries to be made by the carrier alone, whereas a glance at the description of the services which were to be used would inform anyone who looked at the British Overseas Airways Corporation's timetable that the contemplated carriage from Cairo to Asmara and from Asmara to Djibouti was to be performed, not by a British Overseas Airways Corporation aircraft but by an aircraft operated by Aden Airways Ltd. I should here add that opposite the description of the services to be used there was the note: " Method of routing—Agreed stopping places; see " also timetables of the carriers and conditions on the reverse " hereof." Mr. Winn accordingly submitted that these goods were in fact lost whilst being carried upon a flight to which all the provisions of the Convention applied.

He then turned to article 28 (1), and pointed out that under that article, if Aden Airways Ltd. were to be sued at all, it must be either at Aden where they are admittedly ordinarily resident

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and had their principal place of business, or at Djibouti, which was the contractual place of destination of the goods. He submitted that the effect of that article, which in this country now has the force of law, was to limit the courts in which action could be brought to those set out in the article and thus, in the circumstances of this case, to oust the jurisdiction of the courts of this country to entertain a claim against the second defendants. There is no doubt that R.S.C., Ord. 11, r. 1, is only procedural in the sense that it deals with the circumstances in which leave may be given to serve a writ or notice of the writ out of the jurisdiction. It is perhaps unnecessary to say that the Order does not purport to enlarge or restrict the inherent jurisdiction of the courts of this country.

Mr. Kerr, on behalf of the plaintiffs, argued that inasmuch as Aden Airways Ld. were nowhere mentioned in the contractual document, namely, the air consignment note, they were not parties to the contract of carriage nor were they deemed to be so under article 30 (1), because that article only provided that a subsequent carrier should be deemed to be a party " in so far as " the contract deals with that part of the carriage which is " performed under his supervision." He pointed out that the portion of the air consignment note which dealt with " charges " provided for carriage from Cairo to Djibouti by British Overseas Airways Corporation, and that British Overseas Airways Corporation were to receive the freight for that portion of the carriage.

In my view the matter must be looked at more broadly. The actual services by which the whole carriage was to be performed were clearly set out in the air consignment note under the heading " Type of Service." If these services were read in conjunction with the British Overseas Airways Corporation's timetable it must have been clear to all interested parties that, whilst freight from Cairo to Asmara was to be paid to British Overseas Airways Corporation, that portion of the carriage was being undertaken by British Overseas Airways Corporation's subsidiary Aden Airways Dakota Service. The carriage clearly started as an international carriage to be performed by successive carriers as one individual carriage, and I cannot think that when the goods were transferred at Cairo to an Aden Airways plane the carriage ceased to be an international carriage as defined by article 1 (2) of the Convention and ceased to be subject to the conditions of the Convention. What was being done was, in my view, exactly what the plaintiffs contemplated would be done, or would have contemplated if they had directed their minds to the matter. I am accordingly of opinion that the whole contractual carriage from Amsterdam to Djibouti as evidenced by the air consignment note was on the face of it an international carriage by air and as such subject to the terms of the Convention.

In arriving at this conclusion I have been influenced by certain " conditions " which are printed on the back of the air

consignment note: "(1) As used in this contract 'air waybill' "is equivalent to 'air consignment note,' 'shipper' is equivalent "to 'consignor,' 'carriage' is equivalent to 'transportation,' "'carrier' includes the air carrier issuing this air waybill and "all air carriers that carry the goods hereunder or perform any "other services related to such air carriage. For the purposes "of the exemption from and limitation of liability provisions "set forth or referred to herein, 'carrier' includes agents, "servants or representatives of any such air carrier. Carriage "to be performed hereunder by several successive carriers is "regarded as a single operation."

"(2) (a) Carriage hereunder is subject to the rules relating to "liability established by the Convention for the Unification of "Certain Rules relating to International Carriage by Air, signed "at Warsaw, October 12, 1929 (hereinafter called 'the "'Convention'), unless such carriage is not 'international "'carriage' as defined by the Convention. (See carrier's tariffs "for such definition.) (b) To the extent not in conflict with the "foregoing, carriage hereunder and other services performed by "each carrier are subject to (i) applicable laws (including "national laws implementing the Convention), government regu-"lations, order, and requirements, (ii) provisions herein set forth, "and (iii) applicable tariffs, rules, regulations and timetables (but "not the times of departure and arrival therein) of such carrier, "which are made part hereof and which may be inspected at any "of its offices and at airports from which it operates regular "services."

"(5) It is agreed that no time is fixed for the completion of "carriage hereunder and that carrier may without notice "substitute alternate carriers or aircraft. Carrier assumes no "obligation to carry the goods by any specified aircraft or over "any particular route or routes or to make connexion at any "point according to any particular schedule, and carrier is "hereby authorized to select, or deviate from the route or routes "of shipment, notwithstanding that the same may be stated on "the face hereof. The shipper guarantees payment of all "charges and advances."

These conditions were presumably valid and formed part of the contract of carriage in so far as they did not conflict with the terms of the Convention. The definition of "carrier" in condition 1 strongly supports the view that the second defendants were to be considered as carriers although not mentioned in the air consignment note. Condition 2 (b) (iii) showed that timetables were to be incorporated as part of the contract of carriage, and the timetable published by British Overseas Airways Corporation made it clear that the portion of the carriage from Cairo to Djibouti was to be performed by Aden Airways Dakota Service. The conditions to which I have referred did not on their face appear to conflict with any of the provisions of the Convention. If they were to be regarded as incorporated in the contract

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of carriage they supported the view which I have expressed, namely, that the mere fact that the portion of the carriage from Cairo to Djibouti was performed by Aden Airways did not deprive the carriage of its international character, and thus remove it from the scope of the Convention.

Article 32 of the Convention provides in terms that any clause in the contract of carriage which purports to infringe the rules laid down by the Convention, whether by deciding the law to be applied or by altering the rules as to jurisdiction, shall be null and void. This article appears to reinforce the view that article 28 (1) of the Convention, which deals with jurisdiction, was intended to be applied strictly, and I accordingly conclude that the effect of article 28 (1) is to oust the jurisdiction of the courts of this country to entertain a claim by the plaintiffs against the second defendants.

Mr. Kerr took a further point based upon the doctrine of deviation as applied in maritime law. He contended that when the second defendants failed to discharge the goods at Asmara and negligently permitted them to go on to Aden there was a deviation from the contractual voyage. He submitted that that fundamental departure from the contractual voyage entitled the plaintiffs to repudiate the contract of carriage which thus became deprived of its international character and so no longer subject to the terms of the Convention.

He contended, in substance, that wherever the word "carriage" occurred in the Convention it must be taken to refer to carriage by the service provided for in the air consignment note, and that as soon as there was, as in this case, an over carriage or miscarriage not provided for in the air consignment note and factually linked with the loss of the goods, the whole nature of the carriage was changed and ceased to be the contractual carriage covered by the Convention. For a case of over carriage by sea which was held to amount to a deviation depriving the carrier of the benefit of the exception clause, see *Cunard Steamship Co. Ld.* v. *Buerger.*[1] Whilst I was at one moment attracted by this argument, I do not think that it is sound. Whilst over carriage or miscarriage with resulting loss, such as here occurred, might constitute such wilful misconduct as would render the carrier liable for the full value of the goods lost if he were sued in the appropriate jurisdiction, I cannot see anything in the Act or the Convention which enables me to say that such over carriage or miscarriage of the goods, as here occurred, deprived the carriage of its international character so as to remove it entirely from the ambit of the Convention.

All I am here concerned with is, however, the issue whether the courts of this country have jurisdiction to entertain a claim of any kind against the second defendants. For the reasons which I have set out above I am satisfied that the plaintiffs' goods were

[1] [1927] A.C. 1; 42 T.L.R. 653.

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lost upon an international carriage which was subject to the terms of the Convention. I am also satisfied that article 28 (1) of the Convention ousts the jurisdiction of the courts of this country to entertain any claim against the second defendants. Even assuming that the doctrine of deviation, as known in maritime law, applies to air carriage, and assuming that the over carriage or miscarriage, which here occurred, amounted to an unjustifiable deviation from the contractual voyage, I can find nothing in the 1932 Act or the Convention which justifies the conclusion that what occurred in this case served to remove the carriage from the ambit of the Convention or to disentitle the second defendants from relying upon the provisions of article 28 (1) of the Convention.

I am of opinion that the court has no jurisdiction to entertain the plaintiffs' claim against the second defendants, and I direct that the writ and all subsequent proceedings in the action against the second defendants be set aside. The second defendants will have the costs of the hearing of the summons before me.

Solicitors: *Ince, Roscoe, Wilson & Criggs; Beaumont & Son.*

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[CHANCERY DIVISION.]

## *LAWSON *v.* TIGER.

1953
*Feb.* 24.

Vaisey J.

[1951 L. 998.]

*Costs—Counsel's fees—Refresher—Computation of time by taxing master—Time spent in negotiating settlement in judge's private room and in precincts of court—R.S.C., Ord.* 65, *r.* 27 (48).

In computing the time occupied by an action for the purpose of refresher fees to counsel the taxing master included time spent in negotiating a settlement in the precincts of the court—either in the court itself, in the absence of the judge, or in the corridor or in the judge's private room. On a summons to review the taxation:—

*Held*, that under R.S.C., Ord. 65, r. 27 (48), the taxing master had a discretion to bring into computation the whole (or such time as he thought proper) of the time so spent. As long as the judge is in open court, or in his private room if the registrar in attendance is waiting in court for his return, the whole of such time in ordinary court hours is "time occupied by the trial" within the meaning of the rule.

SUMMONS to review taxation.

In arriving at the amount proper to be allowed as refresher fees in this action the taxing master included in his computation of time the time spent in conference in the precincts of the court, either in the court in the absence of the judge, or in the corridor, or in the judge's private room, for the purpose of arriving at a settlement of the action.

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The defendant contended that the taxing master had not exercised correctly the discretion conferred on him by R.S.C., Ord. 65, r. 27 (48),[1] in computing the refresher fees, and took out a summons for the determination of the question.

*Gilbert Dare* for the defendant applicant.
*Charles Lawson* for the plaintiff respondent.

Case referred to in argument: *Wright* v. *Bennett*.[2]

Vaisey J. This is a point which arises on the question of computation of refresher fees to counsel. The matter depends on R.S.C., Ord. 65, r. 27 (48), which is in these terms: [His Lordship read it.]

The very short point which arises here is whether the total time occupied by the trial includes or does not include, first, any time spent by counsel in interviewing the judge at his invitation in his private room, or, secondly, time spent by counsel during the hours normally occupied by the trial in discussing possible compromises or settlements of the action.

In the present case, the taxing master has allowed the refresher fee on a computation of time which included, first, time spent in conference, which, I understand, means in the precincts of the court—either in the court itself, in the absence of the judge, or in the corridor—and also forty minutes in the judge's chambers which, I suppose, means his private room. Those two periods of time have been allowed by the taxing master in arriving at the amount proper to be allowed in respect of the refresher fees.

I was referred to the judgment of Denning J. in *Wright* v. *Bennett*.[1] The point in that case was whether the time actually occupied on each day included or did not include the time occupied by the midday adjournment. It was decided that the time so occupied should not be brought into computation, and that such time was not time occupied by the trial. In my judgment, that case is really no guide as to what I should decide in the present case.

[1] R.S.C., Ord. 65, r. 27 (48): "As "to refresher fees, when any cause or "matter is to be tried or heard upon "viva voce evidence in open court, "if the total time occupied by the "trial whether wholly on the first day "or partly on that day and partly on "any subsequent day or days shall "exceed a period of five hours the "Taxing Master may in respect of "the excess allow for every complete "period of five hours (if any) and for "any less period not included in any "such complete period the following "fees . . .

"The like allowances may be made "where the evidence in chief is not "taken viva voce, if the trial or "hearing shall be substantially pro-"longed beyond such period of five "hours, to be so computed as afore-"said, by the cross-examination of "witnesses whose affidavits or deposi-"tions have been used.

"Provided that in the taxation of "costs between solicitor and client "the taxing officer shall be at liberty "to allow larger fees under special "circumstances to be stated by him."

[2] [1947] K.B. 828; 63 T.L.R. 328; [1947] 2 All E.R. 61.

[1] [1947] K.B. 828; 63 T.L.R. 328; [1947] 2 All E.R. 61.

It is to be observed that the opening words of the rule "when any cause or matter is to be tried or heard" are in direct contrast to the expression following, "total time occupied "by the trial." I think that the opening words merely indicate the kind of cause or matter to which the rule applies, and are calling attention to the fact—as indeed is shown by the proviso which follows—that normally a case tried without witnesses is not covered by this rule. Of course, this is a rule which gives the taxing master a discretion, as by it he "may" allow certain fees.

What I really have to decide is whether the taxing master either had no jurisdiction to allow the fees on the footing on which he has allowed them, or whether he exercised his discretion wrongly.

In my judgment, as long as the judge is in court, either in open court or behind the scenes in his private room, if the registrar in attendance is waiting in court for the judge's return, and no other case or cause is being tried in the court or being attended to by the judge, the whole of the time in ordinary court hours may be said to be "occupied by the trial," even if some part of that time is not being used for the purposes of argument or for the hearing of evidence of witnesses.

I think that the case is very different from that decided by Denning J. to which I have referred. It seems to me that, on the words of this rule, the taxing master has a discretion to bring into computation the whole, or such part as he thinks proper, of the time spent in either of the ways I have mentioned. I think that the objections to the allowance of this particular refresher fee cannot be sustained and, therefore, that this summons must be dismissed. I do not uphold the objections, and I think that the taxing master proceeded on the right footing, and that there is no ground for interfering with the conclusion at which he has arrived.

There will be no order on the summons except that the costs of the objection and of this hearing be paid by the applicant to the respondent.

*Order accordingly.*

Solicitors: *Kennedy, Genese & Co.; Thornton, Lynne & Lawson.*

J. L. D.

[COURT OF APPEAL.]

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*Feb.* 10, 11, 12, 23.

Denning and Romer L.JJ.

# *REGINA *v.* WESTMINSTER COMPENSATION APPEAL TRIBUNAL AND SELL. *Ex parte* ROAD HAULAGE EXECUTIVE.

*Nationalization—Transport—Road haulage—Compensation of employees—Claim under service agreement to damages for breach of contract—"Compensation"—Basis of assessment—Transport Act*, 1947 (10 & 11 *Geo.* 6, *c.* 49), *s.* 101—*Transferred Undertakings (Compensation to Employees) Regulations*, 1950 (*S.I.* 1950, *No.* 1083), *reg.* 3, *sch. II*, *paras.* 4, 5, 17.

The respondent S. was the managing director of a company known as Hauliers Ld., which was the holding company of eight subsidiary companies owning road transport undertakings. Hauliers Ld. did not itself carry on a road transport undertaking. S. had a service agreement with Hauliers Ld. which gave him security of tenure until February 28, 1950, at a salary and emoluments agreed at £3,250 a year. When, on April 12, 1949, the eight subsidiary undertakings were taken over by the Road Haulage Executive, pursuant to the Transport Act, 1947, the respondent's employment was terminated, and he claimed compensation under the Transferred Undertakings (Compensation to Employees) Regulations, 1950. Hauliers Ld. was not itself taken over by the executive and it went into voluntary liquidation, but by agreement the claim of S. was treated as if he were the managing director of one large operating company, and his claim was referred to the Westminster Compensation Appeals Tribunal for assessment. The tribunal held that a "right . . . to . . . compensation in the event of discharge" under paragraph 4 (1) (i) of Schedule II to the regulations included a right to claim damages for wrongful dismissal, and accordingly awarded S. compensation in respect of 10½ months, the unexpired portion of his service agreement, in accordance with paragraph 5 (2). On appeal by the executive from a judgment of the Divisional Court, approving the award and dismissing a motion for an order of certiorari to quash the award:—

*Held*, (1) that "compensation in the event of discharge" in paragraph 4 (1) (i) of Schedule II meant compensation in the event of lawful discharge and did not include damages for wrongful dismissal; (2) that compensation should have been assessed, therefore, under paragraph 5 (3), which applied to applicants having no right or expectation under customary practice to the payment of compensation in the event of discharge and not under paragraph 5 (2); and (3) that there was an error of law on the face of the award and it must be quashed.

Divisional Court, sub nom. *Regina* v. *Minister of Labour and National Service, ex parte Road Haulage Executive* [1952] W.N. 478; [1952] 2 T.L.R. 720; [1952] 2 All E.R. 764, reversed.

APPEAL from Divisional Court (Lord Goddard C.J., Finnemore and McNair JJ.).

On April 12, 1949, when the transport industry was nationalized, the second respondent, George James Sell, held the position of managing director of a company known as Hauliers Ld., which was the holding company of eight subsidiary companies owning road transport undertakings. He held

that position under a service agreement with Hauliers Ld., by which he was entitled to a salary and allowances, totalling, it was agreed, £3,250 per annum. Pursuant to the Transport Act, 1947, the Road Haulage Executive acquired the entire shareholding of Hauliers Ld. in the subsidiary companies and also the whole of their undertakings. Hauliers Ld. thereupon went into voluntary liquidation, the respondent Sell being appointed liquidator and ceasing to be a managing director of either Hauliers Ld. or any of the subsidiary companies. He was not taken over by the Road Haulage Executive, and, accordingly, he claimed against them compensation for loss of emoluments, contending, in effect, that if the service agreement had run its full course he would have received net emoluments at the rate of £3,250 per annum until February 28, 1950.

Being dissatisfied with the amount of compensation offered by the executive, Sell appealed to the Westminster Compensation Appeal Tribunal, appointed by the Minister of Labour and National Service under the Transferred Undertakings (Compensation to Employees) Regulations, 1950, reg. 3 (3). On April 7, 1952, the tribunal made an award which included damages for wrongful dismissal, the amount being determined in accordance with the provisions of paragraph 5 (2) of Schedule II to the regulations [1] on the ground that the respondent had a "right "or expectation under customary practice to the payment of

[1] Transferred Undertakings (Compensation to Employees) Regulations, 1950, Sch. II, para. 4 (1): "For the "purpose of determining whether "compensation should be awarded to "any person for loss of emoluments, "and if so the amount of that compensation, regard shall be had to— "(i) the existence in his case of any "right or expectation under customary practice to the payment of "compensation in the event of discharge, of reduction in earnings or "of worsening of conditions; (ii) the "conditions upon which he held his "appointment, including in particular its security of tenure, whether "by law or by practice; . . .

"(2) Compensation under this paragraph shall be awarded as follows:— "(i) in the case of an applicant who "has any such right or expectation as "is referred to in sub-paragraph "(1) (i) of this paragraph—(*a*) if "the right or expectation is to the "payment of compensation until "normal maximum retiring age, in "accordance with paragraph 5 (1) of "this schedule; (*b*) if the right or "expectation is to the payment of "compensation otherwise than until "normal maximum retiring age, in "accordance with paragraph 5 (2) of "this schedule; (ii) in the case of an "applicant who has no such right or "expectation as is referred to in sub-"paragraph (1) (i) of this paragraph, "in accordance with paragraph 5 (3) "of this schedule; and shall be paid "at intervals equivalent to those at "which the emoluments of the applicant were previously paid."

Para. 5 (3): "Compensation for "loss of emoluments awarded under "this sub-paragraph shall, subject to "the provisions thereof, be payable "for a period of 13 weeks (inclusive "of any period in respect of which "interim payments of compensation "have been made) or in the case of "an applicant aged over 45, of 13 "weeks (inclusive of any such period "as aforesaid) extended by an additional period of one week for every "completed year of whole time service since he attained the age of 45 "subject to a maximum addition of "13 such periods: . . ."

Para. 17: "There shall be set off "against the interim compensation "payment or the compensation award "made to a claimant any payments "for breach of contract to which he "may be entitled arising out of any "service agreement or contract."

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"compensation in the event of discharge" within the meaning of paragraph 4 (1) (i) of the schedule.

The executive admitted that Sell had a right to claim damages for wrongful dismissal, but they contended that such a right was not comprised within the term "compensation" in the regulations, and that compensation was payable only under paragraph 5 (3) of Schedule II. They therefore moved the Divisional Court for an order of certiorari to bring up and quash the award.

On October 21, 1952, the Divisional Court dismissed the motion, and the Executive now appealed.

*Sir Frank Soskice Q.C.*, *T. F. Southall* and *Robin Day* for the Executive.

*L. Caplan* for the respondent.

The appeal, which started before three Lords Justices, was by consent, owing to the illness of Somervell L.J., continued and concluded before two judges.

*Cur. adv. vult.*

On February 23 the following judgments were read.

Denning L.J., having stated the facts, continued:—Mr. Sell claims compensation for his loss of office. He was not strictly entitled under the Transport Act, 1947, to compensation, because Hauliers Ld. were not themselves carrying on a road transport undertaking, but it was agreed between the parties that he should be treated as if he was a person entitled to compensation. The case has to be treated, therefore, on a hypothetical basis, as if Hauliers Ld. themselves operated the road transport undertakings of the eight subsidiaries and as if Mr. Sell was the managing director of one large operating company. I am not sure that this hypothetical state of affairs has not been the cause of some of the difficulties which have arisen in this case.

At any rate, Mr. Sell claimed compensation for the unexpired portion of his service agreement, that is the 10½ months from April 12, 1949, to February 28, 1950. The British Transport Commission, who are the compensating authority, decided that compensation should only be payable for at most six months. Mr. Sell appealed to the Compensation Appeal Tribunal, who decided that it should be payable for the 10½ months claimed by Mr. Sell. The Road Haulage Executive then applied to the High Court for an order of certiorari to quash the award of the tribunal on the ground that it contained an error of law on the face of it (*Rex* v. *Northumberland Compensation Appeal Tribunal* [1]). The Divisional Court found that there was no error

[1] [1952] 1 K.B. 338; [1952] 1 T.L.R. 161; [1952] 1 All E.R. 122.

and refused to quash the award. The Road Haulage Executive now appeal to this court.

The real question involved in this appeal is what is the proper basis of assessing compensation. The compensation regulations lay down three scales. Mr. Sell says that he is entitled to compensation on the second scale. The Road Haulage Executive say that he is entitled to compensation on the third scale. To make these scales intelligible, I must describe the way in which the regulations work.

When the road haulage system was nationalized, the British Transport Commission took over the contracts which the hauliers had made for the purposes of the carrying on of their undertakings. Those contracts included all the contracts for personal service which the hauliers had made with the men who worked in the business. Those men included all the working staff, from the managing director at the top down to the lorry drivers and garage hands at the bottom. The Commission could not be expected to give every man precisely the same work as he had done before, but they had to give him work which was reasonably comparable to it. The Commission were to select the work, and then the man had no choice but to accept it, provided, of course, that it was reasonably comparable to what he had done previously. It sometimes happened that the Commission had no work available for a man which was reasonably comparable to what he had done before. They could then dispense with his services, but if they did so they had to pay him compensation. In dispensing with his services, they had to give him the proper notice required by his contract or else pay him damages. But even if they did give him proper notice, they still had to pay him compensation for his loss of employment. The Minister of Transport made regulations on the point (S.I. 1950, No. 1083) which divide the men into three categories. The first category (no one now suggests that Mr. Sell was in this category) consists of those men who, under their previous employment, in the event of discharge, had a "right or expectation under customary "practice to the payment of compensation," this compensation being payable "until normal maximum retiring age" of 65. If a man in this category is discharged by the Commission, he is entitled to be compensated by an annual sum until he reaches 65. The amount depends on his length of service, but is not to be more than two-thirds of his current emoluments.

The second category (the one in which Mr. Sell claims to be) consists of those men who, under their previous employment, had, in the event of discharge, a "right or expectation under "customary practice to the payment of compensation." This category is just the same as the first category, but with this difference, that, instead of the compensation being payable until normal maximum retiring age, it is payable "otherwise than "until normal maximum retiring age." If a man in this category is discharged by the Commission, he is entitled to be

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compensated by a weekly sum for an indefinite period, not less, however, than 13 weeks, nor after he reaches the age of 65. The amount is not to be more than two-thirds of his weekly wages and is to stop when he "ceases to suffer loss of emoluments."

The third category (the one which the Road Haulage Executive say applies to Mr. Sell) consists of those men who had no such right or expectation as those in the first two categories. If a man in this category is discharged by the Commission, he is entitled to be compensated by a weekly sum for a period of not less than 13 weeks nor more than 26 weeks, the actual period depending on his age and length of service. The amount is not to be more than two-thirds of his weekly wages. We are not here concerned with the amount of compensation. I can see that that will involve some difficult questions for somebody. We are concerned only to place the men into their appropriate categories.

The first category gives rise to no difficulty. It applies only to those men who under their previous employment, if they had been discharged before reaching the age of 65, would have received compensation until they reached 65. "Compensation" in this connexion obviously means a periodic sum payable, every week, month, or year, as the case may be, until the man reaches 65. It does not include a right to damages at law for wrongful dismissal, because that is never payable "until normal maximum "retiring age."

The second category gives rise to the question in this case. Sir Frank Soskice, on behalf of the Road Haulage Executive, says that it includes only those men who, under their previous employment, in the event of discharge, would have received a definite or ascertainable sum by way of compensation for loss of office or employment, such sum being payable either by a lump sum, or by periodic instalments until some age short of 65 years. But Mr. Caplan, on behalf of Mr. Sell, says that it includes all those men who under their previous employment, in the event of discharge without notice, would have had a right at law to damages for wrongful dismissal. In short, Mr. Caplan says that "compensation in the event of discharge" includes damages for wrongful dismissal, whereas Sir Frank Soskice says that it includes only a definite or ascertainable sum or sums.

I feel compelled to reject Mr. Caplan's contention for the simple reason that, if it were right, every man would come into the first or second categories and no one into the third category at all. I say this because the regulations themselves apply only to men who have been continuously engaged from January 1, 1940, in whole-time service for a road haulier. In order to be "whole "time service" the employment must have been such that the man was "required to devote on the average not less than 30 "hours per week" to his work. Every one of the men so engaged would be entitled to reasonable notice, which would be at least a week's notice; and, in the event of discharge without

notice, he would be entitled to damages for wrongful dismissal. Every one of them would, therefore, on Mr. Caplan's contention, have a right "to the payment of compensation in the event of "discharge" and would come into the first or second category. That cannot be right, because it gives no content to the third category at all. In order to give any meaning to the third category, it must consist of all those men who, under their previous employment, in the event of discharge, would have had no right to be paid any compensation (i.e., a definite or ascertainable sum or sums) but at most only a right to damages for wrongful dismissal.

Another reason why I reject Mr. Caplan's contention is that the regulations themselves show that "compensation" does not include a right to damages for wrongful dismissal. In assessing compensation, the compensating authority is directed to have regard, in paragraph 4 (1) (i) of the Second Schedule, to a right to "compensation in the event of discharge," and in paragraph 4 (1) (ii) to the "conditions upon which he held "his appointment, including in particular its security of "tenure, whether by law or by practice." A right to damages for wrongful dismissal clearly comes under paragraph 4 (1) (ii) and not 4 (1) (i). In other words, it is not "compensa-"tion." Again, in paragraph 17 it is provided that there shall be set off against the compensation "any payments for breach "of contract" arising out of any service agreement or contract. That shows that payments for breach of contract are not regarded as "compensation." Finally, in the first category of men, "compensation" clearly does not include damages for breach of contract.

Mr. Caplan said that injustice would result if we adopted any view other than that for which he contended. I cannot see this. Mr. Caplan admits that there is no injustice in the case of men whose contracts of service are taken over by the Commission. If such a man is given proper notice, he has, of course, no claim to damages but he gets compensation. If he is not given proper notice, he gets damages or compensation, whichever is the greater. Mr. Caplan urged, however, that there would be injustice in the case of a man whose contract of service was not taken over by the Commission. I find it difficult to visualize such a case. I should have thought that, in the case of every whole-time man, there was always some work in the Commission which was reasonably comparable to what he had done before, and that the Commission were bound to take him over and provide it for him under section 45 (3) (*f*) of the Transport Act, 1947. The only men whom I can visualize as not being taken over are those who are engaged by a composite company, partly in the haulage business and partly in some other business. Their contracts of personal service might not vest in the Commission because the terms or subject-matter might make it impossible for them to have effect with the Commission: see the

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opening words of section 45 (3). But in that case the contracts would remain in force with the composite company. They would not be frustrated, and if a man were dismissed in breach of his contract he would have an action for damages against the composite company. He would, therefore, not suffer injustice. But if there are any cases where injustice might be done (and I can at present see none) I think that they are so few that we ought not to allow them to affect our judgment as to the true construction of the regulations.

My conclusion, therefore, is that "compensation in the event "of discharge" means compensation in the event of lawful discharge and does not include damages for wrongful dismissal. I realize, of course, that in this particular case Mr. Sell may not have a claim to damages either against the Commission or against Hauliers Ld., but that is because this case is being treated on a hypothetical basis. It has been argued on the assumption that Hauliers Ld. were engaged in the road haulage business themselves and that Mr. Sell was the managing director of that business. If that had been true, the contract with Mr. Sell would have been taken over by the Commission and he would have had a right to damages from the Commission. The reason why this contract has not, in fact, been taken over is that Hauliers Ld. is only a holding company which is not itself engaged in the road haulage business.

Looking at the decision of the tribunal in the light of this section, I think that there is an error of law on the face of it. The tribunal said that Mr. Sell "had the legal right of a servant "whose service agreement is prematurely determined by a "voluntary liquidation, namely, in the absence of special circum-"stances, to damages for breach of contract. Such damages "are comprehended in the term 'compensation' in those "regulations." I think that that is erroneous. I am of opinion that damages for breach of contract are not comprehended in the term "compensation," and that Mr. Sell is not entitled to compensation on the second scale, but only on the third scale.

I need hardly say that I differ from the Divisional Court with much hesitation, but I gather that the case was much more fully argued before us than it was before that court. Indeed, the reasoning of that court contains no reference to the argument which has found favour with us. I think, therefore, that the appeal should be allowed, and the award of the tribunal quashed.

Romer L.J. The question at issue on this appeal is whether the phrase "any right . . . to the payment of compensation in "the event of discharge" in paragraph 4 (1) (i) of Schedule II to the Transferred Undertakings (Compensation to Employees) Regulations, 1950, is referable only to a right to compensation contractually payable to an employee when his employment is lawfully determined, or whether it includes also his inchoate right to damages in the event of his being wrongfully dismissed.

This question appears to me to be purely one of construction of the regulations in question read, as they must be, in the light of the Transport Act, 1947, by itself. I find no assistance in the solution of this problem from previous cases in which the courts have been called upon to construe the word "compensation"; suffice it to say that in some contexts it has been held to include damages, whilst in others it has been held not to include them, and that none of the contexts was comparable to that in which the word appears in the present case.

Sir Frank Soskice, for the appellants, in his argument before us, drew our attention to a very material fact which does not seem to have been emphasized before the Divisional Court. Mr. Sell's claim to compensation was (or has been treated as being) that of an "existing officer or servant" who had, in consequence of the transfer to the Commission of a haulage undertaking by a notice of acquisition, suffered direct pecuniary loss by reason of the dispensing by the Commission with his services (regulation 3); and it is indeed only to "existing officers or servants" that paragraph 4 of the Second Schedule is applicable at all. By virtue of regulation 1, no employee of a haulage undertaking could qualify as an "existing officer or servant" unless he had been employed since January 1, 1940, on employment to which he was required to devote on the average not less than 30 hours per week, during which he was not at liberty to undertake other work for remuneration. It appears to me to be of the highest importance to bear in mind that it is only officers or servants who possess these qualifications who are entitled to an award under paragraph 4. This paragraph divides such officers and servants into two categories, viz., those who had "any right or expectation "under customary practice to the payment of compensation in "the event of discharge," and those who had not; and the award in favour of members of the first of these categories varies according to whether their right or expectation is to the payment of compensation until normal maximum retiring age, on the one hand, or otherwise than until normal maximum retiring age, on the other.

How, then, do these various provisions fit in with the conception presented by the respondent—that the "right" referred to in paragraph 4 includes the right of the officers and servants in question to receive payment of compensation in the event of wrongful dismissal? In my judgment, it is difficult, if not impossible, to reconcile the provisions with any such idea. Having regard to the definition of "whole time service" in regulation 1, every officer and servant capable of qualifying for an award was necessarily employed under a contract of service which could only lawfully be determined by the employers giving at least one week's notice of discharge. Every one of such officers and servants accordingly had, during the subsistence of his contract, an inchoate right to damages in the event of his dismissal without notice. On this view, paragraph 4 of the

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second schedule was, on the respondent's contention, attributing to some only of the officers and servants the possession of a right which was, in fact, enjoyed by all; and if it was enjoyed by all no effect could apparently be given to paragraph 4 (2) (ii) or to its satellite paragraph 5 (3).

Mr. Caplan, for the respondent, sought to evade this result by arguing that these latter provisions were introduced to sweep up any contracts of a special character under which employees, while satisfying the "whole time service" requirement, could yet be summarily discharged without any right to damages. He was unable, however, to give any satisfactory illustration of such a contract, and I am unable to accept the argument. Assuming that the word "discharge" may in general include both lawful discharge and unlawful dismissal, full effect can be given to the whole of paragraph 4 by confining the scope of the word as therein used to lawful discharge, without including wrongful dismissal as well, and the fact that the wider construction renders, as in my opinion it does render, nugatory and ineffective the provisions of paragraphs 4 (1) (ii) and 5 (3) of the Second Schedule affords, in my judgment, a very sufficient reason for rejecting it. It is further to be observed, as my Lord has pointed out, that the word "right" in paragraph 4 (2) (i) (*a*) cannot, on any reasonable view, include a right to damages.

For the above reasons, even if they stood alone, I should be disposed to conclude that the right to compensation envisaged by paragraph 4 means a contractual right and nothing else. The matter does not, however, rest there. It is provided by paragraph 17 of the Second Schedule that "there shall be set off "against the interim compensation payment or the compensa-"tion award made to a claimant any payments for breach of "contract to which he may be entitled arising out of any service "agreement or contract." It is clear, I think, that the payments for breach of contract to which this paragraph refers are, or at all events include, sums paid or recovered by way of damages by an officer or servant for wrongful dismissal. If so, certain conclusions necessarily follow. The first is that the regulations were visualising that the operation of the Transport Act, 1947, might in some cases give rise to claims by employees for the wrongful determination of their service contracts. The second is that the existence of such claims was regarded as an element wholly apart from the considerations specified and enumerated in paragraph 4 (1) (i) to (vii) as being relevant to the question whether an award should be made at all and, if so, of its amount. The third is that a clear distinction was being drawn in paragraph 17 between compensation awarded under the Act and regulations on the one hand, and damages paid for the wrongful determination of service contracts on the other.

These factors strongly confirm, as I think, that a right to damages for wrongful dismissal is altogether outside the purview

of the "right . . . to the payment of compensation in the "event of discharge" referred to in paragraph 4. If a man's contract was determined without notice, then his right to compensation from the Commission, or (possibly) from his former employers, was left unaffected by the regulations, subject to the stipulation that if, whether by action or negotiation, he received a payment in satisfaction of his claim, the payment was to be brought into account in quantifying an award made to him under the Act. To say that such right as he might have to a payment of this nature is included in the rights referred to in paragraph 4 is, in my opinion, to adopt a view which is irreconcilable with the provisions of that paragraph, when taken as a whole, and is in conflict with the language of paragraph 17.

For the above reasons I am unable to arrive at the same conclusion on this matter as that which commended itself to the Divisional Court. Mr. Caplan urged upon us that if the appellant's argument were accepted manifest hardships would result. He instanced the case of a manager who lost his job without notice by reason of his contract of service not being taken over by the Commission; such a man, it was said, would have no remedy against the Commission, nor could he proceed against his former employer who, having lost his undertaking through force majeure, would be exonerated by the "frustration" principle from being answerable to his manager. Unless, so it was argued, his right to damages was provided for by paragraph 4, he would lose it altogether and merely receive the lowest form of compensation under the regulations. It may be that such a case might possibly arise. None, however, so far as I know, has occurred up to now, and I venture to think that it is unlikely that one will arise, principally because it is very difficult to think of a service contract the terms or subject-matter of which "make "it impossible that it should have effect as modified in the "manner provided by" section 45 (3) of the Act and would yet result in the servant losing his employment if his contract were not taken over by the Commission.

Mr. Caplan also suggested further hardships and anomalies which would arise if we were to accede to the appellant's argument. I do not propose to consider them in detail for, assuming their existence, I think that there is a two-fold answer to any submission founded upon them. In the first place, if the language in which the legislature has expressed itself leads with reasonable certainty to a particular result, that result cannot be displaced merely because it gives rise to anomalies; and, secondly, if anomalies or hardships emerge which call for redress, I know of no reason why the Minister should not, if he thinks proper, provide for them by issuing further regulations under section 101 of the Act.

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For the above reasons, and those stated by my Lord, I agree that this appeal should be allowed, and the award of the tribunal quashed.

*Appeal allowed and order of tribunal quashed.*
*Leave to appeal to House of Lords.*

Solicitors: *M. H. B. Gilmour; Carr, Sandelson & Co.*

A. W. G.

[QUEEN'S BENCH DIVISION.]

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*Feb.* 23.
Lynskey J.

## *SURREY COUNTY COUNCIL *v.* MINISTRY OF EDUCATION.

*Local Authority — Education — Transport for pupils — Travelling expenses—Proposal to pay to parents only a sum sufficient to carry child to within walking distance of school and home—"Transport "to and from school"—Education Act*, 1944 (7 & 8 *Geo.* 6, *c.* 31), *ss.* 39 (2) (*c*); 55 (1) (2).

A local education authority, who had arranged for the transport to school of children living more than three miles from school, proposed that the full cost of transport by public conveyance to and from school should no longer be paid for secondary school children, but that expenditure should be limited to partial payment of fares in such a way that no child had a longer distance than three miles to and three miles from school to travel unaided, and that parents of such children living more than three miles from their school should be paid a sum equal to the cost of the fare necessary to bring the child within the three-mile limit. On an originating summons taken out by the authority asking whether they were authorized by section 55 of the Education Act, 1944,[1] to make the proposed arrangements:—

[1] Education Act, 1944, s. 39: "(1) If any child of compulsory school "age . . . fails to attend regularly ". . . the parent . . . shall be guilty "of an offence. . . . (2) In any pro- "ceedings for an offence against this "section . . . the child shall not be "deemed to have failed to attend "regularly at the school . . . (*c*) if "the parent proves that the school at "which the child is a registered pupil "is not within walking distance of "the child's home, and that no suit- "able arrangements have been made "by the local education authority . . . "for his transport to and from the "school. . . . (5) In this section . . . "'walking distance' means, in rela- "tion to a child who has not attained "the age of eight years, two miles, "and in the case of any other child, "three miles. . . ."

S. 55, as amended by the Education Act, 1948: "(1) A local educa- "tion authority shall make such "arrangements for the provision "of transport and otherwise as "they consider necessary or as the "Minister may direct for the purpose "of facilitating the attendance of "pupils at schools . . . and any trans- "port provided in pursuance of such "arrangements shall be provided free "of charge. (2) A local education "authority may pay the whole or any "part, as the authority think fit, of "the reasonable travelling expenses "of any pupil in attendance at any "school . . . for whose transport no "arrangements are made under this "section."

*Held*, that "transport" in section 39 (2) (*c*) clearly meant transport to and from school and the home, and the obligation imposed on a local education authority by section 55 (1) was to make arrangements for such transport, either by their own vehicles or other means; that section 55 (2) imposed on the authority the obligation, where no transport under section 55 (1) was provided, to provide a substitute for such transport which must be of the same character, and that, therefore, substitute for transport in the shape of payment for public transport must provide for the payment of a sum to cover the cost of conveying the child by public transport from a point reasonably near his home to a point reasonably near his school. The authority, accordingly, were not authorized by section 55 to make the proposed arrangements, nor were the arrangements "suitable arrangements" within the meaning of section 39 (2) (*c*).

ORIGINATING SUMMONS.

The Surrey County Council, in the capacity of the local education authority for the county of Surrey, maintained primary and secondary schools pursuant to the provisions of the Education Acts, 1944 to 1948, and their arrangements, under section 55 of the Act, for the provision of transport for the purpose of facilitating the attendance of pupils at their schools were in some cases to provide special vehicles to take pupils to and from school, and in other cases, where a pupil travelled by a public transport vehicle, the usual course was to provide the pupil, free of charge, with a travel voucher. Except in special circumstances, secondary school pupils did not travel by public transport at the council's expense unless they lived at least three miles from the school which they were expected to attend.

By a circular, No. 242 of December 7, 1951, addressed to all local education authorities, the Minister of Education stated that she found it necessary to ask for a reduction in the expenditure on school transport, which had been steadily rising and had reached a figure of over £4,000,000. The circular stated: "In a "number of areas children are being conveyed free to school over "distances less than the statutory minima laid down in section "39 (5) of the Education Act, 1944. In present circumstances "the Minister of Education does not regard this as justifiable, "though she will be prepared to consider quite exceptional cases "where the authority can satisfy her that special justification "exists—e.g., because of serious traffic dangers and the special "needs of handicapped children."

Having considered that circular, the education committee of the council made three proposals which were approved by the council in March, 1952. The first two proposals limited the classes of children living within three miles of their school who would be conveyed to school or assisted with their fares. The third of the proposals was that the full cost of transport by public conveyance to and from school should no longer be paid for secondary school children, but that expenditure should be limited to partial payment of fares in such a way that no child had a

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longer distance than three miles to and three miles from school to travel unaided. The council proposed that parents should be paid a sum equal to the cost of the fare necessary to bring the child within the three-mile limit, special cases of hardship being considered on their merits. It was estimated that the annual reduction in expenditure on the part of the council by the adoption of that proposal would be approximately £20,000 in a full financial year.

After the council had approved the proposals their attention was drawn by officers of the Ministry to the fact that a proposal similar to the council's third proposal had been put into operation in 1950 by the Thanet Divisional Executive, acting on behalf of the Kent County Council. The council were given to understand that, as a result of complaints made by parents, in April, 1951, the Minister of Education, relying on the powers of direction conferred by section 55 (1) of the Education Act, 1944, had issued a directive that the arrangements to be made by the Thanet Divisional Executive under section 55 (1) for the provision of transport of pupils at schools should provide for transport without cost to the parents from the bus stop nearest to the pupil's home to the bus stop nearest to the school.

The fact that the Minister had issued such a direction was not known to the council at the time when they approved the proposals, and accordingly on May 23, 1952, the chief education officer to the council wrote to the secretary of the Ministry of Education setting out the council's proposals, and asking whether the Minister would "follow her predecessor's policy or whether, "having regard to the present circumstances of the country as "defined in circular 242, she will not give any direction to the "authority in the matter." A reply to that letter dated July 1, 1952, stated that the Minister could not accept the council's third proposal. Later, on July 28, 1952, the Minister received a deputation from the council. In the course of her discussion with the deputation the Minister stated that she had been advised that the council's third proposal was contrary to the provisions of the Act, and that, with that advice before her, she could not exclude the possibility of having to give a direction, as her predecessor had done in Kent, if the council put the scheme into operation and an appeal was made to her by an aggrieved parent.

Following that meeting, the council took legal advice, and although of the opinion that the proposal ought to be put into operation, felt no longer at liberty to do so because, in view of the Minister's attitude, to put the third proposal into operation might, by virtue of regulation 15 of the Education (Local Education Authorities) Grant Regulations, 1948, jeopardize the council's right to receive Exchequer grants in respect of the expenditure incurred.

No question arose regarding the first two proposals, which were approved by the Minister, but the council took out an originating summons to have determined—(1) Whether on the

true construction of section 55 of the Education Act, 1944 (as amended), they were authorized to make the arrangements comprised in their third proposal; and (2) whether such arrangements were suitable arrangements within the meaning of section 39 (2) (*c*) of the Act for the transport of a child to and from the school at which he was a registered pupil.

*Harold Williams Q.C.* and *S. B. R. Cooke* for the council.
*J. P. Ashworth* for the Ministry.

No cases were cited in argument.

LYNSKEY J. This is an originating summons brought by the Surrey County Council against the Ministry of Education in which two questions are submitted to the court arising out of the obligations of the Surrey County Council, as the education authority, for the provision of transport or the substitute for transport for children over 12 years of age attending secondary schools in the council's area; the same considerations, so far as the council's obligations are concerned, also apply to children over eight years of age.

[His Lordship stated the facts substantially as set out above and continued:] The answer to the questions submitted for the consideration of the court depends (and depends entirely) upon the construction primarily of section 55 of the 1944 Act as amended by the Act of 1948, and secondly upon the construction of section 39, and in addition, of course, upon the context in which the sections appear. By "context" I mean the general scheme of the Act as indicated by its terms. As I understand the Act, it imposes upon an education authority the obligation to provide education of different standards. I am concerned here particularly with primary education, which the council has to provide within the confines of its jurisdiction; that is a mandatory obligation imposed by the Act upon the local education authority.

Under the scheme of the Act the local education authority originally had to submit schemes for the Minister's approval and the council did submit such schemes. Section 11 (2) (*g*) of the Act required such schemes to give information as to "measures "which the authority propose to take in fulfilment of their duty "to secure the provision of schools for providing primary and "secondary education, such as the making of general arrange-"ments for the transport of pupils to and from school." The taking of such measures, apparently, is one of the primary obligations imposed upon the education authority.

The Act having first, as I have said, imposed a duty upon the education authority to provide schools and instruction, goes on to impose an equal duty upon parents of the children to see that their children take advantage of the educational facilities provided. Section 36 provides: "It shall be the duty of the

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" parent of every child of compulsory school age to cause him " to receive efficient full-time education suitable to his age, " ability, and aptitude, either by regular attendance at school or " otherwise." If the child is not at school, section 37 provides for the making of a school attendance order, and imposes upon the parent the obligation of sending the child to the school of which such school attendance order requires him to be a registered pupil.

Section 39 is concerned with the obligation of the parent to send his child to school and is similar to a section in the earlier Act which was known as the truancy section.

[His Lordship read section 39 (1), (2) (*c*) and (5) and continued:] On the face of section 39, if a parent did not send his child to school, and the child lived outside the three-mile radius of the school, and no transport was provided for him, the parent would be excused from sending his child to school, and for his non-attendance. On behalf of the council it is said that, although that may be possibly the prima facie meaning of the words, their obligation is imposed by section 55 and not by section 39. [His Lordship read section 55 and continued:] The council argue that they have not made the arrangements in question under subsection (1) of section 55 because arrangements under subsection (1) are " arrangements for the provision of " transport and otherwise "—not " or otherwise "—and I think that it is conceded by the council (and if not, it is clearly my view) that subsection (1) of section 55 relates to the actual provision of transport as such, either with hired vehicles or their own vehicles or by other means—maybe by providing a short cut over some obstacle which would make the distance more than three miles, and reducing it to under three miles.

They contend that this scheme is not for the provision of transport in the sense required by subsection (1), but is a scheme made under subsection (2) of section 55 for the provision of the cost of the child using public transport; and as such provision can only be made in the case of a child for whose transport no arrangements are made under the section, it seems clear that no arrangements for transport have been made in the case of the children for whom the scheme is intended to provide, but that the scheme is to pay the reasonable travelling expenses, either in whole or in part, of the children who live more than three miles away from the school at which they are registered pupils.

The council are saying, in effect, that they have a discretion as to what they shall pay. They have to make arrangements for facilitating the attendance of pupils at school, and the argument on their behalf is that by their scheme they are providing payment in respect of the child's transport which will enable the child to reach the school by walking less than three miles. The council, therefore, say that they are within the wording of section 55 (1) and (2) in that they are providing reasonable

arrangements for the provision of transport or substitution for the provision of transport by payment.

The case put forward on behalf of the Minister is that, if section 55 stood alone, and apart from anything else in the Act, that is a possible construction and a possible view; but it is argued that if that view is adopted it will result in a scheme which will not prevent the parent from taking advantage of the provisions of section 39 (2) (*c*) if proceedings are taken against him for truancy; and it is said that a scheme with such results is obviously not a suitable arrangement within the words of section 55. Mr. Williams agreed that if the scheme would leave it open to the parent of a child residing outside the three-mile radius to take advantage of that excuse, it could not be considered a proper scheme within the meaning of section 55.

My view is that this case really turns upon the interpretation of section 39 (2) (*c*) and (5). The question is: Has the council made suitable arrangements for the transport to and from the school of the child who lives more than three miles from the school?—and "to and from the school" in that context means from and to the child's home to and from the school. If it becomes a question of transport to and from the school, I should have thought that that could have only one meaning. Provision has to be made, if the child lives more than three miles distant from his school, for transport between the school and the home. It seems to me that to suggest that transport to a point two miles away from the school—which would mean not transport to the school, but transport half-way to the school—cannot be read into those words.

The words appear to me to be clear. Transport has to be provided to and from the school as from the home. That is the obligation as to transport, and in this case the scheme is to provide a substitute for transport by payment, but in my view the reasoning applicable to the provision of transport must apply equally to payment as a substitute for transport. If in fact the obligation is to provide transport to and from the school when the child is resident more than three miles away from the school, then equally I am satisfied that the substitute for transport in the shape of payment for public transport must be of the same character, and must provide for payment of the sum which will cover the cost of taking the child by public transport from a point reasonably near his home to a point reasonably near the school—I do not say to the school door, but reasonably near thereto.

In those circumstances, on my view of the law, the answer which I must give to the first question is that on the true construction of section 55 of the Education Act, 1944, as amended by the Act of 1948, the council are not authorized to make such arrangements as they propose. On the second question I accept

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the answer which has been suggested to me by Mr. Ashworth, that the proposed arrangements as a matter of law are not suitable arrangements within the meaning of section 39 (2) (*c*).

*Order accordingly.*

Solicitors: *Wyatt, Jeffery & Co. for W. W. Ruff, Clerk of the Surrey County Council; Treasury Solicitor.*

J. F. L.

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[PROBATE, ETC., DIVISION.]

1953
*Feb.* 13.

## * KLUCINSKI *v.* KLUCINSKI.

Lord Merriman P. and Collingwood J.

*Husband and Wife — Justices — Maintenance — Quantum — Earning capacity.*

In assessing the amount of maintenance which a husband should be ordered to pay under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895–1949, the justices should take into account, as in the High Court, not merely the husband's actual earnings, but his earning capacity. Such earning capacity includes the amount which he is capable of earning from overtime.

APPEAL from the justices for the Borough of Mansfield.

On an application by a wife for a maintenance order, the justices held on October 22, 1952, that her husband had committed adultery and had been guilty of desertion, and made an order accordingly. The husband's net weekly wage from his employment at Bilsthorp Colliery, after deducting income tax, national health contribution, etc., between July, 1952, and the hearing of the summons was between £11 8s. and £12 16s. Those figures included pay for overtime; the basic wage was between £9 and £10 a week. The justices made an order of 30s. a week for the wife, and of 15s. for the child of the marriage. A further child was born in January, 1953, and an order was in fact made in respect of that child for 20s. a week under the Guardianship of Infants Acts.

The wife appealed against the amount of maintenance ordered for herself; there was no cross-appeal upon the findings of fact which were admitted to be true. In their reasons the justices said: "Experience in dealing with such cases has shown us that "if we base the amount of our order on such figures [*i.e.*, "including overtime] the man more often than not stops working "overtime as he feels he has no longer any incentive to do so."

*A. B. Hollis* (*John Syms* with him) for the appellant wife.

The husband did not appear and was not represented.

LORD MERRIMAN P. stated the facts and said:—On the face of those facts I am bound to say that it does not strike me that for an injured wife, a woman who has been treated as this woman has been treated, 30s. is a very lavish award. The justices explain that in this way: They say, taking the lower figure, £11 8s., that it includes considerable earnings in respect of overtime. That is fairly obvious. They say that the basic wage is between £9 and £10 a week. That may or may not be so; the figure is not challenged, and I will assume that it is right. But I think that they have gone wrong in a matter of principle, and I think it is necessary that we should make that clear. [His Lordship quoted the reason already stated above and continued:]

To my mind, that is a plain misdirection in law. It is elementary law in this connexion that in assessing the amount of maintenance justices ought to take into account, just as we are bound to do here, not merely actual earnings but earning capacity. Therefore, to make a deduction from wages actually earned because some of it represents overtime and because, if that figure is taken into account, the man will cease to work overtime, is to say in effect: "We will not take any account, not merely of "his earning capacity, but of the fact that he has chosen to "exercise his capacity to earn." That must be wrong, and on that account I think that it is clearly open to us to interfere with this order. The only question is: What is the best way to do it?

The question, strictly viewed, is: What was the proper figure to award last October? Whereas the practical issue is: What is the proper amount to award now if the total amount that she is receiving is not, in fact, enough? It is very seldom advantageous, unless the resulting figure is absolutely clear, to send the case back merely for consideration afresh when by a summons issued tomorrow the aggrieved party can obtain a review of the figures upwards or downwards on the ground that the amount is now shown to be too little or too much, as the case may be; for, as has been explained over and over again, the result of comparatively recent legislation is that it is no longer necessary, on the pure question of amount, to produce "fresh evidence" in the sense in which those words have been interpreted. To put it quite shortly, it is sufficient to show that experience has proved that the amount is too little or too much, as the case may be.

We are not really in a position to decide upon that point, because, apart altogether from the question how much, if any, of this weekly figure represents what I call earning capacity as distinct from the actual basic figure of the husband's wage, there is also the question of the wife's earning capacity, always assuming (which I must not be taken to be assuming against her) that it is right in the circumstances of this case, particularly with a new infant child, that she should, so to speak, be forced to go out to work.

In a word, the obvious solution of this matter is to leave the wife, if it proves to be that she has not sufficient to live on under

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the two orders, to go to the justices and ask for a revision, and I hope that the justices, if that arises, will take note of the view which I am expressing that it is wrong to eliminate overtime pay, or the capacity to earn it, from their calculations.

With these observations I think that the matter may safely be left to the wife and her advisers to take such action as is necessary to obtain any revision of this amount which is thought to be necessary.

COLLINGWOOD J. I agree. In my opinion the justices have misdirected themselves. The criterion here is capacity to earn, and they have deliberately excluded that from their consideration. There is not the material before this court to enable us to assess the amount, and I agree to what the President has said, that it is not a practical solution to send the case back for the magistrates to assess the amount as at October, 1952, which would be what they would have to do. Circumstances have changed since then, and I agree that the best solution is for the wife, if and when she finds the existing amount to be inadequate, to go back to the justices for it to be increased.

*Appeal dismissed in the special circumstances.*

Solicitors: *Peacock & Goddard.*

J. B. G.

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[QUEEN'S BENCH DIVISION.]

1953
*Feb.* 24.

Gerrard J.

## *MAURAY *v.* DURLEY CHINE (INVESTMENTS) LD.

[1952 M. 1345.]

*Landlord and Tenant—Rent restriction—Flat with services—Option to grant new lease in original form—Rent reduced by tribunal—Option exercised—Refusal to grant new lease—Whether option valid—Contract—Legality—Furnished Houses (Rent Control) Act,* 1946 (9 *&* 10 *Geo.* 6, *c.* 34), *ss.* 2, 4 (1), 9.

Landlords leased to a tenant a flat for seven years from June 24, 1946, at a rent of £525 per annum, and covenanted to provide certain services. By a deed dated March 30, 1949 the landlords granted the tenant an option, to be exercised on or before June 24, 1952, to take a new lease of the flat from June 24, 1953, in the form of the existing lease. On the tenant's application, a rent tribunal on January 23, 1950, exercising powers under the Furnished Houses (Rent Control) Act, 1946, reduced the rent to £425 per annum. On December 4, 1951, the tenant exercised the option. The landlords refused to grant the new lease, alleging that as a result of the

[Reported by Miss C. J. ELLIS, Barrister-at-Law.]

tribunal's decision and the subsequent entry of the lower rent in the register they were prohibited by the Act from requiring or receiving a rent of £525 as expressly stipulated in the deed and accordingly the option was null and void:—

*Held*, first, that the granting of a future lease at a rent of £525 would not of necessity involve illegality because, if an application were made to the tribunal to reconsider the rent, they would have power to increase it.

*Held*, secondly, that a mere covenant in a lease to pay rent in excess of the amount permitted was not a requirement in the sense in which the word "require" was used in section 4 of the Act, which provided that "it shall not be lawful to require . . . payment "of any sum in excess of the rent" entered in the register, although any attempt to enforce the covenant would be a requirement within the section.

*Held*, thirdly, that, in any event, such a covenant would not render the whole lease void.

The tenant was accordingly entitled to a declaration that the option was valid and subsisting and that it was duly exercised by his notice of December 4, 1951.

ACTION.

By a lease, dated December 14, 1946, the defendants demised to the plaintiff flat C1, Durley Chine Court, Bournemouth, for a term of seven years from June 24, 1946, at a rent of £525 per annum inclusive, and as an additional rent an amount equivalent to any increase in the rates which the defendants might be obliged to pay during the term. The lease included a covenant by the lessors to provide central heating and hot water.

As one of the terms of a compromise of disputes which had arisen between the parties, the defendants granted to the plaintiff an option by an agreement under seal dated March 30, 1949, which provided, inter alia:—"(1) In pursuance of the said term "of settlement and in consideration of the compromise the lessee "shall have the option of taking a lease of the several rooms and "bathrooms and servants offices known as flat No. C.1 on the "second floor of the building known as Durley Chine Court "Bournemouth in the County of Hants for a term of seven years "from June 24, 1953, at the yearly rent of £525 such lease to be "in the form of the existing lease of the said premises dated "[December 14, 1953] and made between the lessors of the one "part and the lessee of the other part. . . . (4) The said option "shall be exercisable by notice in writing to the lessors at any "time before or on June 24, 1952, and if and when the same shall "be exercised then the lessors shall forthwith grant and the "tenant shall accept a lease of the said flat on the said terms of "the said premises to commence from June 24, 1953."

On the plaintiff's application the Bournemouth Rent Tribunal, exercising their powers under the Furnished Houses (Rent Control) Act, 1946, on January 23, 1950, reduced the rent from £525 to £425 for the duration of the Act. On December 4, 1951, the plaintiff sent to the defendants a notice exercising the option. The defendants refused to grant the lease.

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The plaintiff claimed a declaration that the option was valid and subsisting and that it was duly exercised by his notice of December 4, 1951. The defendants in their defence pleaded: "(5) As a result of the said decision of the said rent tribunal "made on the application of the plaintiff . . . the rent of £525 "per annum which was expressly stipulated in the said deed of "March 30, 1949, as the rent at which the plaintiff was given the "said option of taking a further lease of the said flat became "under the provisions of the Furnished Houses (Rent Control) "Act, 1946, an unlawful rent for the said flat which the defen- "dants under penalties set forth in the Act were prohibited from "requiring or receiving. (6) In the premises the said option "became null and void and the said purported exercise thereof "became and is a nullity. (7) By reason of the matters aforesaid "the plaintiff is not entitled to the declaration claimed."

*F. W. Beney Q.C.* and *Peter Bristow* for the plaintiff.
*Cyril Salmon Q.C.* and *J. T. Plume* for the defendants.

The following cases were referred to in argument:—*W. H. Brakspear & Sons Ld.* v. *Barton* [1]; *Gaskell* v. *King* [2]; *Attwood* v. *Lamont*,[3] and *Regor Estates* v. *Wright*.[4]

Gerrard J. This is a case of considerable interest and novelty. There has been no decision on the particular point which has been discussed before me. [His Lordship stated the facts and continued:] The determination of this matter depends on the proper interpretation of the Furnished Houses (Rent Control) Act, 1946. Section 1 of that Act provides for tribunals being brought into existence. Section 2 (1) provides: "Where a contract has, "whether before or after the passing of this Act, been entered "into whereby one person (hereinafter referred to as the "'lessor') grants to another person (hereinafter referred to as the "'lessee') the right to occupy as a residence a house or part of "a house situated in a district in which this Act is in force in "consideration of a rent which includes payment for the use of "furniture or for services, whether or not, in the case of such a "contract with regard to part of a house, the lessee is entitled, "in addition to exclusive occupation thereof, to the use in "common with any other person of other rooms or accommoda- "tion in the house, it shall be lawful for either party to the "contract or for the local authority to refer the contract to the "tribunal for the district. . . ." It is common ground that the first lease was a contract within section 2 (1) of that Act.

By section 2 (2): "Where any contract to which this Act "applies is referred to a tribunal, then, unless at any time before

[1] [1924] 2 K.B. 88; 40 T.L.R. 607.
[2] (1809) 11 East 165.
[3] [1920] 3 K.B. 571; 36 T.L.R. 895.
[4] [1951] 1 K.B. 689; [1951] 1 T.L.R. 242; [1951] 1 All E.R. 219.

" the tribunal have entered upon consideration of the reference " it is withdrawn by the person or authority by whom it was " made, the tribunal shall consider it and, after making such " inquiry as they think fit, and giving to each party "—and then there are certain immaterial provisions—" an opportunity of being " heard, or, in his option, of submitting representations in " writing, shall approve the rent payable under the contract " —those are material words—" or reduce it to such sum as they " may, in all the circumstances, think reasonable, or may, if they " think fit in all the circumstances, dismiss the reference, and " shall notify the parties and the local authority of their decision " in each case." By subsection (5) it is provided: " An approval, " reduction or increase under this section may be limited to rent " payable in respect of a particular period."

By section 3 (1): " The local authority shall prepare and keep " up to date a register for the purposes of this Act, and shall " make the register available for inspection," in certain circumstances. By subsection (2): " The register shall be so prepared " and kept up to date as to contain, with regard to any contract " under which a rent is payable that has been approved, reduced " or increased under the last foregoing section (being a contract " relating to premises situated in the area of the local authority), " entries of—(*a*) the prescribed particulars with regard to the " contract; (*b*) a specification of the premises to which the " contract relates; and (*c*) the rent as approved, reduced or " increased by the tribunal, and, in a case in which the approval, " reduction or increase is limited to rent payable in respect of a " particular period, a specification of that period." That is a provision for the setting up of a register, which requires as a prerequisite to its coming into operation in relation to any particular case the circumstance that there has been a contract under which a rent is payable that has been approved, reduced or increased.

Under section 3 (2) (*c*) entries will have to be made in the course of keeping the register up to date, and it will also show the results of anything which has happened under section 2 (3), which provides: " Where the rent payable for any premises "—a rather interesting alteration of wording from " rent payable " under the contract "—" has been entered in the register in " accordance with the provisions hereinafter contained,"—and those I have read—" it shall be lawful for the lessor or the lessee " or the local authority to refer the case to the tribunal for " reconsideration of the rent so entered on the ground of change " of circumstances, and the provisions of subsection (2) of this " section shall apply on any such reference in like manner as " they apply on a reference under subsection (1) of this section " subject to the modification that the tribunal shall have power " to increase the rent payable." That power seems to be an important matter which must be borne in mind in considering this case. The joint effect of the provisions to which I have just

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Gerrard J.

referred is that at any time it can be ascertained by inspection of the register what is the rent payable for the premises under the terms of this Act, and the register will show decreases or increases, as the case may be, according to the history of the particular premises.

Section 4 (1) provides: "Where the rent payable for any "premises is entered in the register under the provisions of this "Act, it shall not be lawful to require or receive—(*a*) on account "of rent for those premises in respect of any period subsequent to "the date of such entry"—that is to say, in the register—"(or, "in a case in which a particular period is specified, in respect of "that period) payment of any sum in excess of the rent so "entered." That is carried a stage further by section 9, which provides that "A person who requires or receives any payment ". . . in contravention of section 4 of this Act shall be guilty of "an offence"; and penalties are provided.

Mr. Salmon, on behalf of the defendants, submits that the covenant to pay rent in the lease of December 14, 1946, is a requirement by his clients of the plaintiff to pay £525 a year, and that to grant another lease in the form of that lease would at the material time, June 24, 1953, be a requirement by the defendants from the plaintiff of payment of a sum in excess of the rent entered in the register, and therefore not lawful, and that that would subject his clients to a penalty. He says that his clients cannot be called on to grant a new lease which involves that illegality, and that therefore, because of the events to which I have referred, the option is null and void and the purported exercise of it is a nullity. He says that the existing lease, despite its requirement, in effect, that the plaintiff shall pay a higher rent than that shown on the register, is not affected by these considerations because the effect of the tribunal's decision to reduce the rent payable under the lease is as if it were a physical alteration of the figure, and that therefore the covenant with regard to the payment of £525 rent is, by the act of the tribunal, no longer a requirement to pay £525 but only to pay £425. I do not say that that is precisely how Mr. Salmon put part of his argument, but it is a reasonable paraphrase, I think, of one of his main contentions. He says that "requirement" has to be used in an ordinary business sense; a covenant like this in a lease between two parties is clearly a requirement of the lessor, and that contention is fortified by the fact that the very words of the statute itself in section 2 (2) speak of reducing the rent payable under the contract. So he says that it follows that that has become a requirement to pay the lesser, and not the higher rent. But he also says that that matter has no effect on the lease in futuro which has not yet come into being and which cannot yet come before a tribunal and suffer any alteration in the register.

Mr. Beney drew my attention to section 2 (3), that is, where there is already a rent on the register an application may be made

for an increase of the rent, and the tribunal is given power to increase it. I think that it would be useful to put that subsection in this form: "Where at any given date the rent payable for the "premises is entered on the register, and it is any excess over "this, that it is not lawful to require or receive, either party may "refer the case to the tribunal for reconsideration of the rent "so entered on the ground of change of circumstances." Therefore Mr. Beney contends that, at the time when the new lease takes effect, it is possible that the rent may again be £525 on the register, or indeed, it even might be more, and, if the lessee is then required to pay £525, section 4 (1) will not be infringed. That being so, says Mr. Beney, how can the court today say that in June of this year there will be any unlawful requirement, and how can the court today say that the option is null and void or that the purported exercise of it is null and void? I think that that contention is right. I do not think that I am entitled to speculate about what the tribunal may do if an application is made to them. It is conceivable, if I do not grant the defendants the relief they ask today—and I hope that so far as they are concerned the future lease is a dead letter—that they may go to the tribunal at the end of the present lease and ask the tribunal to put the rent up, say, to £600, and they might possibly get the rent put back to £525. I do not think that I can find affirmatively today that, if the second lease is granted in the terms provided for by the option, any illegality will be involved; and I do not think that I am entitled to make an assumption of illegality.

Having said that, I think that it is really sufficient to dispose of the case. I realize full well, however, that that may not be very helpful to the parties, so I think that I should go further and deal with another aspect of the matter. All that I have said up to now assumes that a lease in the form provided for by the option involves a requirement by the defendants of a rent within the meaning of the word "require" or "requires" in section 4 and section 9 of the Act. I am by no means satisfied that it does. It may be that at any time during the history of the future lease the rent covenanted to be paid may be in excess of the rent payable for the premises entered in the register. It may be that from time to time the two figures will coincide. It may be, as I have said, that on June 24, 1953, the figures may coincide or the register figure may be greater or less than the covenanted figure. All that depends on unforeseeable circumstances. Can it be said that the intention of the Act is to prevent any such future lease being executed and to prohibit or render ineffective any undertaking under deed or consideration to execute such a lease in futuro? I think that it would be extraordinary if that were the intention of the Act. In my opinion, the whole matter turns on the meaning to be given to the word "require" in its context in the Act, bearing in mind the general intention of the legislature to be derived from a

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consideration of it. It is unlawful to require or receive—one need not bother about "receive" for this purpose—any sum in excess of the amount entered in the register. I think that a mere covenant to pay a rent in excess, even at the instance of the lessor, is not a requirement in the sense in which the word "require" is used in this Act. Any attempt to enforce that covenant or demand its fulfilment would, I think, be to require an excess of rent where the amount covenanted for exceeds the amount in the register; but I think that short of that there is no requiring within the statute in this case. Further, I do not think that such a covenant would render the whole lease void or of no effect.

I have been referred to a number of authorities, but I do not think that they really help. This is an Act of a special and peculiar kind, and the meaning of the words in the Act has to be derived from a consideration of the whole of the Act; and that I have endeavoured to do. The result is that the plaintiff is entitled to the declaration in the form in which it is sought, and to the costs of the action.

*Declaration accordingly.*

Solicitors: *Jacobson, Ridley & Co.; Evans, Baker & Co.*

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[CHANCERY DIVISION.]

1953
*March* 3.

Vaisey J.

## * RELIANCE (NAMEPLATES) LD. *v.* ART JEWELS LD.

[1953 R. 547.]

*Copyright — Registered design — "Medal" — Coronation medallion — Whether subject of copyright—Copyright Act,* 1911 (1 *&* 2 *Geo.* 5, *c.* 46), *s.* 22—*Registered Designs Act,* 1949 (12, 13 *&* 14 *Geo.* 6, *c.* 88), *s.* 1 (4)—*Designs Rules,* 1949 (*S.I.* 1949, *No.* 2368), *r.* 26.

A souvenir medallion, sold in connexion with the coronation, bearing on the obverse side a representation of the head of her Majesty the Queen and on the reverse side an inscription, together with a band of oak leaves, and the royal cipher, is a "medal" within the provisions of Rule 26 of the Designs Rules, 1949, and accordingly is the proper subject matter of copyright.

MOTION.

The plaintiffs, Reliance (Nameplates) Ld. and George Henry Paulin, applied to the court by interlocutory motion in a copyright action for an injunction restraining the defendants, Art Jewels Ld., from "reproducing, selling, by way of trade exposing "or offering for sale or distributing medals, being copies or "colourable imitations of a coronation souvenir medallion, "bearing on its face a portrait of Her Majesty, the Queen and "on its back the words 'the Coronation of Her Majesty Queen

" ' Elizabeth II,' a design of oak leaves and a cypher, published " by Reliance (Nameplates) Ld., or of any substantial part of the " design thereof or by authorizing any such acts as aforesaid."

The chairman and managing director of the plaintiff company, in his affidavit, stated that the picture on the face of the medallions was used by the plaintiff company under licence from the second plaintiff, George Henry Paulin, the owner of the copyright, and that the design of oak leaves, the cypher " E.R.," and the selection and arrangement of the words on the reverse side of the medallion were designed and prepared by employees of the plaintiff company in the course of their employment and were the plaintiff company's copyright.

He stated that the defendant company were supplying to street vendors and others similar medallions of inferior workmanship and quality which had been reproduced from the plaintiffs' medallion. The defendants filed no evidence.

The question arose whether the plaintiffs' medallions were " medals " within the provisions of rule 26 of the Designs Rules, 1949,[1] and consequently could be the subject of copyright.

*James Mould Q.C.* and *F. E. Skone James* for the plaintiffs.
*K. E. Shelley Q.C.* and *Maurice Share* for the defendants.

Cases referred to in argument: *Bridgman* v. *Dove* [2]; *Usher* v. *Barlow*.[3]

VAISEY J. This is a motion for an interlocutory injunction in a copyright action.

The plaintiff company has for some time past been manufacturing and distributing what I may call, by a neutral description, " coronation medallions." They are rounded pieces of metal, somewhat larger than a half-crown.

[After further describing the medallions his Lordship continued:] These medallions have apparently been on the market and sold in considerable numbers by the plaintiff company.

The defendants have been supplying a medallion which in design is, I think, admittedly indistinguishable from the plaintiffs' article; and it is alleged and not denied that that has

[1] Copyright Act, 1911, s. 22 (1): " This Act shall not apply to designs " capable of being registered under " the Patents and Designs Act, 1907, " except designs which, though cap- " able of being so registered, are not " used or intended to be used as " models or patterns to be multiplied " by any industrial process."
Registered Designs Act, 1949, s. 1 (4): " Rules made by the Board of " Trade under this Act may provide " for excluding from registration " thereunder designs for such articles, " being articles which are primarily " literary or artistic in character, as " the Board think fit."
Designs Rules, 1949, r. 26: " There " shall be excluded from registration " under the Act designs to be applied " to any of the following articles, " namely: . . . (2) wall plaques and " medals."

[2] (1744) 3 Atk. 201.

[3] [1952] Ch. 255; [1952] 1 T.L.R. 239; [1952] 1 All E.R. 205.

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been produced from the plaintiff companys' medallion by the use of a die, thereby securing an exact copy. Those alleged infringing medallions are being sold in large quantities at a lower price than the plaintiffs' medallions, and it is alleged that such continued sales are likely to cause loss to the plaintiff company.

The law is, I think, well settled and not in dispute. "Copyright" under the Copyright Act, 1911, means the sole right to produce or reproduce the work or any substantial part of the work in respect of which the copyright is claimed, and it also includes the right to authorize sales, publications and so forth. A breach of copyright or an infringement of copyright is doing something, without the consent of the owner of the copyright, the sole right to do which is conferred on such owner by the Act. There is, in section 35 of the Act, a definition which informs one that works of sculpture includes casts and models; and section 22 of the Act excludes from the operation of the Act designs capable of being registered under the Patents and Designs Act, 1907.

That Act has since been repealed, but in *Usher* v. *Barlow*,[1] Jenkins L.J. pointed out that the reference in the Copyright Act, 1911, to the Act of 1907 must now be read, regard being had to the Interpretation Act, 1889, as a reference to the existing Designs Act, namely, the Registered Designs Act, 1949.

That Act excludes from its operation designs for articles which are primarily artistic in character such as may be excluded under rules made by the Board of Trade; that is to say, if this particular artistic work (for artistic it undoubtedly is, whether the art be good or bad) has been excluded from the operation of the Registered Designs Act, 1949, it becomes subject or remains subject to the provisions of the Copyright Act, 1911.

The Board of Trade has by an order made rules known as the Designs Rules, 1949. Rule 26 provides: "There shall be "excluded from registration under the Act"—that is, the Registered Designs Act, 1949—"designs to be applied to any of "the following articles, namely: . . . (2) wall plaques and "medals. . . ."

Mr. Shelley, for the defendants, admitted, for the purposes of this motion at any rate, that the whole of his argument depended on the contention that the particular object on which this action is based was not a medal within the meaning of that excluding rule (rule 26).

What is a medal? I look at the Oxford English Dictionary and I find that it is defined as "a piece of metal, usually in the "form of a coin, struck or cast with an inscription, a head or "effigy of a person, or other device or figure to commemorate a "person, action, or event; also as a distinction awarded to a "soldier" and so forth.

Mr. Shelley suggested that this article was not a medal within

[1] [1952] 1 T.L.R. 239, 246; [1952] 1 All E.R. 205, 212.

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the meaning of that definition, so far as that definition can be applied to rule 26 of the Designs Rules, 1949.

I really do not know why it is not. It is quite obviously a piece of metal. It is equally obviously in the form of a coin. There can be no doubt that it bears an inscription, a head or effigy, and other devices or figures to commemorate an event, namely, the year of the coronation of her present Majesty. As to whether the main purpose of the exclusion was to apply to service medals, I cannot express any opinion. It may be that that was the primary intention of the exclusion; but I think that it is exceedingly difficult to exclude these and similar objects from the definition of "a medal" in the dictionary, and from the conception of a medal in the minds of ordinary people.

During the course of the argument I suggested one or two well-known objects which would certainly be called medals, commemorating either national events or events in the lives of people or partly one and partly the other; but that this is a medal for all purposes I should have thought was perfectly plain.

This, however, is only an interlocutory application and I do not wish to come to any final conclusion as to the validity of Mr. Shelley's submissions, which he may desire to advance at the trial; but I think that, having regard to all the circumstances and to the fact that the sale of these objects is, of course, likely to be of limited duration, the balance of convenience is that I should grant the injunction asked for. [His Lordship read the form of the injunction and continued:] I shall grant that injunction until judgment in the action or until further order; and I think that the costs of this motion should be costs in the action.

*Order accordingly.*

Solicitors: *Allen & Overy; Beach & Beach.*

J. L. D.

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[HOUSE OF LORDS.]

* SHIELS . . . . . APPELLANT;

AND

CRUIKSHANK . . . . . RESPONDENT.

H. L. (Sc.)†

1953 *Jan.* 28; *March* 9.

*Scotland—Damages—Death of husband—Widow's action for negligence—Assessment of damages—Whether widow's private means relevant.*

A widow claimed damages for negligence in respect of the death of her husband in an accident, averring that she was dependent on him for support. The defender averred that she had "a substantial private fortune available for her support" and contended that this was a relevant factor in the assessment of damages:—

† *Present*: LORD NORMAND, LORD OAKSEY, LORD REID, LORD ASQUITH OF BISHOPSTONE and LORD COHEN.

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*Held,* that the defender's averment was irrelevant and should be excluded from probation. It was not permissible to inquire what the amount was of the wife's estate and whether her own private income, which she enjoyed before her husband's death, and continued to enjoy after it, would enable her to maintain herself in future.

The wife lay under the onus of proving her dependency, which she had averred, and its extent, and the defender would be entitled to lead evidence to show that her husband's contribution was less than she represented.

Decision of the Second Division of the Court of Session (sub nom. *Cruickshank* v. *Shiels*) 1951 S.C. 741, affirmed.

Appeal from the Second Division of the Court of Session.

In this action the respondent Mrs. Catherine Cruikshank, who was the widow of the late Alexander Stewart Cruikshank, concluded for damages against the appellant, Henry John Shiels, whose negligence she averred caused the death of the deceased. A question arose as to the relevancy of an averment by the respondent that she had "a substantial private fortune available "for her support." The Second Division having held the averment irrelevant, the appellant appealed to the House of Lords.

The facts are fully set out in Lord Normand's opinion.

*Morison Q.C.* (of the English Bar, Q.C. of the Scottish Bar) and *M'Larty* (of the Scottish Bar) for the appellant.

*Cameron Q.C.* (Dean of the Faculty) and *Grieve* (of the Scottish Bar) for the respondent.

Their Lordships took time for consideration.

March 9. Lord Normand. My Lords, the appellant's counsel made it clear that the real issue in the appeal is whether the interlocutor of the Second Division appealed against unduly restricts the scope of the trial before a jury, which has been allowed.

The respondent, the pursuer, sued the appellant for a sum of £40,000 in name of damages suffered by her in respect of the death of her husband from injuries received in a street accident in Edinburgh on October 8, 1949. She averred that the accident was caused by the fault of the appellant who was riding a motor-bicycle which collided with her husband. There is no question that these averments are relevant. On damages, she averred that she "was dependent upon the deceased for support, and "lived with him until his death. . . . At the time of the said "accident the income of the deceased amounted to approxi-"mately £22,000 per annum, of which at least £17,000 was "represented by salaries and fees, which ceased with his death." In his answers the appellant, after a general denial, averred that the respondent "has been left with ample means for support "for the rest of her life. She is liferented in the residue of the "estate of the deceased. The deceased left movable estate of "over £60,000 and . . . substantial heritable estate. The

"deceased also bequeathed to the pursuer movable property of "considerable value. The defender also believes and avers that "the pursuer has a substantial private fortune available for her "support." In reply the respondent admitted that she has a liferent in the residue of the deceased's estate, which she estimated at about £24,000 and that she has certain private means. She denied that the deceased left any heritable estate. She also added this plea in law: "The defender's averments "relating to the private means of the . . . pursuer being "irrelevant, should not be admitted to probation."

The Lord Ordinary on the motion of the respondent appointed the cause to be heard in the procedure roll for the discussion of the plea of relevancy. In the debate the respondent's counsel admitted, as the Lord Ordinary's opinion shows, that the averments that she had obtained pecuniary benefits under her husband's will were relevant. I have no doubt that this admission was correct, but this point has never been an issue between the parties. The respondent, however, maintained that the averment that she was possessed of a substantial private fortune was irrelevant. The Lord Ordinary sustained the respondent's plea to the relevancy and appointed issues to be lodged. The appellant thereupon lodged a reclaiming motion. The argument presented on his behalf to the Second Division is set out by Lord Patrick, who delivered the leading opinion. He says [1]: "The argument runs that, the true foundation of the claim for "damages for loss of support being partly the existence during "life, as between claimant and deceased, of a mutual obligation "of support in case of necessity, the award must be conditioned "by the same considerations as would affect the right to aliment "and the amount of aliment awarded in an action when such "a claim for support was attempted to be enforced. In an "action for aliment by a wife against a husband the private "means of the wife are always a relevant consideration. The "reason is obvious. Aliment is only awarded ex necessitate. "To the extent to which the wife has private means she cannot "prove her necessity."

This novel argument, which might result in leaving the widow without any claim for damages, beyond solatium, in a case where she had even a mediocre fortune of her own, though she had been maintained by her husband in affluent circumstances out of income which terminated on his death, was without difficulty rejected by Lord Patrick and the Lord Justice-Clerk. Lord Mackay dissented. The court, therefore, by a majority, refused the reclaiming motion and sustained the Lord Ordinary's interlocutor.

In the present appeal Mr. Morison, on behalf of the appellant, did not repeat the argument which had been submitted in the Court of Session. He did not contend that the means of the

[1] 1951 S.C. 741, 746.

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widow must always be a relevant consideration or that the considerations which apply to the claim for aliment and the amount of aliment have any relevance to a claim in an actio injuriarum for loss of support. He did, indeed, submit that there might be special cases in which the widow's possession of a private fortune and its amount should not be left entirely out of account. We are not, however, concerned to consider this submission, for if a case of special circumstances was to be made it should have been specifically averred. But here there is nothing but the bare averment that the respondent had a substantial private fortune available for her support.

The point which Mr. Morison endeavoured to make was that the terms of the interlocutor combined with the terms of the plea in law, which it sustained, would prevent him from leading evidence or cross-examining to show that the respondent had not in fact been wholly supported by her deceased husband during his life. He said, and I agree with him, that in this kind of claim the defender was always entitled to ask the pursuer whether the cost of the wife's support had been met partly by the husband and partly from some other source, and how much from each.

It is clear that neither Lord Patrick nor the Lord Justice-Clerk thought that the result of their judgment would be to exclude inquiry of this sort. Lord Patrick says[2]: "The "amounts of support in fact afforded [sc. by the deceased] in "the past and likely to be afforded in the future have in my "experience been the factors taken into account in making such "awards." That is, in my opinion, an accurate statement, and obviously warrants inquiry into the actual amount of the husband's contribution. But it does not make it permissible to inquire what the amount of the wife's estate was and whether her own private income which she enjoyed before her husband's death and continued to enjoy after it would enable her to maintain herself in future, or to make out of it a larger contribution to her maintenance than she had done in the past.

The Lord Justice-Clerk says[3]: "In the present case the "pursuer avers that she was dependent upon her deceased "husband for support. She does not say that she was totally "dependent. There must therefore be inquiry as to the degree "to which she was dependent in fact prior to his death. Just "what that inquiry will involve before the jury which is to try "the case we are not asked to decide, and I do not want to say "anything which might be construed as circumscribing the "ambit of the trial." I have two observations to make in order to clear away a possible misunderstanding of what the Lord Justice-Clerk said. The first is that the inquiry into the degree to which the wife was dependent in fact would be perfectly open if the widow had averred that she had been wholly dependent

[2] 1951 S.C. 741, 747. [3] Ibid. 753.

on her husband and the defender had denied this averment. Secondly, the Lord Justice-Clerk certainly intended to limit the ambit of the inquiry in this case by excluding questions about the amount of the wife's fortune.

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Though the learned judges did not intend by their interlocutor to exclude legitimate inquiry, I have still to consider whether they may have done so inadvertently. The effect of the interlocutor is to exclude from probation the single averment "the "pursuer has a substantial private fortune available for her "support," and its effect on the conduct of the trial may be judged by supposing that the record had never included this averment. What then would be the position? The pursuer avers her dependency and the defender denies it. The former lies under the onus of proving her dependency and its extent, and the defender is entitled to cross-examine and to lead evidence to show that the husband's contribution was less than the pursuer represented. All this was conceded by counsel for the respondent.

The appellant's apprehensions that the inquiry will be unduly restricted by the interlocutor are therefore, in my opinion, groundless.

I would dismiss the appeal with costs.

LORD OAKSEY. My Lords, I concur.

LORD REID. My Lords, I concur. I am asked by my noble and learned friend, Lord Asquith of Bishopstone, who is unable to be present this morning, to say that he also concurs.

LORD COHEN. My Lords, I also concur.

*Appeal dismissed.*

Solicitors: *Dennes & Co., for Simpson & Marwick W.S., Edinburgh; Stilgoes, for Macpherson & Son, Edinburgh.*

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[CHANCERY DIVISION.]

## * MILES *v.* CLARKE.

1953
*Feb.* 19, 20, 23.
Harman J.

[1952 M. No. 2170.]

*Partnership — Dissolution — Accounts—Business of photographer—No agreement as to partnership assets—What must be deemed partnership assets on dissolution—Consumable stock-in-trade.*

The plaintiff and the defendant, as partners at will, conducted a business as commercial and fashion photographers. The plaintiff was a well-known photographer and brought in a considerable goodwill. The leasehold premises, furniture and studio equipment belonged to the defendant. The latter also claimed to have contributed to the goodwill of the business. Both parties brought in

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a quantity of negatives. It was intended that a partnership agreement should be drawn up to include the above items, but no terms were ever settled except that the parties should share the profits equally.

On taking the account on the dissolution of the partnership:—

*Held*, that no terms ought to be implied except such as were essential to business efficacy, and that only the consumable items of stock-in-trade, which were in fact used up, were to be included in the assets of the partnership; but, although the lease was the property of the defendant, money spent on improvements to the property for the purpose of the partnership, and money properly spent on outgoings, such as rent, rates and insurance, should be debited to the partnership.

*Pawsey* v. *Armstrong* (1881) 18 Ch.D. 698 followed.

Action.

The plaintiff and the defendant carried on business as partners for two years in the following circumstances: The defendant wished to start a business in commercial and fashion photography, and in June, 1948, he took a lease of premises in Shepherd's Market, which subsequently became the place of business of the partnership. The lease was for a period of seven years from midsummer, 1948, at a rent of £400 a year.

The defendant started to carry on a photographer's business there on his own. He was not himself skilled in photography, but he employed other persons to work for him. In January, 1950, he invited the plaintiff to come into the business as a partner. The plaintiff was a well-known photographer who had a good connexion in this particular sphere. He was at that time working as a free-lance photographer, by which he made a considerable income. He was not very anxious to join the defendant, and during the first months of 1950 he came occasionally to the defendant's studio and took photographs. From the beginning of April he attended there as a full-time occupation and brought with him his own connexion. The business proved very successful; the plaintiff's customers followed him, some at once and some at intervals.

The plaintiff and the defendant only agreed on two things: (1) that there should be an equal sharing of the profits; and (2) that the plaintiff should receive £125 monthly on account of his share of the profits.

Both parties contemplated that their association should be legally regularized, and in January, 1950, the plaintiff consulted his solicitors. They wrote to the defendant on the plaintiff's behalf stating what was the plaintiff's conception of the agreement. At that time it was contemplated that the parties would carry on the business as a limited company, but nothing further was ever agreed.

Subsequently the parties quarrelled and the partnership came to an end in May, 1952.

When the action came for trial there were two issues on the

writ. First, whether there was a partnership; secondly, if there was a partnership, what the assets of the partnership were.

The defendant conceded at the outset of the hearing that a partnership existed, being a partnership at will from April 1, 1950, until May 30, 1952.

The second question as to the partnership assets remained for decision. The statement of claim as it stood did not raise that question. It was therefore decided to make an order on the footing that a partnership existed, and then to order the ordinary partnership accounts with an addition in a special inquiry so as to raise the matters which remained in controversy between the parties.

On February 19, therefore, an order was made declaring that there was a partnership between the plaintiff and the defendant from April 1, 1950, until its dissolution on either May 29, 1952, or May 30, 1952. The following inquiries were ordered: Whether any and if so which of the following items on April 1, 1950, formed part of the partnership property, or whether any and if so which of them remained the separate property of the plaintiff or the defendant. Those items were: first, the lease of the property at Shepherd's Market where the business was carried on; second, the furniture and fittings in the studio; third, the equipment of the studio; fourth, the plaintiff's and the defendant's photographic negatives and prints, which were brought in by each of them at the outset; fifth, the defendant's goodwill or reputation; and sixth, the plaintiff's goodwill or reputation. That order was followed by an order for the taking of the usual account and inquiry in a partnership, in common form. Following that was an inquiry as to credits to be given to either party.

The summons to proceed was treated as having been issued and come before the master, and as if the inquiries had been adjourned into court by him.

*H. A. H. Christie Q.C.* and *L. J. Belcourt* for the plaintiff.
*Raymond Jennings Q.C.* and *Nigel Warren* for the defendant.

Cases referred to in argument: *Davis* v. *Davis* [1]; *Ex parte Owen* [2]; *Pawsey* v. *Armstrong* [3]; *Pocock* v. *Carter*.[4]

HARMAN J., having stated the facts, continued:—The plaintiff and the defendant, for years, carried on this business, and failed to agree about the terms at all except that they should have equal profits.

The defendant employed an accountant. Accountants are the witch doctors of the modern world, and they too are apt to deal in unrealities, and the accounts in this case produce extraordinary results. The most startling thing is that all the accounts, whether the accountants were employed by the plaintiff or the defendant,

[1] [1894] 1 Ch. 393.
[2] (1851) 4 De G. & Sm. 351.
[3] (1881) 18 Ch.D. 698.
[4] [1912] 1 Ch. 663.

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treated as something on the debit side of the business a private bank overdraft of the defendant, which neither party had ever contemplated as a liability of the business. As the so-called accounts start from that monstrous unreality, it is impossible to place any reliance on what is put on the other side. On the other side the fixed assets of the business including the lease and the stock-in-trade are set down as assets of the business, but when the chief liability of the business is not a business liability, one is not entitled to assume that that which is put down as an asset of the business is an asset.

It is obvious that these parties and their advisers, so far as they thought about it at all, always contemplated that the lease, the equipment and the studio furniture and the stock-in-trade should all be brought into the common pool, and there is an indication to that effect. But the fact is that nothing was ever finally agreed about it, and the parties just drifted on and on; the plaintiff drew money out of the business in a way which finally led to a split between the parties, and in consequence they separated.

The defendant, under the advice which he was given, denied that the plaintiff had ever been his partner, but that denial was withdrawn at a very late stage. Nevertheless, the difficulty remains: upon what terms were these people partners? The only answer that can be given is that they were partners on the terms that they should share the profits between them. Now, what more?

It was rightly said that although there was no further agreement it must be assumed that stock-in-trade, such as stocks of film, was put into the pot and cannot be taken out again, and became part of the partnership assets. That is not really denied. There remain, however, more important items. The first is the lease and the second is the plant which may be worth £2,000 or less. It was argued for the plaintiff that those two classes of assets were put forward throughout as being brought in as part of the assets of the intended association, and that, the plaintiff having come into the business on that footing, it would be inequitable now to deny him a right to share in those assets. It was contended for the defendant that it was not necessary to assume any further agreement between the parties; and that any property belonging to one of them at the beginning of the partnership still belonged to that one at the end; and that the law would not make any imaginary agreement between the parties, when it was ascertained as a fact that there was no such agreement. In my judgment no more agreement between the parties should be inferred than is absolutely necessary to give business efficacy to that which has happened, and that is the only safe way to proceed.

It is absolutely necessary to assume that things quae ipso usu consumuntur, the stock-in-trade, in fact must be treated as having been brought into the partnership, and that they must be

treated as having a value which must be ascertained by inquiry. They were all brought in by the defendant. I do not see the necessity of assuming that anything else went into the partnership. As the parties failed to agree it is not for me to say that the defendant must be assumed to have thrown the lease and the plant into the pot. The partnership could get on quite well if he gave his partner a licence to go on to these leasehold premises for the purposes of the business, and to use the cameras for the purpose of making the joint profits. In my judgment, therefore, nothing changed hands except those things which were actually used and used up in the course of the carrying on of the business. The stock of negatives which each of these partiers brought in was for the use of the business so long as it continued. There is no great difficulty in separating them again now, and indeed, being ex necessitate negatives or photographs taken before 1950, so far as they are fashion negatives they cannot, except historically, have any great value. However, if desired, each party can take away his negatives. The stock of negatives of photographs taken during the course of the partnership must be a partnership asset; everything that changed its existence during the currency of the partnership must be so included.

It was said that apart from those assets each party brought in a connexion, and that some value must be attributed to the plaintiff for the goodwill which he brought in to the partnership. Some such scheme was undoubtedly envisaged, but it was never agreed on, and it would be idle to suggest that when the parties have not agreed upon anything it ought to be treated as having happened. The plaintiff joined the defendant because, if he had the studio and the equipment, he could, with his connexion, make a very good profit; and presumably it would be worth his while to take only half that profit for the benefit of having the studio and the equipment. I see no reason to suppose that, though his connexion and skill were useful for making profits, one ought to treat them in some way or other as capital assets. Therefore neither the plaintiff's connexion, nor the defendant's connexion, if it was of any value (which I doubt), should be treated in any way as being a partnership asset.

The only partnership assets which necessarily remain are the studio name, or the goodwill, such is it is, which has attached to it (and I should have thought that was probably little), and the photographs in so far as they were accumulated during the two years when the partnership was subsisting.

The parties have separated; the plaintiff will take away his own connexion and his own customers and the defendant will presumably keep his own. It may be to the defendant's advantage that he will be able to keep these leasehold premises, but as they were his before, and as he did not agree to assign them or to sublet them, that is the inevitable result of the failure of the parties to make a more reasonable bargain.

I propose, therefore, to answer the inquiry by declaring that

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the lease, furniture and fittings and the equipment of the studio did not form part of the partnership property but remained the separate property of the defendant; that the plaintiff's and defendant's photographic negatives and prints brought into the business on April 1, 1950, remain the property of the person bringing them in; further, that neither the defendant's nor the plaintiff's goodwill or reputation form part of or should be treated as assets of the partnership. I will make a general declaration that the stock-in-trade and consumable chattels ought to be treated as partnership property brought in by the defendant, and that in default of an agreement I will direct a further inquiry as to the value that ought to be attributed to those things in taking the partnership account.

Lastly it was suggested that, if the property remains that of the defendant, it is not right in taking the accounts to treat any depreciation against the property as a charge against the profits, which would mean that the plaintiff would pay half of it. In my judgment that is right. It would not be right to assume that the defendant leased or licensed either the leasehold property or the plant to the partnership at any price at all, because he did not; and therefore the result of the lack of agreement between the parties works in the plaintiff's favour, as he does not have to contribute to wear and tear on those assets. That being so, in taking the accounts no sum ought to be charged against profit by way of depreciation.

It was also said that certain partnership profits have been devoted to making improvements. For all I know that may or may not be true. The accounts are not sufficient to show. But *Pawsey* v. *Armstrong* [1] shows that provision can be made for that matter in taking a partnership account; and I propose to put in as part of the order an inquiry whether, having regard to the terms of the partnership and the purpose for which any expenditure upon the leasehold property was made, what, if any, sum should be allowed to the partnership for such outlay. If it appears that there is nothing in it the parties need not proceed with that inquiry; it may well be that they will be able to agree, because that cannot be a matter of any magnitude.

It was clear that the partnership paid rent during the partnership, and, although I shall not charge an imaginary licensee, the partnership must be taken to be a partnership on the footing that it would defray the outgoings. Something may arise on that, and in taking the partnership account the partnership should be debited with the proper outgoings during the time they occupied the premises, that is, the rent, rates and insurance.

*Order accordingly.*

Solicitors: *Blacket, Gill & Topham; Stafford Clark & Co.*

I. G. R. M.

[1] 18 Ch.D. 698.

[PROBATE, ETC., DIVISION.]

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*Feb.* 23.

Karminski J.

## *KONINKLIJKE ZWAVELZUURFABRIEKEN V/H KETJEN N.V. *v.* D. A. AND D. D. PSYCHOYOS, PIRAEUS, OWNERS OF THE STEAMSHIP METAMORPHOSIS.

## *THE METAMORPHOSIS.

*Practice and Procedure—Service of writ out of the jurisdiction—Contract by agent in jurisdiction—Charterparty signed by owners' agents in London—Bill of lading signed in Greece—Claim by consignees under bill of lading—R.S.C., Ord.* 11, *r.* 1 (*e*) (ii).

*International Law — Contract — Proper law — Charterparty — Bill of lading—Use of English language—R.S.C., Ord.* 11, *r.* 1 (*e*) (iii).

A Greek ship was chartered under the terms of an English form of charterparty to load a cargo in Sweden for delivery in Holland. The charterparty was signed for the owners by English agents in London. The bill of lading was in English, and incorporated the terms of the charter, but was signed in Greece. The ship was lost off the coast of Holland, and in a claim for non-delivery of the goods by the Dutch consignees named in the bill of lading against the shipowners:—

*Held*, that, in the circumstances, it was not the intention of the parties to the bill of lading that the contract was to be governed by English law; the court, therefore, had no jurisdiction under R.S.C., Ord. 11, r. 1 (*e*) (iii),[1] to grant leave for service of the writ or notice thereof out of the jurisdiction. Further, although the charterparty was signed on behalf of the shipowners by English agents with an office in London, the contract in the bill of lading was not one made "by or through an agent . . . within the jurisdiction" so as to be within the ambit of Ord. 11, r. 1 (*e*) (ii). The consignees might well have been ignorant of the terms of the charterparty.

Order of the registrar, giving leave to serve the writ out of the jurisdiction, set aside.

*Rex* v. *International Trustee for the Protection of Bondholders Aktiengesellschaft* [1937] A.C. 500; 53 T.L.R. 507; [1937] 2 All E.R. 164, and *The Njegos* [1936] P. 90; 52 T.L.R. 216, referred to.

MOTION to set aside an order giving leave to issue and serve a writ or notice of the writ out of the jurisdiction.

On November 26, 1951, a writ was issued in the Admiralty Division on behalf of the plaintiffs, Koninklijke Zwavelzuurfabrieken V/h Ketjen N.V., a Dutch company, in which they claimed for non-delivery of goods as consignees named in the bill of lading for goods shipped on board the Greek steamship

[1] R.S.C., Ord. 11, r. 1: "Service out of the jurisdiction of a writ of summons or notice of a writ of summons may be allowed by the court or a judge whenever . . . (*e*) The action is one brought against a defendant . . . to recover damages or other relief for or in respect of the breach of a contract— (i) made within the jurisdiction, or (ii) made by or through an agent trading or residing within the jurisdiction on behalf of a principal trading or residing out of the jurisdiction, or (iii) by its terms or by implication to be governed by English law."

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*Metamorphosis*, owned by Messrs. D. A. & D. D. Psychoyos, of Piraeus, the defendants.

On August 1, 1952, an order was made, ex parte, by the registrar, giving leave to issue and serve the writ or notice of the writ out of the jurisdiction, namely, at Piraeus, Greece. In January, 1953, the defendants entered a conditional appearance, and on February 9, 1953, notice of motion was given to set aside service of the writ or notice thereof.

*P. Bucknill* for the plaintiffs.

*T. G. Roche* for the defendants.

The following cases were cited in argument: *The Njegos* [2]; *The Hagen* [3]; *Kadel Chajkin* v. *Mitchell Cotts & Co. (Middle East) Ld. and A/S Motortramp, The Stensby* [4]; *Rex* v. *International Trustee for the Protection of Bondholders Aktiengesellschaft* [5]; *Parker* v. *Schuller and Another* [6]; *Société Generale de Paris* v. *Dreyfus Brothers.* [7]

KARMINSKI J., having stated the preliminary facts, continued: The claim arises out of a consignment carried by the defendants' vessel, the consignees being a Dutch company operating, as I understand, in the Kingdom of Holland. The goods were shipped by a Swedish company called Bolidens Gruvaktiebolog from a port in Sweden to Amsterdam. The shipment consisted of a quantity of flotation pyrites, amounting to about 4,000 tons. The goods were shipped in the defendants' steamship *Metamorphosis*, a vessel registered under the Greek flag and commanded by a Greek master. The bill of lading stated that the cargo was to be delivered at the port of Amsterdam to the plaintiffs or their assigns, they paying freight for the same as per charterparty dated November 11, 1950, "all the terms, conditions and excep- "tions of which charterparty are herewith incorporated." Then it stated: "General average payable to York/Antwerp Rules, "1924." The master of the ship signed the bill of lading, and the bill of lading stated that the master received from the shippers on account of freight the sum of 8,000 Swedish crs., insurance and interest having been paid. Then there was indorsed on the bill of lading a clause providing: "All the terms, "provisions and conditions of the rules contained in the Inter- "national Convention for the Unification of certain rules relating "to bills of lading, dated Brussels, August 25, 1924, shall apply "to the contract in this bill of lading, but if in the country of "shipment or delivery of the cargo any special law has been "enacted in order to incorporate the rules of the said Conven- "tion, then all the terms, provisions and conditions of the said

[2] [1936] P. 90; 52 T.L.R. 216.
[3] [1908] P. 189; 24 T.L.R. 411.
[4] (1948) 64 T.L.R. 89; [1947] 2 All E.R. 786; 81 Ll.L.Rep. 124.
[5] [1937] A.C. 500; 53 T.L.R. 507; [1937] 2 All E.R. 164.
[6] (1901) 17 T.L.R. 299.
[7] (1885) 29 Ch.D. 239; 1 T.L.R. 380.

"Convention, with and subject to such modifications and "conditions, if any, as are imposed by such special law shall "apply."

I have had put before me the Swedish version of the statute of 1936 which purports to apply the 1924 Convention, together with an English translation of the Swedish. I use the word "purports" in no derogatory sense, but the matter was not strictly proved, because I was provided only with an uncertified Swedish copy and an unsworn translation of the document. The Swedish statute was not proved by anybody with knowledge of Swedish law. However, I do not think that any great importance attaches to that, and, therefore, I do not propose to pursue that matter any further.

The cargo was shipped in the vessel, but she was lost near the Dutch coast in the course of her voyage, at or near the port of Ymuiden. Reference is made in terms to the charterparty in the bill of lading. The charterparty was entered into between the shipowners, Messrs. Psychoyos, of Piraeus, on the one side, and the Ministry of Economic Affairs, The Hague, on the other. The charterparty is in English, as indeed is the bill of lading. The charterparty has at the top of it: "C. (ore) 7," and it is described as "Mediterranean" somewhat misleadingly, because the voyage in question was a voyage from a Swedish port to Amsterdam. It is in the usual form and provides for "a full "and complete cargo of pyrites about 3,800 tons (five per cent. "more or less at owners' option) not exceeding what she can "reasonably stow and carry . . . and, being so loaded, shall with "all convenient speed proceed to Amsterdam," where the discharge was to take place. Freight was to be paid at the rate of 28s. British sterling per ton "payable as per clause 28" in sterling in London. Clause 28 provided: "Freight to be paid in "cash in sterling in London to West Hartlepool Steam Navigation "Company Limited, London, s.s. *Metamorphosis*, resident "account at the National Provincial Bank, 15 Bishopsgate, "London, E.C.2." Payment for discharge was to be at the rate of 92½ Netherlands cents. per metric ton, and the ton for the purposes of freight was to be a ton of 1,016 kilos—in other words, an English ton.

By clause 5 of the charterparty the cargo was to be shipped at the rate of 1,000 tons, and to be discharged at the same rate, "per clear working day of 24 consecutive hours (weather per-"mitting), Sundays and holidays always excepted." By clause 8 of the charterparty, demurrage (if any) was to be payable "at the rate of £80 per ton running day, or pro rata," and commission was to be payable, as I understand it, in sterling. By clause 30 despatch money was to be paid to the charterers "at "the rate of £40 per day or pro rata for part of a day for all "time saved in discharging." The charterparty was signed by one Germ for the Ministry of Transport, Directorate General of Shipping, for and on behalf of the Ministry of Economic Affairs,

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on behalf of the shippers, and by one Leach, a director of the West Hartlepool Steam Navigation Co. Ld., who were acting as brokers only by telegraphic authority of D. A. & D. D. Psychoyos, of Piraeus, on behalf of the shipowners.

It is said by the plaintiffs that they come within the terms of Ord. 11, r. 1 (*e*) (ii) and (iii), which deal respectively with a contract "made by or through an agent trading or residing within "the jurisdiction on behalf of a principal trading or residing out of "the jurisdiction," or which "by its terms or by implication is to "be governed by English law." It is necessary to consider those two matters separately. Mr. Roche, for the defendants, said that the claim was one under a contract contained in the bill of lading. He did not deny that the consignee had a right to sue under the provisions of the Bills of Lading Act, 1855, but he emphasized that the claim was one under a bill of lading, and although the bill of lading by express reference incorporated all the terms, conditions and exceptions of the charterparty, yet, he contended, the claim remained one under the bill of lading. He also contended that the order for service made by the registrar was wrong because it was made on an ex parte application and the registrar did not in fact have the benefit of knowing all the facts which are now known to me; also that he made the order on a short affidavit which alleged that the contract of carriage of the goods was made on behalf of the defendants by or through their agents, the West Hartlepool Steam Navigation Co. Ld., who reside within the jurisdiction of the court. He further contended that the registrar was wrong in making the order which he made and was misled into making it.

I have to consider the nature of the contract under which the plaintiffs seek to sue. Mr. Bucknill laid great stress on the close connexion between the bill of lading and the charterparty, and he pointed out with great force that, in effect, the ship was chartered to carry this particular consignment of pyrites from Sweden to the consignee and nothing else, and that it was therefore a full and complete cargo—and he called my attention to a passage in Scrutton on Charterparties, 15th ed., p. 52, which states: "Where the charterer is himself the shipper, and receives "as such shipper a bill of lading in terms differing from the "charter, the proper construction of the two documents taken "together is that, prima facie and in the absence of any intention "to the contrary, as between the shipowner and the charterer, "the bill of lading, although inconsistent with certain parts of "the charter, is to be taken only as an acknowledgment of the "receipt of the goods." Mr. Bucknill argued that the two transactions were so completely identified that in effect the consignees, the plaintiffs, were really the charterers. I think that the difficulty in that submission is this: the charterers were in fact the Dutch Government, and under the regulations, or perhaps the law, of the Netherlands at that time, apparently, a charter could only be arranged through the Government, and

the charter was made by the Netherlands Government with the shipowners. It is true that the agents for the shipowners were an English company. But, considering this matter as a question of fact, I am quite unable to say that this was a transaction in which the plaintiffs were really the charterers. I do not think that they were.

Although Mr. Bucknill called my attention to various authorities in support of his contention, I do not think that it is necessary for me to go into them in detail. He emphasized that this was a carriage of one cargo and that therefore the true contract was not contained in the bill of lading alone. Up to a point I agree with him, because the bill of lading refers in terms to the terms and conditions of the charterparty. But, as I understand it, I have to look at the bill of lading itself. The principle to be applied has been stated, and has often been referred to since, in the well known speech of Lord Atkin in *Rex* v. *International Trustee for the Protection of Bondholders Aktiengesellschaft.*[1] Lord Atkin said[2]: "Various questions have been "raised in this case; but that which comes first under considera-"tion is what is the proper law of the contract: for if that be "answered in one way no further issues remain." I will therefore proceed to discuss that matter. The legal principles which are to guide an English court on the question of the proper law of a contract are now well settled. It is the law which the parties intended to apply. Their intention will be ascertained by the intention expressed in the contract, if any, which will be conclusive. If no intention be expressed, the intention will be presumed by the court from the terms of the contract and the relevant surrounding circumstances. In coming to its conclusion the court will be guided by rules which indicate that particular facts or conditions lead to a prima facie inference, in some cases an almost conclusive inference, as to the intention of the parties to apply a particular law: e.g., the country where the contract is made; the country where the contract is to be performed; if the contract relates to immovables, the country where they are situate; the country under whose flag the ship, in which the goods are contracted to be carried, sails. But all these rules but serve to give prima facie indications of intention; they are all capable of being overcome by counter indications, however difficult it may be in some cases to find such. The principle of law so stated applies equally to contracts to which a sovereign State is a party as to other contracts.

Continuing in search of a principle, my attention was called to the decision in *The Njegos.*[3] In that case the plaintiffs were Danish and Norwegian merchants, indorsees of a bill of lading, who were claiming for loss of cargo which was damaged by fire when on board the *Njegos*. In that case it was clearly admitted that, so far as the charterparty was concerned, the proper law to

[1] [1937] A.C. 500.
[2] Ibid. 529.
[3] [1936] P. 90.

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be applied was English, and the question was the system of the law applicable to the bill of lading. It was held that the arbitration clause was not incorporated in the bill of lading, but that the clauses which were incorporated in it, and particularly the exceptions clause, could not be isolated from their context and incorporated without any indication of the proper law of the contract from which they were taken; that the inference was that business men must have intended that the bill of lading should be read with the English interpretation attaching to the charterparty; and that both on what should be presumed to be the intention of the parties and on the ground of business efficacy the proper law of the contract was English and not Yugo-Slavian law.

I emphasize that there was a vital difference between that case and the present case. In that case there was an arbitration clause in the charterparty which is absent from the charterparty in the present case—and in that case, at apparently a very early stage in the argument, it was frankly and freely admitted by Mr. Willink, for the defendants, that the law to be applied to the charterparty was English. The matter was determined in a considered judgment by the President, who commented, I think with approval, on the doctrine set out in Dicey's Conflict of Laws, 5th ed., p. 666, where he said[4]: "'Here, as in other "'branches of law, an inquiry into the intention of the parties "'is really an inquiry, not into the actual intention of X and A, "'for it possibly never had any real existence, but into the "'intention which would have been formed by sensible persons "'in the position of X and A if their attention had been directed "'to contingencies which escaped their notice.'" The President said that he was dealing[5] "with the difficult, but not unfamiliar, "problem of deciding what that hypothetical person, the sensible "business man, must be taken to intend when he is content to "be bound by a contract in writing of which, by commercial "usage, he is unable to see the actual terms beforehand, and "with which, in practice, as Mr. Willink insisted, he does not "really trouble himself in the least"—and he came to the conclusion that, having regard to all the circumstances, it was not the law of Yugo Slavia which applied to the contract but the English law.

I have to consider what I believe to be the realities of the situation. The pyrites were being shipped from a Swedish port to a Dutch port in a Greek ship; the consignees were Dutch and the consignors were Swedish. I think that the real point, as Mr. Roche has argued, is by what law the contract in the bill of lading is governed. There are no express terms; it is a matter of inference or implication. Looking at it as best I can, I am quite unable to find that the true implication is that anybody intended that this contract should be governed by English law.

[4] [1936] P. 90, 102. [5] Ibid. 103.

It may well be that when the contract was made none of the parties applied their minds very closely, if at all, to that particular problem. As was pointed out by the President, one has to determine the matter as if they might have done. I can see no reason why the parties should have wanted to make this particular contract one to which English law applied. If they had done so, they could very easily have put in a clause to that effect. There is some evidence that, in some cases of chartering by the Dutch Government, an arbitration clause has been insisted upon, and a clause could have been put in the contract providing for arbitration in Holland. But that was not done in this case. I do not draw any inference from the absence of such a clause in the contract.

Mr. Bucknill argued that the English language in the charterparty and bill of lading was of some significance, but I think that that is no more than one of the matters which I have to consider. I was told by both counsel, and I readily accept it, that a very large number of documents concerned with the carriage of goods by sea are in the English language, and the English language undoubtedly is used in contracts of this kind which have no relation to geographical circumstances, such as consignment to or from an English port, or without any intention, as I think, of applying English law. Therefore I am bound to hold that this case does not come within sub-paragraph (iii) of R.S.C., Ord. 11, r. 1 (*e*), and that it was not the intention that it should be governed by English law.

I now return to the other justification put forward, namely, that this was a contract "made by or through an agent trading "or residing within the jurisdiction on behalf of a principal trading "or residing out of the jurisdiction." I have already stated the facts, which show that, so far as the shipowners were concerned, the charterparty was signed on their behalf by an English company with an office in London. But that refers to the charterparty, and Mr. Roche has emphasized that, as in other cases (and in a number of reported cases), it may well be that the parties to the bill of lading were quite ignorant of the terms of the charterparty. I myself do not think that this contract between the plaintiffs and the defendants was one made within the ambit of Ord. 11, r. 1 (*e*) (ii), namely, by or through an agent within the jurisdiction.

That disposes of the matter, but I think that it is desirable that I should say something else with regard to the discretionary power of the court. Even if I had been satisfied that this matter came within Ord. 11, r. 1, it would still have remained for the court to consider the question whether or not the power conferred by that rule should be exercised. In *The Hagen*[6] Farwell L.J.[7] emphasized the great care which must be exercised in the application of the jurisdiction conferred by the rule, and he cited

[6] [1908] P. 189.

[7] Ibid. 201.

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with approval the principle enunciated by Pearson J. in *Société Generale de Paris* v. *Dreyfus Bros.*,[8] where he said: "... 'it "'becomes a very serious question, and ought always to be con-"'sidered a very serious question, whether or not, even in a case "'like that, it is necessary for the jurisdiction of the court to be "'invoked, and whether this court ought to put a foreigner, who "'owes no allegiance here, to the inconvenience and annoyance "'of being brought to contest his rights in this country, and I "'for one say, most distinctly, that I think this court ought to be "'exceedingly careful before it allows a writ to be served out "'of the jurisdiction.'" Kennedy L.J. said much the same thing, in slightly different words, when he said[9]: "But, "assuming that there was jurisdiction to make an order, the "court has to decide whether, under the initial words of Ord. 11, "it was a case in which the jurisdiction, though legitimate, "ought to be, as a matter of discretion, exercised in favour of "the owners of the *City of Bradford*."

I have to consider whether, even if the jurisdiction was open, it ought to be exercised. In this case the plaintiffs are a Dutch company and the defendants are a Greek partnership or firm in Piraeus, and the ship was lost off the coast of Holland. I am told that the pilot survived, and I have no doubt that the master and some members of the crew also did so. I have to consider, amongst other things, where the balance of convenience lies, and whether it would be right in this case in any event to bring the defendants to this country. I am told by Mr. Bucknill (and, of course, I accept it at once, and it is borne out by an affidavit sworn on behalf of the defendants) that the persons with the major financial interest in this loss are an insurance club. That may well be so, but it does not alter the position with regard to collecting witnesses and bringing them to this country. I deal with this matter only for this reason, that had I felt that I possessed the jurisdiction to make the order in question I do not think that I would have done so in the exercise of my discretion, having regard to all the material facts which have been put before me.

But I have come to the clear conclusion that there is no jurisdiction to make the order for notice and service of the writ out of the jurisdiction, and, in my view, this motion succeeds. Therefore the order made by the registrar on August 1, 1952, giving leave to serve notice of the writ outside the jurisdiction must be set aside.

*Appeal allowed.*

Solicitors: *William Charles Crocker; Richards, Butler & Co.*

H. G.

[8] 29 Ch.D. 239, 242.

[9] [1908] P. 189, 204.

[CHANCERY DIVISION.]

## * *In re* HARROW LITERARY INSTITUTION.

1953
*Mar.* 10.

[1953 H. 562.]

Vaisey J.

*Literary Society—Dissolution—Jurisdiction of court—Motion for order dissolving society—Disposal of funds—Literary and Scientific Institutions Act*, 1854 (17 & 18 *Vict. c.* 112), *ss.* 29, 30.

A literary institution, founded in 1847, ceased to be of use in 1894 and remained dormant since that date. The property was sold and the funds were retained by the trustees until 1953 when an application was made by them, by motion in the Chancery Division, for an order for the dissolution of the institution and the transfer of its funds to the local county council for the purpose of contributing to the cost of a museum at the local county library:—

*Held*, that no order for dissolution should be made, as the institution had, in the events which had happened, already in effect dissolved itself; but that an order would be made for the transfer of its funds to the local county council for the purpose of equipping and maintaining a museum in one of the rooms of the county library.

ORIGINATING MOTION.

The Harrow Literary Institution was founded in or about 1847 for the purpose of providing for the inhabitants of Harrow and its neighbourhood a reading room supplied with newspapers and magazines, and a library of works of reference. The institution owned the building in which the reading room and library were housed and it continued to be used until the beginning of 1893, when consideration was given to its dissolution, owing to financial difficulties, but no formal dissolution took place. The property was, however, sold by auction on July 18, 1894, and the institution remained dormant since that date. The funds, which included the proceeds of sale, amounted, in 1953, to approximately £2,200.

Shortly before the beginning of the 1939–1945 war the trustees approached the county council with a view to the council using the trust funds for some purpose in connexion with the county library service. No proposal could be formulated at that time, but in 1950 the trustees again approached the county council, and it was agreed that the funds could be used to furnish a museum room at a proposed central library which was to be built by the county council at Gayton Road, Harrow.

An application was made under the Literary and Scientific Institutions Act, 1854,[1] to the Willesden County Court for the

[1] Literary and Scientific Institutions Act, 1854, s. 29: "Any number "not less than three fifths of the "members of any institution may "determine that it shall be dissolved "and thereupon it shall be dissolved "forthwith, or at the time then agreed "upon, and all necessary steps shall "be taken for the disposal and settlement of the property of the institution, its claims and liabilities, "according to the rules of the said

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transfer of the funds to the county council for the purpose agreed on, although it was doubted whether the county court judge would hold that he had jurisdiction under sections 29 and 30 of the Act. The county court judge (Sir Henry Braund) heard the application on October 11, 1951, and, not being satisfied that he had jurisdiction to entertain it, adjourned it generally.

On July 7, 1952, the libraries sub-committee of the county council passed a resolution in that the trustees of the Harrow Literary Institution be requested to make application to the Chancery Division for an order dissolving the institution and for directions as to the disposal of the funds.

An application was therefore made by the trustees for (1) an order that the institution be dissolved; (2) that the trustees might be authorized to transfer the funds to the Middlesex County Council for the purpose of contributing to the cost of providing, equipping and maintaining a Harrow museum at the county library which it was proposed to establish.

*D. E. Evans* for the applicants.

Cases referred to in argument: *In re Cleveland Literary and Philosophical Society's Land*[2]; *Blake* v. *Smither*[3]; *In re Lead Company's Workmen's Fund Society.*[4]

VAISEY J. This is an originating motion of a somewhat unusual character. It relates to the affairs of an institution which has long since been, if not defunct, at any rate dormant, and which is known as the Harrow Literary Institution. It is said to have been founded in the year 1847, and there is no doubt that it comes within the provisions of the Literary and Scientific Institutions Act, 1854. These organisations were in former days useful and popular, but times have somewhat changed and it appears that in 1894 the period of the useful life of this institution had come to an end. Its property has been

" institution applicable thereto, if any, " and if not, then as the governing " body shall find expedient: provided, " that in the event of any dispute " arising among the said governing " body, or the members of the institu- " tion, the adjustment of its affairs " shall be referred to the judge of the " county court of the district in which " the principal building of the institu- " tion shall be situated, and he shall " make such order or orders in the " matter as he shall deem requisite, " or, if he find it necessary, shall " direct that proceedings shall be " taken in the Court of Chancery for " the adjustment of the affairs of the " institution."

S. 30: " If upon the dissolution of " any institution there shall remain, " after the satisfaction of all its debts " and liabilities, any property what- " soever, the same shall not be paid to " or distributed among the members " of the said institution or any of " them, but shall be given to some " other institution, to be determined " by the members at the time of the " dissolution, or in default thereof by " the judge of the county court afore- " said: provided, however, that this " clause shall not apply to any institu- " tion which shall have been founded " or established by the contributions " of shareholders in the nature of a " joint stock company."

[2] [1931] 2 Ch. 247.

[3] (1906) 22 T.L.R. 698.

[4] [1904] 2 Ch. 196; 20 T.L.R. 504.

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Vaisey J.

sold, no person who belonged to it is known to exist, and all that remains are three small investments and a sum of cash, which represent the proceeds of the sale of its property and certain accumulated income. I am told that it was supported in the years of its useful activities by many of the masters of Harrow School, and I observe that Dr. Butler, the famous headmaster of that school, was at one time one of the trustees of the institution.

When one seeks to discover what ought to be done with these sums of investments and cash, it is difficult to find in the Act any clear guidance on the point, because the purported dissolution, which took place many years ago, was not a dissolution within the meaning of the Act; inasmuch as the necessary majorities were not obtained at the relevant meeting. The position is that certain persons, who admit themselves to be trustees of the property of this institution, seek the directions of the court as to its disposal.

The Act of 1854 appears to place the discretion as regards dissolution and matters relating to dissolution in the judge of the county court of the district which includes the town of Harrow; but for the reason which I have indicated it does not seem that what is now sought to be done is really within the Act at all. The judge of the Willesden County Court has come to the conclusion that he ought not to attempt to exercise jurisdiction, as it is not expressly conferred on him by the terms of the Act. It is now suggested that this court, having a wider jurisdiction, can supply the deficiency and make an order for the purposes which I have mentioned.

This motion now comes before me on the application of the trustees, and they ask, first, for an order that the institution be dissolved. I do not propose to make that order as I think that the institution has dissolved itself and has vanished into thin air, but I will declare that the trustees shall be authorized, on the assumption that the institution no longer exists, to transfer the sums of stock and cash specified in the schedule to the notice of motion, those being the whole of the assets, to the county council of the administrative county of Middlesex.

The purpose for which it is proposed to place the funds in the hands of that public authority is a purpose which is clearly within the sense and meaning of the Act of Parliament.

As I have said, these institutions, though they did good service in former and perhaps simpler days, have now entirely outlived their usefulness; but one of the objects which, I think, that they were intended to secure was that an interest should be taken by the inhabitants of particular places in the history and the antiquities of their native town or district. Therefore, the proposal which has been made and with which I have the fullest sympathy is, that the purpose for which these funds should be taken over by the Middlesex County Council will be expressed in the order by these words: "That the county council

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"will hold these funds for the purpose of contributing to the "cost of providing, equipping and maintaining a Harrow museum "in one or more of the rooms of a county library which is at "present carried on in a temporary building, and is intended to "be established in a permanent building at Gaydon Road, "Harrow, in the said County of Middlesex."

I confess that I can imagine no better way of disposing of these unwanted sums of money, and I think that the Middlesex County Council can be safely entrusted with the duty of applying them in the best possible way to the purpose which I have indicated.

*Order accordingly.*

Solicitor: *Clerk to the Middlesex County Council.*

J. L. D.

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[CHANCERY DIVISION.]

1953
*Feb.* 24;
*March* 11.

Upjohn J.

* *In re* MILLS AND MILLS, DECD. MIDLAND BANK EXECUTOR AND TRUST CO. LD. *v.* BOARD OF GOVERNORS OF THE UNITED BIRMINGHAM HOSPITALS AND OTHERS.

[1952 M. 1728.]

*Will—Hospital—Legacy—Endowment of bed in hospital—No quantification—Nationalization of hospital—Hospital willing to accept* £1,000 *to name bed—Effect of legacy.*

A testatrix, by her will dated May 19, 1922, bequeathed, subject to a life interest, "such a sum as shall be necessary to endow a bed "in the Children's Hospital Birmingham . . . to be known at all "times as the 'Mills' Bed in memory of my father mother and "brother."

The hospital was nationalized by the National Health Service Act, 1946.

The tenant for life died in 1950, and the court was asked to consider whether the legacy was effective.

The Board of Governors of the hospital, as it now existed, stated in evidence that they had for over 30 years accepted £1,000 for the endowment of a bed in the hospital; and that they had not considered the question since 1948, when the Act came into force, but that they were still willing to name a bed for that sum. It was conceded that the sum required to endow a bed was a purely conventional amount and had no reference to the sum required to maintain a bed.

It was contended that the testatrix had contemplated that there would be at her death a recognized scheme and a recognized sum for the endowment of a bed, the existence of which was an essential condition of the legacy:—

*Held*, that the existence of a recognized scheme and a recognized sum were not an essential condition of the gift; that once it was

established that the gift was not to be determined by reference to the actual cost of running the hospital, but was a conventional sum acceptable to the hospital for naming a bed, there was no difficulty in ascertaining the amount; so that effect could be given to the legacy by the payment to the hospital of the sum of £1,000 on their undertaking to name a bed as provided in the will.

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ADJOURNED SUMMONS.

Ann Mills, by her will dated May 19, 1922, made the following provision: "I devise and bequeath all other my real "and personal estate whatsoever and wheresoever unto and to "the use of my said sister Clara Mills during her life, and after "the decease of the said Clara Mills I bequeath such a sum as "shall be necessary to endow a bed in the Children's Hospital "Birmingham to the trustees of that institution upon trust for "such endowment the bed to be known at all times as the "'Mills' bed in memory of my father mother and brother." She gave the rest of her estate upon trust for such persons as Clara should by deed or will or codicil appoint. She died on March 5, 1929.

Clara Mills, her sister, by her will dated May 27, 1946, bequeathed by clause 8 thereof 74 legacies of varying amounts which totalled between £26,000 and £27,000. Among those legacies was a legacy: "To the Birmingham Children's Hospital "such a sum as with the amount directed to be given by the "will of my late sister Ann (otherwise Annie) Mills will make "the sum of £1,500." She died on February 10, 1950.

Having regard to the large number and amount of the legacies bequeathed by the will of Clara, there had to be some abatement in the amount of the legacies given by her will. Clara, by her will, had exercised the power of appointment given to her by the will of her sister Ann.

The plaintiffs, as executors of the wills of both Ann Mills and Clara Mills, took out this summons to determine whether, on the true construction of the will of Ann Mills, and in the events which had happened, the Board of Governors of the United Birmingham Hospitals were entitled to receive any, and if so what, sum of money as a legacy. A similar question was asked on the construction of the will of Clara Mills.

When the summons was first before the court it was adjourned in order to enable the Board of Governors to file evidence as to what sum they were now prepared to accept for the endowment of a bed. They stated in their affidavit that this question had not arisen since 1948, but that for over 30 years they had accepted £1,000 to name a bed, and that they were still prepared to name a bed for that sum.

*G. A. Grove* for the executors.

*John W. Mills* for the Board of Governors of United Birmingham Hospitals.

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*D. B. Buckley* (*B. J. H. Clauson* with him) for the Attorney-General.

*R. J. S. Thompson* for persons beneficially interested under the will.

Cases referred to in argument: *Attorney-General* v. *Belgrave Hospital*[1]; *Cherry* v. *Mott*[2]; *In re Ginger*[3]; *In re Morgan's Will Trusts*.[4]

Upjohn J., having stated the facts, continued:—The Children's Hospital, Birmingham, is a well known hospital. There is no doubt whatever about its identity. Its strict title, until the National Health Service Act, 1946, which came into force in 1948, was The Children's Hospital, King Edward VII Memorial, Birmingham, but it was commonly known as The Children's Hospital. Since the National Health Service Act came into force the work of the hospital has been carried on in the same building. It is conceded by Mr. Thompson that, having regard to section 60 of the National Health Service Act, and to *In re Morgan's Will Trusts*,[1] a decision of the Court of Appeal, and *In re Ginger*,[2] no difficulty arises on the construction of Ann's will, except for this vital circumstance, that no fixed sum is mentioned in the will with which to endow a bed. Had it been a gift of a fixed sum, Mr. Thompson concedes that it would be valid and effectual; provided, of course, that the successors of the hospital (who are the Board of Governors of the United Birmingham Hospitals) were prepared to accept the gift upon the terms and conditions on which it was given.

It is further conceded that a gift of a sum to endow a bed does not, again having regard to the authorities, mean a gift of a sum sufficient to maintain and service a particular bed in a particular place in a hospital; it does not even mean a gift of a sum which is ascertained by taking the total expenses of the hospital and dividing it by the number of beds. It is a purely conventional sum, and there was no difficulty in ascertaining it before the National Health Service Act came into force, because this hospital, like many other hospitals, held itself out as ready to accept legacies for the endowment of a bed—that is, in effect, to name it—for the sum of £1,000. It is conceded that, apart from the Act, when a person gave a sum to endow a bed, it meant no more than this: that it was a sum to be given to the hospital, the capital to be treated as part of the permanent funds of the hospital, the income to be expended for the general purposes of the hospital, and it would be coupled with a condition in the will of the testator with regard to naming a bed, or, in some cases, even nominating persons or giving the

[1] [1910] 1 Ch. 73; 26 T.L.R. 40.
[2] (1836) 1 My. & Cr. 123.
[3] [1951] Ch. 458; [1951] 1 T.L.R. 750; [1951] 1 All E.R. 422.
[4] [1950] Ch. 637; 66 T.L.R. (Pt. 1) 1037; [1950] 1 All E.R. 1097.
[1] [1950] Ch. 637.
[2] [1951] Ch. 458.

right to executors to nominate the persons to occupy the bed. That was one of the circumstances in *Attorney-General* v. *Belgrave Hospital*,[3] and it is conceded that that is the meaning of the gift.

Mr. Thompson, however, submitted that the National Health Service Act makes it now impossible to give effect to the gift, there being no sum mentioned, because the testatrix contemplated a state of affairs where there would be a scheme in force at the time that the gift took effect—that is, after the death of Clara in 1950—by which it would be recognized that any charitably minded person could, for a sum advertised by the hospital, endow and name a bed. There had to be, it was argued, a recognized sum and a recognized scheme; and counsel pointed out that since 1948 the evidence showed that there had been no recognized sum and no recognized scheme. That, indeed, is clear from the affidavit of the Board of Governors of the United Birmingham Hospitals, where it was explained that the hospital had not since 1948 had to consider the question what sum they would require to carry out a condition of holding that sum as a part of the permanent investments of the hospital, that a bed in the hospital should be named. The Board of Governors said that they thought that the proper sum to ask for naming a bed in the hospital now—that is, in March, 1953—was the sum of £1,000, and that, if they received that sum, they would undertake to name in perpetuity a bed to be known as the "Mills" Bed, in memory of the father, mother and brother of Ann Mills, in The Children's Hospital at Ladywood in the City of Birmingham, or any other building to which The Children's Hospital might be removed. They were prepared, further, to undertake to invest that sum in investments for the time being authorized by law, and to apply the income for purposes of hospital services rendered by The Children's Hospital at Ladywood or in such other building to which it might be removed.

The whole question on the will of Ann Mills that I have to consider is whether the testatrix contemplated that there would be in existence at her death a recognized scheme and a recognized sum readily ascertainable by any person charitably minded, or whether that was not an essential condition of the gift. On the whole, I have come to the conclusion that it is not such an essential condition. The gift is of "such a sum as shall be "necessary to endow a bed in the hospital." Once it be admitted (as it is) that that is not a gift to be ascertained by reference to the actual cost of running the hospital, but is a conventional sum which the hospital was prepared to accept as a condition for naming a bed, then I see no difficulty in ascertaining that sum by asking the hospital authorities what sum they are now

[3] [1910] 1 Ch. 73.

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Upjohn J.

prepared to accept on the conditions which I have already mentioned. That sum in the present case is the sum of £1,000.

It was said that that is the evidence as of today, but that there is no evidence as to what the hospital authorities would have thought necessary in the year 1950. Again, I do not think that that is, in the circumstances of this case, a tenable argument. For 30 years before 1948 the old hospital had asked for £1,000 to name a bed. On the first occasion which has arisen since 1948—that is this occasion—the Board of Governors are asking for the same amount. I cannot doubt that, had they directed their minds to the question in 1950, they would have asked for £1,000

Accordingly, it seems to me that it is possible to give effect to this gift, and in the result it is a gift of £1,000 to the hospital authorities on the undertaking by them to which I have referred. That being the case, it is conceded that the point on the will of Clara does not arise. In the circumstances, as £1,000 has been directed to be given by the will of Ann, a sum of £500 remains to be given by the will of Clara. That, of course, is a gift to the hospital authorities for their general purposes and without any conditions attached, and the latter sum of £500 is, of course, subject to abatement. I will make the appropriate declarations accordingly.

*Declarations accordingly.*

Solicitors: *P. F. Walker, for Collis, Higgs & Son, Stourbridge; Burton, Yeates & Hart, for Johnson & Co., Birmingham; Treasury Solicitor; Edwin Coe & Calder Woods.*

I. G. R. M.

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[QUEEN'S BENCH DIVISION.]

1953
*Mar.* 11, 12.

Parker J.

## * ROSENFELD *v.* NEWMAN AND OTHERS.

[1952 R. No. 736.]

*Estoppel—Election to abandon claim—Proceedings for possession in county court—Lack of jurisdiction—Landlord's election to abandon claim based on trespass and rely on claim under Rent Acts—Dismissal of claim—No evidence whether defendants contractual or statutory tenants—Proceedings for possession in High Court based on trespass—Whether landlord estopped from asserting trespass.*

The plaintiff, the owner of a house occupied by the defendants, brought proceedings for possession in the county court on the ground of trespass and on the alternative ground that if, contrary to his contention, the defendants were protected by the Rent Acts, the

house had been sublet or assigned to them by the original tenant without his consent. The annual value of the house exceeded £100 and the defendants objected that the county court judge had no jurisdiction so far as the claim of trespass was concerned. The plaintiff thereupon elected to proceed on the alternative ground, and the county court judge said that "owing to lack of jurisdiction "I am compelled to hold that the plaintiff's claim fails as there "is no evidence that the defendants are contractual or statutory "tenants." In proceedings for possession on the ground of trespass brought by the plaintiff in the High Court in which each party contended that the county court proceedings and findings raised an estoppel against the other:—

*Held*, that if and so far as the county court judge found that the defendants were trespassers that could not amount to a res judicata between the parties because it was the very thing which he had no jurisdiction to find and was a claim which had been abandoned. There having been a clear election by the plaintiff in the county court to proceed on the alternative claim on the assumption and admission that the defendants were tenants, it was not open to him to call evidence in the High Court to prove that they were trespassers, and, accordingly, although on the evidence it was clear that the defendants had at no time become tenants, the plaintiff was estopped from asserting his claim.

ACTION.

The plaintiff was the owner of a house which he let in 1940 to two families named Ball and Tracey; rent books were made out, and until June, 1951, remained in their names. In 1941 the first two defendants, Mr. and Mrs. Newman, of whom the latter was related to both the Balls and the Traceys, occupied one downstairs room in the house and their daughter-in-law lived upstairs with the Traceys. When the son of Mr. and Mrs. Newman returned from war service, he and his wife, the daughter-in-law, occupied the premises upstairs. In 1942 the Balls left the premises, and in 1946 the Traceys left. On January 4, 1951, old Mrs. Tracey, who had stayed on in the house, died. After June, 1951, no further rent was paid.

On October 24, 1951, the plaintiff commenced proceedings for possession in Bow County Court against the defendants on the ground of trespass, and by his claim stated that the annual value of the property did not exceed £100. The defendants pleaded, in effect, that they had become tenants and were protected by the Rent Restrictions Acts, whereupon the statement of claim was amended and a paragraph 4 added, as follows: "If, contrary to the plaintiff's contention, the defendants are "protected by the Increase of Rent and Mortgage Interest "(Restrictions) Acts the plaintiff reasonably requires possession "of the said dwelling-house as a residence for himself." The facts not sufficiently supporting that plea, paragraph 4 of the claim was shortly afterwards amended to read: "If, contrary "to the plaintiff's contention, the defendants are protected by "the Rent Restrictions Acts the plaintiff relies on the first "schedule to the Act of 1933," alleging that "on a date "unknown to the plaintiff one of the original tenants without the

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" consent of the plaintiff sublet or assigned the whole premises " to the defendants or one of them."

In fact the annual value of the house exceeded £100, and when the matter came on for hearing before Judge Andrew at Bow County Court counsel for the defendants objected that the judge had no jurisdiction to determine the claim so far as it was based in trespass. The judge's notes stated: " On Mr. Buckee's " objection that the rent exceeds £100 a year and that I have " no jurisdiction, Mr. Merriton " [counsel appearing for the plaintiff] " elects to proceed on the alternative ground set out in " paragraph 4 (as amended) of the amended particulars of " claim."

Having heard evidence and the submissions of counsel on both sides the judge dismissed the claim with costs, and in giving his reasons said: " Owing to lack of jurisdiction I am compelled " to hold that the plaintiff's claim fails—as there is no evidence " that the defendants are contractual or statutory tenants."

The plaintiff then brought this action in the High Court alleging that the defendants were trespassers, who had been since June 20, 1951, and were before that date, wrongfully in possession of the house and he claimed possession, damages for trespass and mesne profits.

The defendants contended that as the plaintiff had elected in the county court to abandon the plea of trespass and to proceed against them on the basis that they were tenants, and that claim had been dismissed, he was estopped in the action from denying that they were his tenants by a tenancy to which the Rent Restrictions Acts applied. The plaintiff denied that he was estopped and contended that in view of the judge's finding that there was no evidence whether the defendants were contractual or statutory tenants the defendants were estopped from asserting that they were either contractual or statutory tenants.

*S. W. Magnus* for the plaintiffs.
*H. T. Buckee* for the defendants.

The following cases were referred to in argument: *Marwood* v. *Waters* [1]; *In re Simms* [2]; *Scarf* v. *Jardine* [3]; *Morel Brothers & Co. Ld.* v. *Westmorland (Earl of)* [4]; *Boileau* v. *Rutlin* [5]; and *Jones* v. *Lewis*.[6]

PARKER J. stated the facts and continued: The defendants maintained, and have sought to maintain here, that they had become tenants of the plaintiff because they had informed the rent collector that both the Balls and the Traceys were no longer there and that they (the Newmans) were in occupation, and that thereafter the collector had continued to collect rent.

[1] (1853) 13 C.B. 820.
[2] [1934] 1 Ch. 1.
[3] (1882) 7 App.Cas. 345.
[4] [1904] A.C. 11; 20 T.L.R. 38.
[5] (1848) 2 Ex.Rep. 665.
[6] [1919] 1 K.B. 328.

The case is unusual and difficult by reason of what happened in the proceedings in the Bow County Court. [His Lordship referred to the county court proceedings and continued:] I find it very difficult to ascertain what was passing through the county court judge's mind, but clearly there was some confusion: before me both sides in effect rely on what took place in the county court as creating estoppels. Mr. Magnus, for the plaintiff, submits that in these proceedings it has already been determined between the parties that the defendants are not tenants and are therefore trespassers. He says that the defendants cannot before me adduce evidence that they are tenants because it is res judicata between the parties that, so far from being tenants, they are trespassers, and, accordingly, that there is no defence to the claim. The defendants, on the other hand, by Mr. Buckee, say: Oh, no; it is the plaintiff who is estopped, because the plaintiff by his counsel, as appears from the county court judge's note, elected, and (it is said) finally elected, to abandon his claim in trespass and to proceed on the basis that they were tenants, and that, having done so and having finally elected, then, on the principle laid down in a number of cases—in particular *Scarf* v. *Jardine* [1]—he cannot now come forward and seek to assert the remedy which he has elected to abandon.

So far as concerns the plaintiff's contention, the judgment was a judgment for the defendants which, on the issue raised in the amended paragraph 4 of the particulars of claim, might be based on a finding under the Rent Restrictions Acts that it was unreasonable to grant possession or on some other ground. If, however, one looks at the reasons (as Mr. Magnus says I am entitled to do) it does appear that the judge was holding that the claim failed because he had no jurisdiction, the defendants being trespassers. It seems to me that if and in so far as the judge did find that the defendants were trespassers, that could not amount to a res judicata between the parties because it was the very thing which he had no jurisdiction to find and which was not the basis of the claim before him; indeed, it was a claim which had been specifically abandoned.

The defendants' contention as regards estoppel—that the claim now raised was specifically abandoned before the county court judge—is a simple one. The judge recorded it as an "election"; and Mr. Buckee (who was there) assures me that he understood it, and it was understood as, a final election; and, indeed, his submissions at the end of the case bear that out. He took his stand on the basis that the plaintiff was proceeding on the alternative claim—that is, on the assumption and on the admission that the defendants were tenants. It seems to me that that must be the basis on which the matter proceeded. It is suggested that all that really took place was that counsel for the plaintiff said, in effect: "I now find that the annual value

[1] 7 App.Cas. 345, 360.

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" is over £100; therefore I cannot proceed before the court in a " claim for trespass; but we are all here, the witnesses are here, " and, of course, if I am right under the Rent Restrictions Act " there is an end of the matter and " (in effect) " will you (the " county court judge) decide that issue without prejudice to my " being able to pursue my claim in trespass should you be against " me."

I do not think that such a course can be taken except by agreement between the parties, and there is no sign of any agreement between counsel for the parties that the county court judge should proceed on that basis. So far from that, there is clearly expressed in the notes, and it was clearly understood by Mr. Buckee, as appears from his submission, that, so far from there being an agreement between the parties as to what the county court judge should do, the plaintiff abandoned his claim in trespass and finally elected to treat the defendants as tenants. I agree that on that basis it is difficult to see what was passing through the mind of the county court judge, but it seems to me perfectly clear that there was a final election, and that being so, though it may not have been intended—I do not know—and may produce difficulties for the landlord. I do not think that it is open to the plaintiff to call evidence before me that the defendants are trespassers. I should add that if I am wrong, I should be forced to hold on the evidence that the defendants at no time have become tenants of the plaintiff; but in the view I take on the points with regard to the estoppel that issue does not arise.

In these circumstances this claim must be dismissed.

*Judgment for the defendants.*

Solicitors: *Bennett, Hobson & Co.; Breeze, Benton & Co.*

J. F. L.

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[COURT OF APPEAL.]

C. A.

* DAVID TAYLOR & SON LD. *v.* BARNETT TRADING CO.

1953
*Mar.* 3, 4.

Singleton, Denning and Hodson L.JJ.

*Arbitration—Misconduct—Award based on illegal contract—Jurisdiction of court to set aside—Contract for sale of goods—Price in excess of maximum price—Meat Products and Canned Meat (Control and Maximum Prices) Order,* 1948 (*S.I.* 1948, *No.* 1509) *as amended by S.I.* 1951, *No.* 1317—*Arbitration Act,* 1950 (14 *Geo.* 6, *c.* 27), *s.* 23.

The defendants entered into a contract to sell to the plaintiffs 10,000 cases of Irish stewed steak at a price which was in excess of the maximum price permitted by emergency legislation. The contract was therefore illegal. The defendants having failed to deliver the goods, the plaintiff buyers claimed damages for breach

of contract. The dispute which arose was referred to arbitration. The umpire, although the illegality was pointed out to him, awarded the plaintiffs £11,000 damages, but gave no reasons in the award for his decision. The defendants moved to set aside the award. The motion was dismissed by Lord Goddard C.J. On appeal:—

*Held*, that the award must be set aside because it was the duty of the umpire to decide questions submitted to him according to the legal rights of the parties, and in failing to take into account the illegality of the contract he had been guilty of misconduct in law.

Observations of Lord Dunedin in *Champsey Bhara & Co.* v. *Jivraj Balloo Spinning and Weaving Co. Ld.* [1923] A.C. 480 at p. 487; 39 T.L.R. 253; of Lord Cozens-Hardy M.R. in *Smith, Coney & Barrett* v. *Becker, Gray & Co.* [1916] 2 Ch. 86; 112 L.T. 914; 31 T.L.R. 151; and of Sir Vicary Gibbs C.J. in *Wohlenberg* v. *Lageman* (1815) 6 Taunt. 251 at p. 255, applied.

*Per* Denning L.J. The court has jurisdiction to set aside an award based on an illegal contract, even where neither the umpire, nor even the parties, knew that it was illegal.

Lord Goddard C.J. reversed.

APPEAL from Lord Goddard C.J.

On February 27, 1952, a contract was entered into between the defendants, Barnett Trading Co., as sellers, and the plaintiffs, David Taylor & Son Ld., as buyers, the contractual document, which was headed with the name and address of the sellers (who were described as general produce merchants, exporters and importers) being in the following terms: "Dear Sirs, we confirm "having this day sold to you . . . 10,000 cases Irish stewed steak. "Price 2s. 4d. per lb. . . . Delivery, shipment April, May, June, "July, 1952. Part shipment allowed. Payment: Nett. Cash "against delivery. . . . Remarks. Not for sale by retail." On the back of the document were the conditions of sale, which included the following: "Any dispute arising out of this contract "which cannot be settled by mutual agreement between the "parties concerned, such dispute to be referred to arbitration in "London in the usual customary manner."

The contract was admittedly one between wholesalers and not a first-hand sale. The sellers having failed to make delivery of the goods, the buyers claimed damages for breach of contract, and the dispute which then arose between the parties was referred to arbitration, one arbitrator being appointed by each side. The arbitrators, being unable to agree, referred the matter to Mr. A. C. Coltman as umpire. On August 21, 1952, Mr. Coltman made the following award: "Whereas a dispute has arisen "between Messrs. David Taylor & Son Ld. . . . and Messrs. "Barnett Trading Co. . . . and the said buyers and sellers have "agreed to submit such dispute to arbitration, and whereas the "said arbitrators . . . having failed to agree, have appointed me, "Arthur Cranfield Coltman, to act as umpire.—I hereby award "as follows: (1) That the said sellers do pay to the said buyers "the sum of £11,000. (2) I direct that the costs of the arbitra-"tion, namely £34 13s. 0d., shall be paid by the sellers."

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On August 26 the buyers gave notice to a master of an application for leave to enforce the umpire's award. The application was opposed by the sellers, and on September 1, 1952, the master adjourned the application to give the sellers an opportunity of moving to set aside the award. On October 29 a motion by the sellers to set aside the award, on the grounds (1) that it was bad on the face of it, in that it incorporated by reference and purported to enforce a contract that was illegal, and (2) that the umpire had misconducted himself in law in failing to take into account that the contract was illegal, inasmuch as the selling price was in excess of the maximum price prescribed by S.I. No. 1317 of 1951, was dismissed by Lord Goddard C.J.

The sellers, Barnett Trading Co., now appealed.

*Gilbert Beyfus Q.C.*, *Sebag Shaw* and *S. Bolton* for the sellers.
*R. F. Levy Q.C.* and *Leonard Pearl* for the buyers.

SINGLETON L.J., having stated the facts, continued:—It is clear from the document itself, and from what we have been told, that this was a contract between wholesalers. The Barnett Trading Co. has a partner, Mr. Jack Toby Barnett, of 22 Harrow Lodge, St. John's Wood, who, in his affidavit, describes himself as a merchant. He, or his firm, did not deliver the goods under the contract. I suppose the reason for that was that the price had risen. A claim was made upon him by the buyers, and in the ordinary way that claim, or the dispute which arose, was referred to arbitration. Two arbitrators were appointed, one by each side; they met, and as they failed to agree they appointed an umpire, and, as sometimes happens in cases of this nature, thereafter the arbitrators became, in a sense, representatives of the respective parties, and the decision on the dispute was left to the umpire.

The umpire made an award on August 21, 1952.

[His Lordship read the award, and continued:] Mr. Coltman, who was called upon to act as umpire, is well known, and I have no doubt that he was satisfied that the sellers had failed to make delivery. The price had gone up considerably, and he awarded that the sellers should pay to the buyers the sum of £11,000.

On August 26, five days after the award, the buyers gave notice of an application for leave to enforce the award. On September 1 a master heard that application, and he adjourned it so that the sellers could have an opportunity of moving to set aside the award. Notice of motion to set aside the award was served on October 1, 1952, and was heard by the Lord Chief Justice on October 29. Lord Goddard C.J. dismissed the motion. Unfortunately no shorthand writer was present in court at the time when his judgment was delivered, so that we have not a complete note of the judgment, and though Mr. Beyfus and Mr. Levy were agreed in part as to what his Lordship had said, they

were not wholly agreed as to how he dealt with the second part of the case, to which I shall refer later. It was ascertained, however, that the solicitors who represented one of the parties had some note, though not a complete one, of that which the Lord Chief Justice had said, and we have copies of that before us now.

The motion to set aside the award was, so far as is material now, put on two grounds: first, "that the award is bad on the "face of it in that it incorporates by reference, and purports to "enforce, the contract between the parties, dated February 27, "1952, which contract is illegal under the provisions of a "Statutory Instrument, No. 1317 of 1951." The Lord Chief Justice was of opinion that that submission failed; in other words, he said that he had reached the conclusion that there was no substance in the contention that the award was bad on the face of it. With that view I find myself in complete agreement.

The legal position was stated by Williams J. in *Hodgkinson* v. *Fernie* [1] in this way: "The law has for many years been "settled, and remains so at this day, that, where a cause or "matters in difference are referred to an arbitrator, whether a "lawyer or a layman, he is constituted the sole and final judge "of all questions both of law and fact. . . . The only exceptions "to that rule are cases where the award is the result of corrup-"tion or fraud, and one other, which, though it is to be regretted, "is now, I think, firmly established, namely, where the question "of law necessarily arises on the face of the award, or upon some "paper accompanying and forming part of the award. Though "the propriety of this latter may very well be doubted, I think "it may be considered as established." And in *Champsey Bhara & Co.* v. *Jivraj Balloo Spinning and Weaving Company Ld.*,[2] Lord Dunedin said: "An error in law on the face of the "award means, in their Lordships' view, that you can find in "the award or a document actually incorporated thereto, as for "instance a note appended by the arbitrator stating the reasons "for his judgment, some legal proposition which is the basis of "the award and which you can then say is erroneous." Applying those tests, I find it quite impossible to say that this short award is bad upon the face of it.

The second point which is raised is of a different character: it is that the umpire misconducted himself in law in that he failed to take into account the illegality of the contract. Thus, the sellers, the appellants in this court, contend that there was misconduct on the part of the umpire in that he failed to take into account the illegality of the contract into which the parties had entered. It sounds rather unpleasant to say of an arbitrator that he has misconducted himself, but as Denning L.J. pointed out in the course of the argument, if an arbitrator assumes an

[1] (1857) 3 C.B.(N.S.) 189.

[2] [1923] A.C. 480, 487; 39 T.L.R. 253.

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excess of authority he may be guilty of misconduct in the arbitration, and I think that I am right in saying that Mr. Levy agreed that if an arbitrator knows, or recognizes, that a contract is illegal, and thereafter proceeds to make an award upon a dispute arising under that contract, he is guilty of that which is in law misconduct.

In *Smith, Coney and Barrett* v. *Becker, Gray & Co.*[3] an effort was made to obtain an injunction to prevent the other party to a contract going to arbitration on a dispute which had arisen, and one of the grounds on which the action was brought for an injunction was that the contract between the parties was an illegal contract. The attempt to obtain an injunction failed by reason of the fact that the court did not find that the contract was illegal. The Court of Appeal, upholding the judgment of Warrington J., so decided. Warrington J., in the course of his judgment, said[3]: "I think that the plaintiffs in order to "succeed must show that the contract for arbitration with the "submission was invalid. For that purpose I think that I am "bound to look at the date at which the contract was made, and "to see whether at that date there is any reasonable ground for "saying that the contract was invalid. Was that so? For that "purpose it is necessary to turn to the contract and see what it "really is." Lord Cozens-Hardy M.R., in his judgment, said: "The plaintiffs in this action sought a declaration that the "contract which I have just read was illegal by reason of the "war. Of course, if it was illegal, then any question of arbitration under the contract would fall with it."

In an old case, *Wohlenberg* v. *Lageman*,[4] Sir Vicary Gibbs C.J. said: "If an arbitrator acts directly against law, the court "will set aside the award; but if, in a matter mixed of law and "fact, he mistakes some of the points, they will not therefore "set aside an award."

It is submitted by Mr. Beyfus, on behalf of the appellants, that the umpire, in basing his award on a contract which was an illegal contract, acted directly against the law, and in that sense was guilty of misconduct. Alternatively, it is contended that if one party to an arbitration puts before the arbitrator a contract which is an illegal contract, and asks the arbitrator to act upon that illegal contract, and the arbitrator does so and makes an award, then the award is improperly procured.

I have thought it right to refer to those authorities first, and I will now consider the facts in this case as we know them. Mr. Jack Toby Barnett swore an affidavit, in paragraph 8 of which he said: "The said agreement which, as in the next pre-"ceding paragraph mentioned, is by reference incorporated in "the umpire's said award, is illegal and void in that the price "agreed for the goods bought and sold thereunder exceeds the "maximum price permitted under the relevant provisions of

[3] (1915) 112 L.T. 914, 916, 917; 31 T.L.R. 151.

[4] (1815) 6 Taunt. 251, 255.

" Statutory Instrument No. 1317 of 1951. I was not at the date " of the said agreement, or the hereinbefore mentioned reference " to arbitration, aware of the said statutory instrument or any " provisions thereof and did not realize that the respondent firm " had entered into an illegal contract." I am not sure that it matters, but I should not think that the umpire accepted that explanation. Here is a man who says that he is the sole partner in a firm of general produce merchants, importers and exporters at St. Magnus House, Monument Street, London, and that he did not know that there was any such order.

The contract states the price of these goods, tins of Irish stewed steak, at 2s. 4d. per lb. We have before us several statutory instruments. The first which is material is No. 1509 of 1948, and that provides in paragraph 13, in regard to imported canned meat: " A person shall not sell or buy any imported " canned meat at a price exceeding the maximum price applic- " able in accordance with the provisions of the fourth schedule " to this order." The definition paragraph, paragraph 1, includes these words: " ' Buy ' includes offer or agree to buy, and ' sell ' " includes offer or agree to sell or expose for ' sale ' "; and a later paragraph provides that infringements of this order are offences against the Defence (General) Regulations of 1939. So that it is an offence if a person sells or offers to sell, or buys or agrees to buy, imported canned meat at a price exceeding the maximum price. To find the maximum price one has to look at the fourth schedule. In 1948, by this order, the maximum price as between wholesalers was 1s. 5d. per tin. That was altered by the later statutory instrument which applies to this case, No. 1317 of 1951, and by that, on a sale between wholesalers, the figure in the fourth schedule has risen to 2s. 0¾d., so that at the time this contract was entered into the maximum price was 2s. 0¾d., whereas the price under the contract was 2s. 4d. per tin.

In my judgment, that is contrary to the terms of the two orders read together, and accordingly the contract entered into between the parties was an illegal contract. I do not think that that has been seriously challenged. The price in the contract was 2s. 4d. It is true to say that delivery was to be in April, May, June and July, but I do not think that that affects the question at all, for there was clearly an offer and an agreement on the one hand to buy, and an offer and agreement on the other hand to sell, at 2s. 4d. per lb., on February 27.

The arbitrator appointed by the Barnett Trading Co. was Mr. Reginald Francis Newman, and he deposed to that which took place before the umpire on August 21, 1952. He said that the two arbitrators were engaged with the umpire for about an hour. Mr. Mischeff, the other arbitrator, put his case to the umpire, " and at the conclusion thereof I presented my case on " behalf of Barnett Trading Co. The first point I raised in my " argument to the said Coltman was that the contract was illegal " on the ground that the price for the Irish stewed steak stated

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" in the contract exceeded the fixed price laid down by the statu-
" tory instrument controlling meat products. Not only did I
" describe the contract as illegal but I also submitted that the
" contract was impossible to perform. The said Coltman heard
" me but did not make any comment or observation upon that
" aspect of my submission."

Perhaps one may sympathize with the thoughts of the umpire, even if he said nothing, when he had before him the case of Mr. Jack Toby Barnett, who said, in effect: " I made this contract;
" the price has gone up and I have not supplied the goods, but I
" am not liable if I made an illegal contract; it is a bad one for me,
" and so I am setting up that it is an illegal contract." The fact remains that the illegality of the contract was brought to the notice of the umpire. It was not challenged by the other side. All these gentlemen were engaged in the trade; they all knew that there were maximum prices, and I should think that they probably all knew what the maximum prices were. When the point was taken that this was an illegal contract it was the duty of the umpire to pay attention to that fact.

The duty of an arbitrator is to decide the questions submitted to him according to the legal rights of the parties, and not according to what he may consider fair and reasonable under the circumstances. It looks to me as though the umpire thought it fair and reasonable that the sellers should pay the loss incurred by their breach of contract; equally it looks to me as though the arbitrator cannot have had any regard for the fact that the contract was an illegal contract. I do not see that there can be any dispute as to that. Thereupon the question arises, what ought to be done? If this be misconduct in law, the proper course is to move to set aside the award. The court is given certain powers under sections 22 and 23 of the Arbitration Act, 1950. Section 22 (1) is in these terms: " In all cases of reference to arbitration
" the High Court or a judge thereof may from time to time remit
" the matters referred, or any of them, to the reconsideration of
" the arbitrator or umpire."

Mr. Beyfus submits that we can and ought to remit if we do not think it right to proceed under section 23 (2), which reads:
" Where an arbitrator or umpire has misconducted himself or the
" proceedings, or an arbitration or award has been improperly
" procured, the High Court may set the award aside." As I have said, within a few days of the award the buyers moved for leave to enforce it. The master ultimately adjourned that application so that the motion to set aside the award could be brought on. After the motion had failed before the Lord Chief Justice the buyers appeared by counsel before the master again and sought leave to enforce the award, as the Lord Chief Justice had refused to set it aside. Mr. Levy, in his submission to us, said that the award could be treated as a piece of waste paper, in that he would not get leave to enforce it in any event, and he might never bring an action upon the award. If that were so,

he said, the award would remain merely as a piece of paper. I do not think that it is right that it should do so.

I thought at one time that the proper course for this court to adopt was to remit the case under section 22 of the Act in order to ascertain whether or not the umpire had considered the question of illegality of the contract, as Mr. Levy said that the umpire might have considered it and thought that it was not really an illegal contract. I feel, however, that whether a layman or a lawyer looks at this contract, along with the relevant statutory instrument, there is only one answer to be found—he must see that the contract is an illegal contract. If, notwithstanding that, the umpire thought it right to make an award because, in his view, the buyers ought to pay, then the court ought to set aside the award. I say that for these reasons: it seems to me that if we remitted the matter to the umpire to ascertain whether he had considered the question of illegality or not, it would not carry the matter any further. The point was raised before him; he had at least the opportunity to consider it, and he must have had it in his mind. Therefore, if we left the case standing, as Mr. Levy asked, and dismissed this motion, it would only mean that someone would have to go before the master again, and there probably would be, or might be, an action upon the award.

In the circumstances of this case, I think that it is the duty of the court to say that the award should be set aside, not upon the ground that the award is bad upon the face of it—upon that ground I find myself in full agreement with that which the Lord Chief Justice said—but upon the second ground, which was not pursued before the Lord Chief Justice as strenuously as the first, with the result that little was said about it in his Lordship's judgment, so far as we can ascertain, though he did indicate that if he had been satisfied that the agreement was illegal he would have adopted the course which I have suggested that this court ought to adopt.

In my judgment the appeal succeeds and the motion to set aside the award should be granted.

DENNING L.J. On February 27, 1952, the sellers agreed to sell to the buyers 10,000 cases of Irish stewed steak at 2s. 4d. a lb., delivery to be between April and July, 1952. At that date there was an order in force which prohibited any person from selling or buying any of such meat at a price exceeding the maximum price of 2s. 0¾d. The contract price was therefore 3¼d. in excess of the permitted price. On March 16, 1952, the price limit was altered; the maximum was raised to 2s. 4d., the very price which was in the contract. If the contract had itself been lawful, the deliveries could therefore have been lawfully made between April and July, 1952. The sellers did not make delivery and the buyers claimed damages. They went before arbitrators who referred the matter to an umpire, and the umpire awarded £11,000 damages.

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Mr. Beyfus has moved before us to set aside the award on the ground that the contract on which it was based was illegal, because the price exceeded the maximum ruling at that time. Mr. Levy suggested that the contract was not illegal. He said that if the parties had received advance information that the maximum restriction was to be lifted, they might lawfully contract for future deliveries at a price higher than the existing maximum. I do not think so. The regulation definitely forbids any agreement to buy or sell at a price in excess of the maximum. That must invalidate agreements for future delivery as well as present delivery. No advance information of an impending change can alter the law. It is only when the law itself is altered that the parties can safely act upon it. The contract, therefore, was plainly illegal.

Mr. Levy next suggested that if an arbitrator or an umpire had knowledge of an illegality, he could, if he pleased, turn a blind eye to it; and, despite the fact that the contract was illegal, the arbitrator or umpire could award damages for the breach of it, if he thought it was fair and reasonable so to do. It is clear that Mr. Levy carried his argument thus far, because when I put to him the case of a building contract which was illegal for want of a licence, he said that the umpire could award payment to the builder if he thought it fair that he should be paid. He sought to support his argument by reference to two cases, *Delver* v. *Barnes*[5] and *Wohlenberg* v. *Lageman*.[6] Those cases do not support his proposition, and I do not think that we should countenance it. There is not one law for arbitrators and another for the court. There is one law for all. If a contract is illegal, then arbitrators must decline to award upon it just as the court would do.

Finally, Mr. Levy contended that the procedure was at fault, that the award should not be set aside, but that the question of illegality should be decided in an action on the award. That might well be a proper course if the illegality depended on evidence, but I cannot see how any evidence could cure this illegality. In my opinion, the court has jurisdiction to set aside an award based on an illegal contract. It may be that the umpire, not being a lawyer, did not realize that the contract was illegal; it may be that the claimants themselves did not know it; and in that sense there was no misconduct or improper procurement, but, nevertheless, the award cannot stand. An arbitrator has no jurisdiction or authority to award damages on an illegal contract. It is obvious that the court would not itself enforce such an award. Equally it should not allow it to stand.

Mr. Beyfus suggested that if we were in doubt about misconduct or improper procurement under section 23, we might remit the award under section 22 for reconsideration. I agree that we might do so, but I see no point in remitting the award

[5] (1807) 1 Taunt. 48.

[6] 6 Taunt. 251.

to the umpire when there is only one conclusion to which he could come, namely, that the contract was illegal.

In my judgment, the award should be set aside here and now, and there should be no further costs incurred.

HODSON L.J. I agree. The first point taken in the court below, and in this court, was that the award was bad on the face of it in that it incorporated by reference an illegal contract. On that point I agree with the Lord Chief Justice that there is no error in law on the face of the award which entitles the sellers to set it aside. In the first place, there is no incorporation by reference sufficient to identify the document said to be an illegal contract, and even if there had been identification of the document, incorporation is not brought about by mere reference, as is shown by *Champsey Bhara & Co.* v. *Jivraj Balloo Spinning and Weaving Co. Ld.*[7] Further, even if incorporated, as Mr. Levy pointed out, the contract is not illegal on the face of it, because the price quoted is not higher than the maximum price merely by reference to the contract itself, because the permitted prices vary according to the functions of the contracting parties, which do not appear on the face of the contract.

The second ground on which the sellers, the appellants, have sought here and below to set aside the award is that the umpire misconducted himself in failing to take into account the illegality of the contract. That is a matter which can be dealt with independently of the face of the award, if established. According to the rough note which we have of the judgment of the Lord Chief Justice, he dealt with it in this way: "I may say on one "part I had some doubt, and that is if the court can clearly "see that the applicants were enforcing an illegal contract, then "it might be misconduct to proceed with the arbitration at all. "But I have no evidence." The first question, then, is whether there is evidence that the umpire proceeded with the arbitration in face of evidence that the parties were seeking to enforce an illegal contract. I think the other such evidence is contained in an affidavit of Mr. Newman, the arbitrator who presented his case before the umpire on behalf of the Barnett Trading Co., and put the matter in his affidavit in this way: "The first point I "raised in my argument to the said Coltman was that the "contract was illegal on the ground that the price for the Irish "stewed steak stated in the contract exceeded the fixed price "laid down by the statutory instrument controlling meat "products."

Having regard to the functions performed by the parties to this contract, it is clear that the contract was an illegal contract, and that it matters not that the time for delivery, when the sale was to take place, was later than the contract. By the definition contained in the regulation sale includes agreement to sell,

[7] [1923] A.C. 480; 39 T.L.R. 253.

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and I think it follows therefore that not only an immediate sale at a price in excess of the permitted maximum, but also an agreement for sale at such a price at a future date must be illegal.

It is said by the respondent buyers that even if there be an illegal contract, or assuming for the purpose of their argument that there is an illegal contract, the court should do nothing to assist either party. Mr. Levy relied on the decision in *In re Boks & Co. and Peters, Rushton & Co. Ld.*[8] Although the matter came to the Court of Appeal, the passage relied on is contained in the statement of facts containing the decision of the Divisional Court from which the appeal was brought. The view taken by that court was that it would not be right to set aside the award; the matter being treated as if it were a matter arising out of an illegal transaction: the court would not interfere in any way either to enforce the award or to set it aside, but would let the parties remain in whatever position they were. I need make no comment on the decision of the Divisional Court beyond, I think, two. First, the present case is, in my judgment, distinguishable from that case, because although it is true that in the proceedings before this court the sellers, the appellants, are taking the initiative, yet these proceedings are, to my mind, closely bound up with the proceedings initiated by the buyers, the respondents to this appeal. They first proceeded before the master to take out a summons for leave to enforce the award summarily, to which this motion was taken out as a counter move. Therefore, to my mind, the position is not the same as it would have been if an original application had been made, not being one brought in answer to an application by the other side.

Secondly, it is, I think, clear from *Smith, Coney and Barrett* v. *Becker, Gray & Co.*[9] that the court will interfere by injunction in a proper case to prevent an arbitration being held on an illegal contract. The application failed in that case because it was held that there was not an illegal contract.

Mr. Levy argued further that illegality is not necessarily fatal even to an action on an award, and for that proposition he referred to *Delver* v. *Barnes*[10] and *Wohlenberg* v. *Lageman.*[11] To my mind, the judgments in those cases do not really support the proposition contended for. I will not refer in detail to those judgments, but it does seem to me that the headnote in the first seems to go rather further than the judgment of Sir James Mansfield warranted. I think that it is clear that, once the illegality is made plain, the award can, and should be, set aside.

Lastly, on very much the same lines, it was submitted by Mr. Levy that if the parties agreed to submit to arbitration an illegal contract, they could not complain of the illegality and consequent want of jurisdiction. I am bound to say that I cannot agree with that proposition as, at any rate, applicable to this

[8] [1919] 1 K.B. 491.
[9] (1915) 112 L.T. 914; 31 T.L.R. 151.
[10] (1807) 1 Taunt. 48.
[11] (1815) 6 Taunt. 251.

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case, because Mr. Newman, having taken the point that the contract was illegal, had addressed himself to other matters. In this connexion I would refer to what Lord Selborne L.C. said in *Hamlyn* v. *Betteley* [12]: "In arbitrations, where a protest is "made against jurisdiction, the party protesting is not bound to "retire; he may go through the whole case, subject to the protest "he has made." I think that the effect of the arbitrator who presented the case on behalf of Mr. Barnett drawing attention to the illegality was to protest against the jurisdiction, and the fact that he did not retire from the arbitration at that moment does not prevent the point being raised now.

The principle which I think is applicable is that often quoted, the language of Lord Ellenborough C.J. in *Langton* v. *Hughes* [13]: "What is done in contravention of the provisions of an Act of "Parliament, cannot be made the subject-matter of an action." In the circumstances of this case, I think that principle is applicable and ought to be acted on by this court.

I agree that the appeal should be allowed.

*Appeal allowed.*
*Award set aside.*

Solicitors: *Carters; Gale & Phelps.*

A. W. G.

[12] (1880) 6 Q.B.D. 63, 65. [13] (1813) 1 M. & S. 593, 596.

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[QUEEN'S BENCH DIVISION.]

* ANSON *v.* ANSON.

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*Mar.* 10, 12.
Pearson J.

[1952 A. No. 92.]

*Husband and Wife — Guarantee — Banking account — Guarantee by husband to bank of housekeeping account in wife's name—Payment by husband under guarantee—Right of reimbursement—Presumption of advancement.*

A bank account, out of which the housekeeping expenses of a matrimonial home were paid, was kept in the name of a wife who also had a personal bank account elsewhere. The husband made the wife a substantial allowance, but beyond expecting her to keep the housekeeping account in a proper state made no appropriation of the money paid to her. The wife paid most of the sums given to her by the husband into her personal account and the housekeeping account became overdrawn. The husband gave the wife a cheque to pay off the overdraft; but this she paid into her own account, and told the husband that he would have to guarantee the housekeeping account. The husband gave a written guarantee of the housekeeping account to the bank, and the overdraft remained outstanding. Subsequently the parties were divorced and the bank demanded payment of the overdraft from the wife; the wife refused to meet the demand and the bank demanded payment from the husband, who paid £500 under the guarantee. In an action by the husband to recover the £500 from the wife,

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the wife denied that she was indebted to the husband and contended that the transaction was in the nature of an advancement:—

*Held*, that the essence of a transaction of guarantee was the implied intention that the principal debtor should retain the obligations of a principal debtor and that the surety should remain secondarily liable, and if called on to pay should be entitled to reimbursement; that as between husband and wife, the presumption of advancement ought not to be implied unless there was an intention at the time of the giving of the guarantee that there was to be no reimbursement and a special agreement that the husband was to bear the liability; that, on the facts, the husband gave the guarantee, not to relieve the wife of her obligations to the bank, but to resolve an immediate emergency, with the intention that the transaction should have the ordinary incidents of a guarantee; and that the wife, accordingly, was liable to reimburse the husband.

*In re Salisbury-Jones* [1938] 3 All E.R. 459 applied.

*In re A Debtor* [1937] 1 Ch. 156; 53 T.L.R. 191; [1937] 1 All E.R. 1 considered.

Action.

In September, 1946, the plaintiff, Colonel Claud Ronald Anson, provided £100 to open a bank account at Lloyds Bank, Camberley, in his wife's name. The wife had ample means of her own and already possessed an account at a bank in London. The husband also had an account at Lloyds Bank, Camberley, but it was intended that the account opened in the wife's name should be primarily a housekeeping account out of which she would pay bills relating to the housekeeping at their matrimonial home, and, in fact, the account was so used. The husband made the wife a very large allowance out of which, while making no express appropriation, he expected her to keep her Camberley account in a proper state. Between January 1 and September 5, 1947, the husband paid the wife £4,245. Out of that sum the wife paid only £250 into her Camberley account, which by August 21, 1947, was overdrawn by about £330. The husband became aware of the overdraft and a heated discussion took place at which the wife told the husband that he must arrange something and he told her, in effect, that he had already given her the money and could not pay twice over. The wife said that he must guarantee her account at Camberley, and on August 29, 1947, the husband drew a cheque for £380 in favour of the wife, his intention, as expressed to the wife, being that she should pay it into her Camberley account to pay off the overdraft and provide a small working balance. In fact, the wife paid that cheque into her London bank account. On September 5, 1947, in the course of a telephone conversation the wife told the husband that her London account needed the money and that he would have to guarantee the account at Camberley. On the same day the husband entered into a written guarantee to the extent of £500, the surplus over the overdraft being intended to provide for contingencies. The husband then stopped the cheque for £380 but from September 6 to December 31, 1947, continued to make the wife a large allowance, paying her, in all, £3,338, out of which she paid £220 into

her Camberley account; and during 1948 the husband gave the wife £1,205, out of which she paid £50 into her Camberley account. At all material times the wife had a very substantial balance at her London bank and could easily have paid off the small overdraft at Camberley.

In 1949 the parties were divorced, and on November 21, 1950, the Camberley bank made a written demand for payment of the debit balance of her account, then at least £500, from the wife; the wife refused the demand and the bank demanded payment from the husband under the guarantee, and on December 14, 1951, the husband duly paid £500 to the bank.

The husband now claimed from the wife the sum of £500 as money paid under a guarantee entered into at her request. The wife denied that she was indebted to the husband and alleged that the guarantee was not entered into at her request, but was given without her knowledge or approval, and further alleged that money drawn on the Camberley account was in fact used in settling accounts at the request of the husband and for which he was liable; alternatively, that the transaction was in the nature of an advancement by the husband to her which she was not liable to repay.

*John Hobson* for the husband.
*D. A. Fairweather* for the wife.

The following cases were referred to in argument: *In re a Debtor* [1]; *Biberfeld* v. *Berens* [2]; *In re Eykyn's Trusts* [3]; *In re Salisbury-Jones* [4]; *Bendall* v. *McWhirter* [5]; *Dunbar* v. *Dunbar.* [6]

PEARSON J. stated the facts, held that the Camberley account was the wife's account and that she was liable for repayment of the overdraft; that the husband by giving the guarantee did not, to the wife's knowledge, intend to relieve her of her liability, and continued:—On those facts, what is the legal position? Prima facie, if this is to be treated as an ordinary case of one person guaranteeing another person's account, the ordinary rule, that the guarantor, having been called upon to pay the debt, is entitled to reimbursement, would apply. The question is whether any special defence can be established on the facts of this case, including the important fact that at the material time when the guarantee was given the parties were husband and wife. By paragraph 2 of the defence it is stated: "The said guarantee was "not entered into at the request of the defendant but was "entered into without her knowledge or approval." On the facts I do not accept that defence. I find that the guarantee was

[1] [1937] Ch. 156; 53 T.L.R. 191; [1937] 1 All E.R. 1.
[2] [1952] 2 Q.B. 770; [1952] 2 T.L.R. 39; [1952] 2 All E.R. 237.
[3] (1877) 6 Ch.D. 115.
[4] [1938] 3 All E.R. 459.
[5] [1952] 2 Q.B. 466; [1952] 1 T.L.R. 1332; [1952] 1 All E.R. 1307.
[6] [1909] P. 90; 25 T.L.R. 230.

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entered into at her request and with her knowledge and approval. Then, by paragraph 3: "Sums of money drawn by the defendant "on the said account were in fact expended during coverture in "settling accounts at the request of the plaintiff and for which "the plaintiff was liable." I do not find that it was used in settling accounts at the request of the plaintiff, but it was to some considerable extent used in settling accounts in respect of household bills, and to that extent that paragraph is partly true, Although that is not decisive of the issue, it is, or may be, an important factor in considering what the intentions of the parties were. It is perfectly possible for a wife and a husband to agree that household bills shall be paid from her account and that the liability shall be hers—in fact, that is probably the normal position. Then, finally, the defence states: "Alternatively, the "whole transaction was in the nature of an advancement by the "plaintiff to the defendant (his wife) and the defendant is not "liable to repay the same to the plaintiff." The theory of advancement is not very easy to apply to a case of a bank guarantee, because the presumption of advancement normally arises when the husband buys property in his wife's name, whereas in a normal case where there is no special relationship between the parties there would be a resulting trust in favour of the person who provided the money, as between husband and wife the presumption, which is called one of advancement, is the other way: that is, and I think it is the normal use of the word "advancement" in this context, the husband is presumed to have intended a particular sum to become the wife's property by way of a free gift from him. When that theory is applied to the case of a bank guarantee I think it must be understood as meaning that there was an intention that the husband should not have the right of reimbursement. For advancement to be presumed in such a transaction it would have to be interpreted as a transaction of a very special character, in that, although the husband gives a guarantee of his wife's account, there is a special arrangement, expressed or implied, between him and his wife whereby he is expected to bear the liability and is not expected, if he is called upon to pay and does pay, afterwards to claim reimbursement.

There are two possible legal bases for the right of reimbursement by a surety against the principal debtor left open by the authorities. The orthodox or more usual basis upon which it can be placed appears from *In re a Debtor*,[1] where the Court of Appeal had to consider what was the origin or essential nature of this right of reimbursement. In that case the position depended on whether the obligation should be treated as having arisen before or after a given date, because there was a transitional period in the Law Reform (Married Women and Tortfeasors) Act, 1935. The guarantee had been given in 1933 and

[1] [1937] Ch. 156; 53 T.L.R. 191; [1937] 1 All E.R. 1.

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the guarantor was called on to pay in 1936, and it had to be decided whether the obligation arose in 1933 or 1936, before or after the Act had come into operation. For that purpose the Court of Appeal had to consider what was the nature of the right, and the answer was in the main that in the normal case where a guarantee is given by a surety at the request of the principal debtor the right of reimbursement is of a contractual character and arises from an implied contract. Slesser L.J. referred to it as [2] "the implied undertaking of the principal debtor "to repay the money paid on her behalf." So it appears that the right can be placed on that basis of presumed contract or implied contract or, I am tempted to say, actual contract, because in the normal case what occurs, expressly or impliedly, is that A, who wishes to overdraw, or has an existing overdraft, says to B: "Will you please give a bank guarantee of my overdraft?", and B says: "Yes, I will," and proceeds to do so. That is an agreement between the two of them, the terms of which can be worked out on ordinary contractual lines, applying the principles with regard to implied terms. The intention as between the two of them normally is that the principal debtor shall remain the principal debtor; it is his debt and his obligation and he is expected to pay it. If the surety is called upon to pay and does pay, that for the time being defeats the intention of the parties that the debt shall be and remain that of the principal debtor. In order to put that position right, and to restore it to the position intended between the two of them by their original contractual intention, it is necessary that the right of reimbursement should be read into the contract or inferred to be one of the terms of the contract. The essence of the matter is that the principal debt is primarily the obligation of the principal debtor, while the liability of the surety is only a secondary liability, and it is the intention as between the two parties to the transaction as well as against the third party that that position should be preserved. That is the explanation on contractual lines of this implied term which confers the right of reimbursement.

It is of some interest to observe that in the judgment of Greene L.J. in that case there is an indication of a second possible foundation for the right of reimbursement, which throws some light on the present case. Greene L.J. said [3]: "Now where, as "in the present case, the implied request for payment is referable "to a request to give a guarantee, the contractual basis of the "action is apparent, and the difference between the old form of "action of indebitatus assumpsit and an action on a special "contract to indemnify disappears for all practical purposes. "The question whether or not the subsection applies cannot, in "my opinion, be affected by the fact that it would have been "open to the plaintiff to bring his action on an indebitatus "assumpsit instead of declaring on the implied undertaking

[2] [1937] Ch. 156, 161.

[3] [1937] Ch. 156, 166.

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"to indemnify." He referred to *Crampton* v. *Walker*,[4] and *Hamilton* v. *Goold*,[5] and continued[6]: "A question may arise as "to the application of the subsection in a case where a guarantee "is given without any antecedent request on the part of the "debtor. That case is merely one example of a number of cases "where the law raises an obligation to indemnify irrespective of "any actual antecedent contractual relationship between the "parties. A quite recent example of a case where the law raises "such an obligation irrespective of antecedent contract is to be "found in a case decided in this court of *Brook's Wharf and Bull "Wharf Ltd.* v. *Goodman Brothers*." [7]

*Brook's Wharf and Bull Wharf Ltd* v. *Goodman Brothers*,[7] was a case in which importers had put imported goods into a bonded warehouse and the bonded warehousemen were compelled to pay out of their own moneys the appropriate customs duties, although there had been no prior request from the importers to do so, because it was an obligation imposed on them by law. The bonded warehousemen reclaimed the sum paid by them from the importers, and it was held that their claim succeeded. Lord Wright said[8]: "Under these circumstances the plaintiffs claimed "that they are entitled to recover from the defendants the "amount which they had paid to the Customs in respect of duties "due on the defendants' goods. They make their claim as for "money paid to the defendants' use on the principle stated in "Leake on Contracts. The passage in question is quoted in "the Exchequer Chamber by Cockburn C.J. in *Moule* v. *Garrett*,[9] "and is in these terms: 'Where the plaintiff has been compelled "'by law to pay, or, being compellable by law, has paid money "'which the defendant was ultimately liable to pay, so that the "'latter obtains the benefit of the payment by the discharge "'of the liability; under such circumstances the defendant is "'held indebted to the plaintiff in the amount.' This passage "remains, with a slight verbal alteration, in the eighth edition of "Leake on Contracts at p. 46. The principle has been applied "in a great variety of circumstances. . . . These statements "of the principle do not put the obligation on any ground "of implied contract or of constructive or notional contract. The "obligation is imposed by the court simply under the circum-"stances of the case and on what the court decides is just and "reasonable, having regard to the relationship of the parties."

That is a possible alternative basis of the right of reimbursement, and I think it is of interest as tending to confirm the explanation which I have sought to give of the way the relations of the parties is worked out on the contractual basis. The essence of the matter, as I have said, is that the debt is the debt of the principal debtor and so remains, and therefore when the

[4] (1860) 3 El. & El. 321.
[5] (1839) 1 Ir.L.R. 171.
[6] [1937] Ch. 156, 166.
[7] [1937] 1 K.B. 534; 53 T.L.R. 126; [1936] 3 All E.R. 696.
[8] [1937] 1 K.B. 534, 543.
[9] (1872) L.R. 7 Ex. 101, 104.

surety is called upon to pay the position has to be put right between the parties so that the liability becomes once more to be the liability of the principal debtor.

In *In re Salisbury-Jones*, *Hammond* v. *Salisbury-Jones*, the headnote [10] states: "Upon a mortgage by the wife, the husband "joined as surety, the two covenanting jointly and severally to "pay the mortgage debt. The wife received the mortgage "money from the mortgagees. Later the mortgagees during the "lifetime of the wife called upon the husband as such surety "to repay the mortgage moneys, which he did. After the death "of the wife the husband sought to prove in her estate as a "creditor for the sum so paid, when it was contended that he "had no right to prove as a creditor since the payment was an "advancement of the wife:—Held, the husband in paying the "mortgagees was discharging a legal obligation under his guaran-"tee, and, in such circumstances there could be no question of "making a gift and no presumption of an advancement. Upon "payment he became entitled to all remedies of a surety who "has paid the debt of the principal debtor, and, in the absence "of any evidence of a release by him, he was entitled to prove in "the estate as a creditor." Simonds J. said [11]: "It is clear that "he has paid those sums, and that he has paid them in conse-"quence of the demand made upon him as surety to repay the "principal sum and interest due by the principal debtor to the "mortgagees. If that were all, the claim which he makes would "be unanswerable, but it is urged on behalf of the estate of the "intestate that that claim cannot be sustained, and cannot be "sustained for two reasons. In the first place, it is said that, "the relation between the parties being that of husband and "wife, the sums paid by the husband to the mortgagee society "are to be deemed to be gifts made by the husband to the wife, "and that claim is based upon this. It is said that, where a "husband purchases property in the name of a wife, and there "is no evidence to show that it was not a gift, the presumption "that it is a gift prevails. It is urged that a similar equity is "applicable in a case of this kind, where the husband has joined "as surety to guarantee a debt due by the wife to the husband. "No authority of any kind has been adduced in support of that "view. I decline to extend the doctrine of advancement in that "way. The case has been put, really, in two ways. First of "all, it is said that at the inception of the transaction, when "the husband entered into a contract of guarantee, he did so by "way of advancement. That is to say, from the moment the "transaction began, he is to be deemed, in the absence of "evidence to the contrary, to be in some way advancing his "wife and making a gift to her. That view, I think, was not "persisted in, but at a later stage it was urged that at any rate

[10] [1938] 3 All E.R. 459. [11] Ibid. 461.

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" at the moment of every payment so made in pursuance of " his obligation the husband is to be deemed to be advancing " his wife. That seems to me to be a quite untenable proposi- " tion. The husband made the payments, at the moment when " he made them, in pursuance of a legal obligation which he was " under to the mortgagee society. A demand being made, he " fulfilled his obligation, and, from the moment of fulfilling his " obligation, he became entitled to claim against the principal " debtor for the sums which he so paid. He had all the rights " at law and in equity of a surety who pays off the principal " debtor's debt, and, as it appears to me, the wife, or those " claiming through her, must show that in some way he released " that right." Then he went on to say that there was no evidence of the right having been released.

That, prima facie, is the position here. But as I have said, it must be borne in mind that it is possible to conceive a case as between husband and wife in which the right of reimbursement might be excluded by express or implied agreement between the parties at the moment when the guarantee is given. Suppose a case where the wife had no substantial resources of her own, but had an account at the bank in her own name, being her own account, out of which she paid the household bills and her own personal expenses, and which was fed by her husband by regular monthly payments. Suppose that in such a case in one particular month the husband was unable to provide the money, but was able to arrange by himself giving a bank guarantee to provide an overdraft for the wife on that bank account; and suppose he said to his wife expressly or by implication: " This " new guarantee arrangement that I have made will involve your " being in debt to the bank, but you need not worry about it, " because this arrangement is entirely for my convenience; it " will be my debt, and I will pay it and you will not be concerned " in it." If something of that sort had been said, I think it would be very arguable that, working out the position on a contractual basis, there should be read into the implied contract a term that there was to be no right of reimbursement. In a case like that, therefore, I think there would be a term excluding the right of reimbursement. The main question here is whether such a term can be implied. On the special facts of this case, there can be no such implication, indeed, I think the facts point the other way. The husband made it plain to his wife that he was not going to relieve her of the debt. The intention was that, it being already her debt, it should remain her debt, and he gave this instrument of guarantee to the bank, not to relieve her of the obligation, but to solve the immediate banking emergency. If he had meant to relieve her of her obligation he would have done so directly by a payment to her account. In those circumstances, the ordinary position as between surety

and principal debtor prevails as in *In re Salisbury-Jones*,[12] and I think that the proper view of the matter is that the wife is liable to reimburse the husband for the sum which he has paid. I hold, therefore, that the sum of £500 is due from the wife to the husband.

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*Judgment for the plaintiff.*

Solicitors: *Glover & Co.; A. E. Hamlin, Brown, Veale & Twyford.*

J. F. L.

[12] [1938] 3 All E.R. 459.

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[PROBATE, ETC., DIVISION.]

* IN THE ESTATE OF LANGSTON, DECD.

1953
*Mar.* 25.

Davies J.

*Probate — Will — Bequest to "my fiancée" — Subsequent marriage to "fiancée"—Wills Act*, 1837 (7 *Will.* 4 & 1 *Vict. c.* 26), *s.* 18—*Law of Property Act*, 1925 (15 & 16 *Geo.* 5, *c.* 20), *s.* 177.

Where the question arises whether a will has or has not been "expressed to be made in contemplation of a marriage" the test to be applied is this: Did the testator express the fact that he was contemplating marriage to a particular person?

*Pilot* v. *Gainfort* [1931] P. 103; 47 T.L.R. 376; *Sallis* v. *Jones* [1936] P. 43; 52 T.L.R. 113; *In re Knight* (1944) (unreported) followed and applied.

PROBATE MOTION.

The testator, Herbert Edgar Langston, was a widower whose first wife had died in July, 1935. On November 4, 1935, he executed his last known will, and on January 7, 1936, he married the sole beneficiary, the applicant on this motion. He died on December 28, 1952.

By his will he directed: "All my just debts funeral and testamentary expenses to be paid and satisfied by my executrix hereinafter named as soon as conveniently may be. After my decease I give devise and bequeath unto my fiancée Maida Edith Beck of 108 Regents Park Road, London, N.W.1 . . ." (The deceased left her everything and appointed her sole executrix of the will.)

The question accordingly arose whether this will had been revoked by the marriage.

*John Mortimer* moved the court for a grant of probate of the will. The only persons other than the applicant who were interested in the estate upon an intestacy were three nieces who had signed consents to the motion.

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The three cases cited in argument were those cited in the judgment.

Davies J. stated the facts and continued: The point that makes this motion necessary will be obvious to those familiar with the relevant statutes. By section 18 of the Wills Act, 1837, so far as it is relevant, it is provided that: "Every will made by "a man or woman shall be revoked by his or her marriage." But it was provided by section 177 (1) of the Law of Property Act, 1925 (which, of course, applies in the present case as the will was made after 1925), that: "A will expressed to be made "in contemplation of a marriage shall, notwithstanding anything "in section 18 of the Wills Act, 1837, or any other statutory "provision or rule of law to the contrary, not be revoked by the "solemnization of the marriage contemplated." The material words there are, of course, "expressed to be made in contempla-"tion of a marriage."

The relevant words in this present will are these: [His Lordship read them and continued:] The question which arises is whether that will, by reason of the expression "unto my fiancée "Maida Edith Beck," is a will "expressed to be made in con-"templation of a marriage" so as to remain valid after the marriage which was solemnized between the applicant and the testator on January 7, 1936, or not. In the latter event it is, of course, subject to the general provision of section 18 of the Wills Act, 1837, and there would be an intestacy.

The only persons other than the applicant who are interested in this estate upon an intestacy are three nieces of the deceased, and they have all (and one is not surprised having regard to the circumstances) signed consents to this application.

Mr. Mortimer cited three authorities to me upon which I am satisfied that, as a matter of law, I can come to a decision which I feel gives effect to what the testator would undoubtedly have desired.

The first is a case in 1931 before Lord Merrivale P., *Pilot* v. *Gainfort*.[1] In that case the testator's wife had disappeared. Some years later the testator had set up home with another woman and had lived with her as his wife. Having so lived with her for about three years he made a will in February, 1927, of which the material portion was as follows: "I herewith bequeath and leave "to Diana Featherstone Pilot my wife all my worldly goods." On August 15, 1930, seven years having elapsed since the disappearance of the testator's wife, he married the lady with whom he had been living for some years, being I suppose advised that in any event he would have a defence to a charge of bigamy if the first wife turned up again.

The material words there were "my wife." The woman was not his wife at the date of the will. It was held by Lord

[1] [1931] P. 103; 47 T.L.R. 376.

Merrivale P., who had first decided (for otherwise, of course, this point would not have arisen) that the marriage between the testator and the woman with whom he had been living at the time when he made the will was a valid marriage, and that the will would therefore otherwise be caught by the provision of the 1837 Act, that the use of the words " my wife " in those circumstances was the expression of a contemplation of marriage to that particular woman. Lord Merrivale P. summarized his conclusion at the end of a very short judgment in these words [2]: " Under the circumstances I do not think that it can be doubted " that the will was in contemplation of the subsequent marriage " and practically expresses that contemplation and is good." That decision, on the particular facts, has been criticized in Theobald on Wills, 10th ed., at p. 37.

But the President there applied the test as to whether there was a practical expression of the fact of a contemplation of marriage. It would therefore appear to be the law that the test is this: Did the testator express the fact that he was contemplating marriage to a particular person?

The authority for the words " particular person " is to be found in the next case which was cited to me, namely, *Sallis* v. *Jones*.[3] In that case Bennett J., who was for the time being sitting in this Division, held against the will. The expression used in that will made before marriage was: " this will is made " in contemplation of marriage."

At the conclusion of his judgment Bennett J. says this [4]: " In " my judgment section 177 of the Law of Property Act, 1925, " upon its true construction excludes the operation of section 18 of " the Wills Act if the will made before a marriage is expressed " to be made in contemplation of a particular marriage and is " followed by the solemnization of that marriage." He said that that principle excluded the will under consideration in that case because, to quote the judgment again,[5] " All that is to be " found in the present will is a declaration that the will was made " ' in contemplation of marriage ' and nothing more."

The last authority that was cited to me is an unreported case which is referred to in a note at p. 25 of the 19th ed. of Tristram & Coote's Probate Practice, *In re Knight*,[6] decided in 1944, where, according to the textbook, " By his will the testator gave all his " estate ' to E.L.B. my future wife.' " Thereafter he married E.L.B., and it was held that the will was not revoked by that marriage.

Those authorities all seem to me to make it quite clear that in the present case when the testator used the words " unto my " fiancée Maida Edith Beck " he was expressing a contemplation of marriage to that named lady. *In re Knight* [6] is, in my opinion, a direct authority in favour of the present motion; there

[2] [1931] P. 103, 104.
[3] [1936] P. 43; 52 T.L.R. 113.
[4] [1936] P. 43.
[5] Ibid. 46.
[6] (1944) unreported.

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is obviously no effective difference between "my future wife" and "my fiancée."

I accordingly hold that this will was so made and was therefore not revoked by the subsequent marriage. There will be a grant of probate as prayed.

Solicitors: *Lindus & Hortin.*

J. B. G.

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[COURT OF APPEAL.]

C. A.

1953

*Mar.* 16, 17.

Singleton, Jenkins and Hodson L.JJ.

*A. H. WORTH *v.* INLAND REVENUE COMMISSIONERS. INLAND REVENUE COMMISSIONERS *v.* A. H. WORTH. INLAND REVENUE COMMISSIONERS *v.* G. A. WORTH. INLAND REVENUE COMMISSIONERS *v.* A. HAY.

*Revenue — Income tax — Special contribution — Investment income — Tenant farmer paying rent to wife—Schedule A assessment—Farm let to partners, landlord being a partner—Finance Act,* 1948 (11 & 12 *Geo.* 6, *c.* 49), *ss.* 47, 48, 49 (2) (*b*).

A tenant farmer occupied and farmed land belonging to his wife and paid rent to her:—

*Held,* that for the purposes of the special contribution levied by Part V of the Finance Act, 1948, the net Schedule A assessment of the lands owned by the wife was to be included in the assessment based on the aggregate income of the husband and wife as being part of the husband's investment income, just as it would be so treated for purposes of surtax. It was not income arising to the farmer as a person carrying on business from property occupied and used by him for the purposes of that business within section 49 (2) (*b*) of the Act of 1948.

Decision of Harman J. upheld.

A father and son were in partnership together, farming land owned separately by the father. As partners they paid rent to the father.

*Held,* that the Schedule A assessment of the land was not part of the investment income of the father for the purposes of his assessment to the special contribution, for it was income arising to him from property occupied and used by him for the purposes of the trade of farming, within the scope of the exemption in section 49 (2) (*b*).

*Income Tax Commissioners for City of London* v. *Gibbs* [1942] A.C. 402; [1942] 1 All E.R. 415; 24 T.C. 221, considered.

Decision of Harman J. reversed.

Appeals from Harman J.

In the first case, Mr. Arthur Worth, the appellant, was a tenant farmer farming land at Soham in Cambridgeshire. Some of the land which he farmed was owned by his wife, and she was the tenant for life in fee simple of the rest of it. Mr. Worth paid rent to Mrs. Worth in respect of his occupation of the whole of the lands, but there was no formal lease or agreement in writing.

The rent so paid was disallowed as a deduction in computing Mr. Worth's farming profits, only the amount of the Schedule A assessment being allowed. For the purposes of the special contribution levied under Part V of the Finance Act, 1948, the Special Commissioners (and, on appeal, Harman J.) held that the income from the said lands, as measured for the purpose of the Income Tax Acts by the net Schedule A assessment of £1,136, was investment income arising to the wife, and although for the purpose of computing the husband's total income it had to be included, it did not "arise to him" within the scope of section 49 (2) (*b*). Therefore, it had to be taken into account in computing his liability for the special contribution. The taxpayer appealed.

The second case concerned certain land in the same neighbourhood owned by Mr. A. H. Worth but farmed by him in partnership with his son, Mr. G. A. Worth. The father and son paid rent to the father in respect of the land. They had been in partnership for many years, and at the relevant period the profits were shared equally between them, though at an earlier date the son had had only a fifth share. The net Schedule A assessment of the land owned by the father was £1,489 10s. and the Special Commissioners of Inland Revenue held that that sum did not form part of the investment income of the father for the purposes of the special contribution but that it was exempted by the provision in section 49 (2) (*b*) of the Act of 1948. On appeal, Harman J. reversed that finding and the taxpayer appealed.

The third and fourth cases were not fully argued on appeal. In each case the question at issue was whether the net Schedule A assessment based on the rent paid to one of two partners owning land farmed by the partnership firm was to be taken into account in computing the liability to the special contribution.

*L. C. Graham-Dixon Q.C.* and *F. N. Bucher* for the taxpayer in each case.

*F. Heyworth Talbot Q.C.* and *Sir Reginald Hills* for the Inland Revenue Commissioners.

The following cases were cited in argument:—*Inland Revenue Commissioners* v. *Barclays Bank Ltd.*[1] (sub nom. *Latilla* v. *Inland Revenue Commissioners*[2]); *Pegler* v. *Craven*[3]; *Clift* v. *Taylor*[4]; *Leitch* v. *Emmott*[5]; *Watson and Everitt* v. *Blunden*[6]; *Income Tax Commissioners for City of London* v. *Gibbs*[7]; *Heastie* v. *Veitch & Co.*[8]

[1] [1951] A.C. 421; [1951] 1 T.L.R. 280; [1951] 1 All E.R. 1.
[2] (1950) 32 T.C. 159.
[3] [1952] 2 Q.B. 69; [1952] 1 T.L.R. 618; [1952] 1 All E.R. 685.
[4] [1948] 2 K.B. 394; 64 T.L.R. 346; [1948] 2 All E.R. 113.
[5] [1929] 2 K.B. 236; 14 T.C. 633.
[6] (1934) 18 T.C. 402.
[7] [1942] A.C. 402; [1942] 1 All E.R. 415; 24 T.C. 221.
[8] [1934] 1 K.B. 535; 18 T.C. 305.

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sioners.

Singleton L.J. By Part V of the Finance Act, 1948, there was established what became known as the "special "contribution." The special contribution was to be charged upon individuals whose total income for the year 1947–1948 exceeded £2,000, and whose aggregate investment income for that year exceeded £250. The last words in Part V, section 68 (2), are: "Save as expressly provided in this Part of this Act, expressions "used therein have the same meanings as in the Income Tax "Acts." Section 47 of the Act provides for the charge and the amount of contribution of the individual. By subsection (5) of section 47: "Subject to the provisions of this Part of this Act "and of regulations thereunder, contribution shall be charged by "assessment on the individual by reference to whose income it is "charged, and shall be payable by that individual."

[His Lordship stated the facts and continued:] To provide how income and total income should be ascertained for the purposes of the special contribution, section 48 provided: "Subject to the provisions of this Part of this Act, income from "any source and total income shall be ascertained for the pur-"poses of this Part of this Act as they are ascertained for the "purposes of surtax; and subject as aforesaid income shall be "treated for the purposes of this Part of this Act as income "of an individual if it would be so treated for the purposes of "surtax." It would, I think, have sufficed to have said that the income or the total income was to be ascertained in the way in which it was ascertained under the provisions of the Income Tax Acts. But, clearly, any individual who became chargeable to the special contribution levied by section 47 would be one who was a payer of surtax, and, accordingly, section 48 provides that the total income was to be ascertained in the same way as it was ascertained for the purposes of surtax.

Rule 16 of the General Rules applicable to the Schedules to the Income Tax Act, 1918 (which was applicable until 1950), was: "A married woman acting as a sole trader, or being entitled to "any property or profits to her separate use, shall be assessable "and chargeable to tax as if she were sole and unmarried: "provided that—(1) the profits of a married woman living "with her husband shall be deemed the profits of the "husband, and shall be assessed and charged in his name, and "not in her name or the name of her trustee." Section 100 of the Income Tax Act, 1918, provides in subsection (1): "Every person chargeable under this Act, when required to do so "by any general or particular notice given in pursuance of this "Act, shall, within the period limited by such notice, prepare "and deliver to the assessor a true and correct statement in "writing as required by this Act, signed by him, containing— "(*a*) the annual value of all lands and tenements in his occupa-"tion, whether situate in one, or more than one, parish; (*b*) the "amount of the profits or gains arising to him, from each and "every source chargeable according to the respective schedules,

"estimated for the period and according to the provisions and "rules of this Act." Mr. Graham-Dixon especially directed our attention to the words in subsection 1 (*b*) "arising to him," words which also appear in section 49 of the Finance Act, 1948.

For the purposes of Mr. Worth's surtax assessment, his income and his wife's income had to be aggregated. The £1,136 (the Schedule A assessment of the net annual value of his wife's lands) is income of his wife and it is investment income which under section 49 (1) of the Act of 1948 means "income from any "source other than a source of earned income." Thus, it is submitted, on behalf of the Inland Revenue Commissioners, that the £1,136, being investment income of Mrs. Worth, it had to be included in Mr. Worth's assessment for the purpose of his assessment of surtax, and further, that it also had to be included in his assessment for the purposes of the special contribution.

The concluding words of section 48 are of importance and form a considerable part of the argument by counsel on both sides. Those words are: "and subject as aforesaid income shall "be treated for the purposes of this Part of this Act as income "of an individual if it would be so treated for the purposes of "surtax." The effect seems to me to be that the total income of the individual is to be treated for the purposes of the special contribution as the income of the individual (that is the income of Mr. Worth) "if it were so treated for the purposes of surtax," as to which there is no question.

It was submitted by Mr. Graham-Dixon, on behalf of Mr. Worth, that the £1,136 ought not to be taken into account by reason of the terms of section 49 (2) (*b*) of the Act which provides: "The following shall not in any case be treated as "investment income, that is to say— . . . (*b*) income arising to "persons carrying on a trade, profession or vocation from pro- "perty occupied and used by them for the purposes thereof. . . ." In the case stated the contention is put in this way: "It is said "by Mr. Worth that this land would not be part of his total "income as an individual, within the meaning of section 47, but "for the provisions of section 48 which lay down that the total "income shall be ascertained for the purposes of the special "contribution as it is ascertained for the purposes of surtax. It "is therefore contended that the income of his wife derived from "the rent payable in respect thereof by her husband, and "measured for purposes of the Income Tax Act by the net "Schedule A assessment, must be deemed to arise to him for the "purposes of the special contribution, within the meaning of "section 49 (2) (*b*) with the result that he is entitled to claim "that the said net Schedule A assessment is not to be included "in computing his aggregate investment income." I cannot agree with that contention. The income was not the husband's income, nor did it arise to a person carrying on the trade or vocation of farming: nor did it arise to a person carrying on a trade, profession or vocation from property occupied and used by

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him for the purposes thereof. Under section 48 it fell to be treated as income of Mr. Worth for the purposes of Part V of the Act, because it was so treated for the purposes of surtax. The fact that it had to be treated for this purpose as though it was the husband's income does not alter its character. It remains investment income, and it cannot be said to be income arising to Mr. Worth as a person carrying on business from property occupied and used by him for the purposes of business.

That was the opinion and finding of the Special Commissioners, and it was also the view of Harman J. The appeal on that point fails.

I come to the second point in this case. Mr. Arthur H. Worth owns other farm land in the neighbourhood, and he farms that land in partnership with his son, Mr. G. A. Worth. The net Schedule A assessment of that land is £1,489 10s. 0d. The rent is paid by the father and son to the father in respect of that land. The father and son have been in partnership for many years. At first the son held a one-fifth interest, but, latterly, he has had a half share, with his father, of the profits from the farm.

The contention, made on behalf of the Inland Revenue Commissioners, is that that £1,489 10s. 0d. is investment income, and that it should be taken into consideration in arriving at the total liability of Mr. Arthur H. Worth under the provisions as to the special contribution. The submission made by Mr. Graham-Dixon on behalf of the taxpayer is that that sum does not fall to be included at all. The question arises under the same provision of the Act of 1948, that is, section 49 (2) (*b*): "The "following shall not in any case be treated as investment income, "that is to say— . . . (*b*) income arising to persons carrying on "a trade, profession or vocation from property occupied and used "by them for the purposes thereof."

It is said on the one side that this was investment income arising to Mr. Arthur H. Worth in carrying on the trade of farming on the farm, the property, "occupied and used" by him "for the purposes thereof." As against that, it was submitted by Mr. Heyworth Talbot that it could not be said that Mr. Worth was entitled to exemption under section 49 (2) (*b*), for he was not occupying and using the farm. The farm was occupied and used by him and his son who were farming in partnership. The submission made on behalf of the Inland Revenue Commissioners was that, unless the income from the property belongs to the identical individuals who are carrying on the trade, there cannot be any exemption under the terms of that subsection.

It was common ground between counsel that, in order to read paragraph (*b*) of subsection (2) in the sense which was plainly intended, it was necessary to substitute for the word "persons" the word "individuals." It was agreed that, if this income arose to Mr. Arthur Worth in carrying on the trade, profession or vocation on property occupied and used by him alone he would be entitled to exemption, but it was said by the commissioners

that the exemption did not apply if user and occupation were shared by two partners of whom the owner of the property was one.

Our attention was called to *Income Tax Commissioners for City of London* v. *Gibbs*[1] and, in particular, to the speech of Lord Simon L.C., where he said[2]: "I concede without any doubt or qualification the proposition "relating to the English law of partnership on which the judgment of the Court of Appeal is largely based. Strictly speaking, "it is certainly true that an old partnership cannot be regarded "as 'ceasing' to carry on the trade, and the new partnership "cannot be regarded as 'succeeding' to it when some members "of the old partnership are also members of the new, and thus "do not individually cease to carry on the trade at all. A, B, C "and D are carrying on the trade throughout the year. How, "then, can it be said that they, or any of them, have in the "course of the year ceased to carry it on? If language is "accurately used, a partnership firm does not carry on a trade "at all. It is the individuals in the firm who carry on the trade "in partnership. It is not the firm which is liable to income tax. "The individuals composing the firm are so liable, though by "rule 10 when a trade is carried on by two or more persons "jointly the tax is computed and stated jointly and in one sum "and is separate and distinct from any other tax chargeable to "those persons or any of them, and a joint assessment shall be "made in the partnership name. If, therefore (it is argued), "rule 9 is applied to a partnership, it applies not because a "partnership is 'a person charged under this schedule,' but "because the singular includes the plural, and instead of a single "person the case is one of a number of persons who are jointly "so charged. So far as English law is concerned, it is indisputable that a partnership firm is not a single persona, though "a different view obtains in Scotland, and in construing a taxing "statute which applies to England and Scotland alike, it is "desirable to adopt a construction of statutory words which "avoids differences of interpretation of a technical character such "as are calculated to produce inequalities in taxation as between "citizens of the two countries."

The Lord Chancellor continued[3]: "As a strict proposition "of English law, there is no doubt at all that a partnership is "not, as such, a single juristic person. As Farwell L.J. said in "*Sadler* v. *Whiteman*,[4] 'In English law a firm, as such, has no "'existence; partners carry on business both as principals and "'as agents for each other within the scope of the partnership "'business; the firm name is a mere expression, not a legal "'entity, although for convenience under Order 48A it may be "'used for the sake of suing and being sued.' And again: 'It is

[1] [1942] A.C. 402; [1942] 1 All E.R. 415; 24 T.C. 221.
[2] [1942] A.C. 402, 413.
[3] Ibid. 415.
[4] [1910] 1 K.B. 868, 889.

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" ' not correct to say that a firm carries on business; the members " ' of the firm carry on business in partnership under the name or " ' style of the firm.' "

I have referred to Lord Simon's words in that case because of the reliance which was placed in the course of the argument on the wording of rule 10 applicable to Cases I and II of Schedule D as to partnership assessments. That rule, which is of very long standing was, no doubt, made for the convenience of those who had to make assessments on the one hand, and of those who had to suffer under assessments on the other hand. It was a great convenience if a trading partnership could be assessed as such though the liability of the individual members remained. But, as was said in *Income Tax Commissioners for City of London* v. *Gibbs*,[5] the fact is that strictly the firm does not carry on business: the members of the firm carry on the business in partnership.

On behalf of the Inland Revenue Commissioners it is said boldly that, if a man has been farming a farm for 30 or 40 years and thereafter, because, it may be, he is pleased with his bailiff, he gives the bailiff a small interest or a share in the profits, or makes him a partner to a small extent, the farmer himself, the owner of the farm, ceases to be in occupation for the purposes of this section. I do not think that that is right.

The Special Commissioners state their finding in this way in the case stated: " In our opinion Mr. Worth does occupy and use " the property for the purposes of the trade of farming carried " on by him, and we do not consider the fact that his son also " occupies and uses the same land for the same purpose, and " that a joint assessment under Schedule D in respect of the " profits falls to be made in the partnership name, debars him " from the relief claimed. We therefore hold that he is entitled " to exclude the net annual value of the land owned and farmed " by him in computing his aggregate investment income for the " purposes of the special contribution."

On appeal, Harman J. took a different view. The ground for his decision can, I think, be stated from his judgment as follows: " Nevertheless it seems to me that it is not true to say that " Mr. Worth occupies this land or that Mr. Worth carries on this " trade. He and another person carry on; he and another person " occupy the land. The person who pays the money is not " identical with the person who receives it. In my judgment, " subclause (*b*) does postulate an identity of payer and payee " before the exemption comes into operation." I do not agree with that view of Harman J. Mr. Arthur Worth owned the farm. He had been farming it for many years. If the question was asked, after his son had become a partner, " Is the father occupy- " ing and using it for the purposes of farming? " the answer, I think, would be: " Yes, he is." It is true that there was someone

[5] [1942] A.C. 402.

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else there too. It is impossible to find an answer covering every side of every problem which might arise under this particular subsection: but the view which I hold on this part of the case is that the income arose to Mr. Worth, a person carrying on the trade of farming from property occupied and used by him for the purposes thereof, and that, consequently, the sum £1,489 10s. is not to be treated as investment income.

To that extent, in my view, this appeal should be allowed.

JENKINS L.J. I agree on both points, and I find nothing I can usefully add.

HODSON L.J. I also agree on both points, and I, too, have no desire to add anything.

*Appeal in first case dismissed.*
*Appeal in other cases allowed.*
*No order as to costs in first two cases. Costs to appellants in other two.*
*Leave to appeal to House of Lords granted.*

Solicitors: *Smiles & Co. for Mossop & Bowser, Holbeach; Solicitor for the Inland Revenue.*

E. D.

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[COURT OF CRIMINAL APPEAL.]

* REGINA *v.* JACKSON.

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1953
*March* 23.
Lord Goddard C.J., Byrne and Parker JJ.

*Criminal Law — Evidence — Accomplice — Corroboration — Failure of accused person to give evidence not corroboration.*

The fact that a prisoner chooses not to give evidence to rebut the charge against him is not, by itself, corroboration of evidence given by an accomplice in support of the charge.

APPEAL against conviction.

In December, 1952, the appellant, Richard Albert Jackson, a café proprietor, was charged before Stable J., at Stafford Autumn Assizes, on eight counts, the first of which charged him with being an accessory before the fact to the theft of 222 motor tyres, and the next three counts charged him with receiving motor tyres knowing them to have been stolen. Counts five to eight charged the appellant with receiving a miscellaneous assortment of stolen property.

In his opening address to the jury counsel for the Crown indicated that, with regard to count eight, he proposed to call evidence to show that other stolen property had, within the preceding 12 months, been found in the appellant's possession.

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On the last four counts, however, the judge withdrew the case from the jury and the proposed evidence was never called.

The evidence against the appellant on the first four counts consisted in the main of that of the persons who had been convicted of stealing the goods in question. In his summing-up the judge warned the jury of the danger of convicting the appellant on the uncorroborated evidence of accomplices, but indicated that the fact that the appellant had chosen not to go into the witness box might amount to corroboration. The appellant was convicted on all four counts and sentenced to four years' imprisonment.

*John Bussé Q.C.* and *John Ellison* for the appellant.
*G. G. Baker Q.C.* and *H. J. Davies* for the Crown.

The following cases were referred to in argument: *Reg.* v. *Davies* [1]; *Rex* v. *Feigenbaum* [2]; *Rex* v. *Blatherwick* [3]; *Waugh* v. *The King*.[4]

Lord Goddard C.J. stated the facts and continued: Mr. Bussé has very properly taken the point, based on *Reg.* v. *Davies*,[1] that, as there were in the indictment both charges of receiving and a charge of being an accessory before the fact to stealing goods, evidence under section 43 (1) of the Larceny Act, 1916, to show that quantities of other stolen property had within the preceding 12 months been found in the possession of the appellant, was not admissible. But, even if evidence under that section was in the circumstances inadmissible, no such evidence was, in fact, called. There was merely the statement of counsel that he proposed to call evidence with regard to one particular lot of goods that the appellant had been in possession of other stolen property during the 12 months preceding the alleged receiving. The judge did not in summing-up refer to this statement, but told the jury to put out of their minds, so far as they could, anything to do with those counts, on which he directed them to find a verdict of Not Guilty. We think that that was a very wise method of dealing with the position on the part of the judge. If he had referred to counsel's opening statement, the more it would have been in the minds of the jury and the harder it would have been for them to disregard the judge's direction to put it out of their minds. In any case we cannot say that, merely because counsel in opening mentioned some evidence which he proposed to lead which turned out to be inadmissible, that is a ground for quashing a conviction, unless whoever was presiding at the trial had treated that opening as equivalent to the calling of the evidence. No

[1] [1953] 2 W.L.R. 304; [1953] 1 All E.R. 341.
[2] [1919] 1 K.B. 431.
[3] (1911) 6 Cr.App.R. 281.
[4] [1950] A.C. 203; 66 T.L.R. (Pt. 1) 554.
[1] [1953] 2 W.L.R. 304; [1953] 1 All E.R. 341.

such thing arose here, and, accordingly, we cannot quash the conviction on that ground.

As regards *Reg.* v. *Davies*,[1] which was decided during the present sittings, it is enough for me to say that in some respects that case may require at the proper time some further consideration as to the extent of the decision and how far it was intended to go. I do not say more about it here because, in our opinion, the matter does not arise.

I now go on to the other points raised. The present case is one of those in which, as so often happens in charges of receiving stolen goods or of being accessories, which are very often closely akin to conspiracies, the evidence that has to be led consists of that of the people who themselves were the thieves, and, of course, their evidence is open to the comment that it is the evidence of accomplices. In such cases the court always directs the jury that they must regard the evidence with great caution and that it may be unsafe to act on that evidence unless they can find some corroboration. The court then goes on to tell the jury that, even though there is no corroboration, they may convict if they are satisfied that the accomplices are telling the truth, but that they ought, if they can, to find corroboration because that is the only satisfactory way of coming to a decision where the evidence consists of the evidence of accomplices. But the day has long gone by when this court will quash a conviction merely because it is obtained on the evidence of accomplices, because it is always open to the jury, if they choose, to accept such evidence.

The difficulty that arises here is on the direction that the judge gave, because, having emphasized the danger of acting on the evidence of accomplices and pointed out who might be regarded as accomplices, in commenting on the fact that the appellant had not gone into the witness box to give evidence, he said: "You, members of the jury, will attach just what "weight you think right to that and if you say: 'Well, that, "'in our view, forms ample corroboration that those thieves "'were telling the truth, that he has refrained from going into "'the witness box because he does not dare; he thinks he will "'only make matters worse if he does'—if you come to that "conclusion—the weight you attach to his silence is entirely a "matter for you." That came just at the end of the judge's summing-up, and could only have been understood by the jury as meaning that the fact that the prisoner had not gone into the witness box might amount to corroboration if they thought fit to treat it as such. In the opinion of the court, that is not correct. One cannot say because a man has not gone into the witness box to give evidence that that of itself is corroboration of the accomplices' evidence. It is a matter which the jury could very properly take into account and very probably would, but it is

[1] [1953] 2 W.L.R. 304; [1953] 1 All E.R. 341.

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not a right direction to give a jury, and it should be clearly understood that that direction is wrong in law. But this case is one which, evidently, the jury thought was overwhelming, because after a trial of a day and a half they were out for exactly five minutes and came back and found this man Guilty. In view of the case set up, the court thinks that it is proper to apply the proviso to section 4 (1) of the Criminal Appeal Act, 1907, which provides that, if in the opinion of the court, no substantial miscarriage of justice has occurred, they are entitled to dismiss the appeal although they decide the point of law in the appellant's favour.

Lastly, Mr. Bussé relied on *Waugh* v. *The King*,[2] which came before the Judicial Committee, who quashed a conviction on account of the many times that the judge in Jamaica referred to the absence of the prisoner from the witness box. In that case, Lord Oaksey, who delivered the advice the Board proposed to tender to His Majesty, said[3]: "It is true that it "is a matter for the judge's discretion whether he shall comment "on the fact that a prisoner has not given evidence; but the "very fact that the prosecution are not permitted to comment "on that fact shows how careful a judge should be in making "such comment. Here the appellant had told the same story "almost immediately after the shooting, and his statements "to the prosecution witnesses and his statement to the police "made the same day were put in evidence by the prosecution. "Moreover, his story was corroborated by the finding of the "bag of coconuts and the iron tool and by the independent "evidence as to the place where the shooting took place. In "such a state of the evidence the judge's repeated comments "on the appellant's failure to give evidence may well have led "the jury to think that no innocent man could have taken such "a course."

That case concerned a charge of murder, and I do not want in the least to appear to be whittling down what their Lordships in the Judicial Committee said on these matters, but each case on such a point as this must depend on its own facts. Here, although the judge referred to the appellant's absence from the box it was not till he came to the end of his summing-up. It has to be remembered, among other things, that the charge against the appellant was one of receiving stolen property, and once it is shown that a man is in possession of stolen property, providing the stealing has been reasonably recent, if ever there was a case in which one would expect him to give evidence to explain his possession of the property that is the case. We cannot say that because the judge commented on the appellant's absence from the box that it was in any way unfair. Of course, a prisoner is always entitled to say: "I am going to stand here and say "nothing. The evidence against me is so unsatisfactory that it

[2] [1950] A.C. 203; 66 T.L.R. (Pt. 1) 554.
[3] [1950] A.C. 203, 211.

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"does not call for any answer." But nowadays, whatever may have been the position immediately after the Criminal Evidence Act, 1898, came into operation, everybody knows that absence from the witness box requires a very great deal of explanation, and in view of the evidence here, if the appellant had any explanation to give, one cannot doubt that he would have given it. While we think that there was a misdirection on the point of corroboration, there was no misdirection or anything that amounted to an unfair comment on the appellant's absence from the witness box; we think it is a case in which the proviso should be applied, and, accordingly, we dismiss this appeal.

*Appeal dismissed.*

Solicitors: *Registrar, Court of Criminal Appeal; Gibson & Weldon, agents for W. C. Scott, Stoke-on-Trent.*

J. D. P.

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[CHANCERY DIVISION.]

1953
*March 20.*
Roxburgh J.

* *In re* NESBITT DECD. DR. BARNARDO'S HOMES NATIONAL INCORPORATED ASSOCIATION *v.* BOARD OF GOVERNORS OF THE UNITED NEWCASTLE-UPON-TYNE HOSPITALS.

[1951, No. 268]

*Will—Construction—Misdescription—Extrinsic evidence—Former will—Admissibility—Bequest to minister for general purposes of church—Whether church entitled to share of residue as "institution." Revenue—Estate duty—Australian assets—Incidence of duty.*

A testatrix bequeathed a sum of money to each of two hospitals, but no hospital corresponded exactly to the descriptions set out in the will.

*Held*, that a former will was admissible as evidence, not of intention, but to identify the hospitals which had been misdescribed in the will.

*In re Ofner* [1909] 1 Ch. 60 applied.

The testatrix also bequeathed a sum of money to two ministers of two churches, each legacy being "for the general purposes of "such church," and left the residue of her estate to "the charitable "institutions referred to by me in this my will."

*Held*, that the churches were "charitable institutions" within the meaning of those words in the residuary bequest, and were, therefore, entitled to share in the residue.

ADJOURNED SUMMONS.

By clause 3 of her will dated February 16, 1946, Sarah Ann Nesbitt, a spinster, directed her trustee out of the moneys to arise from the sale and conversion of her real and personal estate and out of her ready money "to pay my funeral and testamen-"tary expenses death duties and legacy duties (if any) and any

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"debts" and to "stand possessed of the residue on trust to pay "thereout (*a*) the following legacies free of legacy duty . . . "(2) to the Royal Infirmary of Victoria Street Newcastle-on-"Tyne the sum of £500 for the general purposes of such institu-"tion; (3) to the Victoria Hospital of Newcastle-on-Tyne the "sum of £500 for the general purposes of such institution . . . ; "(13) To the Reverend C. W. Townsend of the Unity Church "Torquay or if he predeceases me then his successor at such "church for the general purposes of such church the sum of "£100; (14) To the Reverend H. Barnes of the Divine Unity "Ellison Place for Unitarian Work Newcastle or if he pre-"deceases me then his successor at such church for the general "purposes of such church the sum of £100." The testatrix further directed that:—"(*b*) Subject to the payment of the fore-"going legacies and all legacy duty (if any) my trustee shall "pay or transfer the residue of the said money in equal shares "between the charitable institutions referred to by me in this my "will. . . ." Clause 4 read: "I declare that the receipt of the "treasurer for the time being of the foregoing charitable institu-"tions shall be a good and sufficient discharge to my trustee for "any moneys bequeathed by this my will to any such charitable "institution."

The testatrix had made two previous wills dated May 11, 1943, and April 24, 1944, respectively. She also made a subsequent will dated January 9, 1949, but that will was not duly executed. She died on January 10, 1949. By the will dated May 11, 1943, she had bequeathed (inter alia) "To the Royal "Infirmary, Victoria Road, Newcastle-upon-Tyne, £500 and To "the Hospital also of Newcastle-upon-Tyne, £500."

A summons was taken out by the administrator of the will of the testatrix to determine (inter alia) (1) whether the Board of Governors of the United Newcastle-upon-Tyne Hospitals was entitled to the gifts contained in the will of February 14, 1946, of £500 to "the Royal Infirmary of Victoria Street Newcastle-on-"Tyne" and "the Victoria Hospital of Newcastle-on-Tyne"; and (2) whether the gifts to the Reverend C. W. Townsend and the Reverend H. Barnes for the general purposes of their churches entitled those beneficiaries to a share in the residue as charitable institutions.

A further question arose as to the incidence of estate duty, having regard to the fact that there were certain Australian assets.

*Wilfred Hunt* for the plaintiff.

*A. Lloyd Stott, E. I. Goulding, Stewart Newcombe, Ian Campbell, J. H. Stamp* and *Denys Buckley* for various defendants.

Case referred to in argument:—*In re Ofner.*[1]

[1] [1909] 1 Ch. 60, 65.

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NESBITT, DECD., *In re.*

ROXBURGH J. The testatrix, who made her will (or, rather, made the only will which has so far been proved) on February 16, 1946, and died on January 10, 1949, by clause 3 directed her trustee "to pay the following legacies free of all legacy duty "(if any) namely." The first I need not read. Gift (2) reads: "To the Royal Infirmary of Victoria Street Newcastle-on-Tyne "the sum of £500 for the general purposes of such Institution," and gift (3) reads: "To the Victoria Hospital of Newcastle-on-Tyne "the sum of £500 for the general purposes of such Institution." Then I need not read gifts (4), (5), (6), (7), (8) and (9). I read (10) just to show that not all these legacies are charitable: "To Mr. "J. E. Elliot of Victory House, Leicester Square, London, if "living at my death the sum of £250." I need not at present read any of the remaining gifts which range up to No. 18. Then, subject to the payment of the foregoing legacies and all legacy duty (if any), the testatrix directed her trustee to pay or transfer the residue of her estate in equal shares between the charitable institutions referred to by her in her will.

The gifts numbered (2) and (3), which I have read, raise questions of identification. The facts which are indubitably admissible, as distinct from certain facts to which I shall refer later, are that there was, before the nationalization of hospitals, a Royal Victoria Infirmary for the Sick and Lame Poor of the Counties of Durham, Northumberland and Newcastle-upon-Tyne in Queen Victoria Road, Newcastle-upon-Tyne. The only other general hospital in Newcastle-upon-Tyne was the Newcastle General Hospital of West Road, Newcastle-upon-Tyne. Those are the indisputable facts, facts of such simplicity as to render my task much easier than it well might have been in other circumstances. I have no doubt whatever that the first gift contains a misdescription of the Royal Victoria Infirmary of Queen Victoria Road. That is a very small misdescription, but it has, in my judgment, an important bearing on the construction of the more difficult bequest. The word "Victoria," it will be noted, is not in the title of the infirmary in the will, though it would have been if the description had been wholly accurate. On the other hand, in the gift to the Victoria Hospital the word "Victoria" is wholly out of place. It cannot be imagined that the testatrix meant to give this legacy to a non-existent body. That would be a quixotic idea. Therefore, on the evidence, by that gift she must have either meant the Royal Victoria Infirmary or the General Hospital; so that, unless she intended by these two separate gifts to make a gift of the same sum of money to the same body, I am driven to the conclusion that the word "Victoria" is out of place, ought not to be there, is a misdescription in gift (3) and should be deleted.

The explanation of the confusion suggests itself on a mere inspection of the actual proved will. It is so easy for the word "Victoria," which was undoubtedly associated in her mind with one of the hospitals, to have been accidentally transferred by her

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from the right hospital to the wrong hospital, and the two clauses are complementary. The word "Victoria" is not only erroneous in gift (3), but it is lacking in gift (2), and I should, I think, have been prepared, on the mere language of the will itself, without any extrinsic evidence, other than the precise state of hospitals in Newcastle, to come to the conclusion that that was a misdescription. If one leaves out the word "Victoria" from the gift (3) on the footing that it has been erroneously transposed from gift (2) to gift (3), the meaning is quite clear. A gift in these circumstances to the hospital of Newcastle-upon-Tyne would, without any question, be a gift to the General Hospital; but there is a curious circumstance which does in my view, confirm that interpretation of the document.

I have been much exercised as to the admissibility of what I regard as confirmatory evidence. Before I read it and before I refer to any authority, I must point out that there is no doubt about the intention of the testatrix in one sense of the word "intention." There is no doubt that she intended to give a legacy to a hospital in Newcastle. That is not ambiguous, and no evidence is required of any sort to enable the court to reach that conclusion. What is ambiguous (and it is a latent ambiguity, because until one knows the facts about hospitals in Newcastle one would not see that the gift involved any difficulty at all) is the identification of the particular body to which the testatrix referred.

It has been argued that this testatrix intended to give two legacies of the same amount to the same institution. Now there is a rule of construction laid down by Hawkins on Wills, 3rd ed., p. 352, namely: "Rule. If a legacy of the same amount to the "same person be repeated in two separate testamentary instru- "ments, as a will and codicil, prima facie the legatee is entitled to "both legacies. . . . But if the repetition occurs in one and the "same testamentary instrument, prima facie the legatee is "entitled to one legacy only." It is to be observed that the reason of that last-mentioned rule, or the last-mentioned branch of the rule, must be that the court thinks that it would be quite absurd to attribute to any testator or testatrix an intention to give two legacies of precisely the same amount to the same legatee by two separate sentences. If that be so, I certainly resile from the submission which has been made to me that I should take words, which are certainly not the same, and apply the doctrine of falsa demonstratio so as to make them the same, with the result that I should reach a situation which the courts have regarded as so absurd that I should have to put a blue pencil through what I had done. That argument makes no appeal to me. I am sure that she intended to give to two separate institutions.

Therefore, the only question is: Can I identify the second institution, or am I driven to say that the gift is to a non-existent body, or that it is uncertain to what the gift is given? In my

view, I am not, and in my judgment, for that purpose I am entitled to look at the document up to which I am leading. The document is an earlier will which was signed. I doubt if it was attested properly, but that does not matter; because, on any view, it was revoked and therefore could not have been admitted to probate. Of course, as a will it has no operation whatever. Nobody doubts that; but may I look at it for the purpose neatly stated by Cozens-Hardy M.R. in *In re Ofner*,[1] to identify (or, I interpose, to assist in identifying) the object which has been misdescribed? In my judgment, I may do so, and it seems to me that, if I do so, it will confirm the reasoning which I should, I think, have adopted apart altogether from this document. This document provides, amongst other things, " I give and " bequeath to the Royal Infirmary Victoria Road Newcastle-upon-" Tyne £500, and to the Hospital also of Newcastle-upon-Tyne " £500," and it seems to me that that shows that the confusion to which I have referred is the true explanation of the position. In that document it is to be noted that she was a little nearer to the true address of the Royal Infirmary. It is perhaps a small point, but she gave the address as " Victoria Road." It was not wholly accurate. It should have been " Queen Victoria Road "; but it was more accurate than " Victoria Street." It is to be noted that she did not there use the word " Victoria " at all in any connection except as regards the address. She did not give the hospital any description except " the Hospital also of " Newcastle-upon-Tyne." To me it seems quite clear that in between May 11, 1943, when she made that will, and 1946, when she made her last will, it occurred to her that the name " Victoria " formed part of the name of one of the two Newcastle hospitals which had been the object of her previous but ineffective disposition. To that extent she was right, but where she went wrong was in attaching the " Victoria " to the wrong member of the two. That seems to me to be real confirmatory evidence (though not, of course, conclusive evidence) of the process of reasoning by which I arrive at a similar conclusion by looking merely at the will in the light of the known facts about the hospitals.

In my judgment, this is a case of misdescription, the word " Victoria " having appeared in the second gift by inadvertence when it should have appeared in the first of the two gifts. If that word is struck out, there is no doubt whatever, in the circumstances of this case, that the hospital is the only other general hospital, other than that which is the subject-matter of the previous gift, in Newcastle-upon-Tyne. Therefore, this second gift is a good gift, or was a good gift, to the General Hospital, Newcastle-upon-Tyne. Having regard to the nationalization legislation, that is not the body to which it can now be paid, but it is payable to the management committee of that hospital, whatever is its appropriate official designation.

[1] [1909] 1 Ch. 60, 65.

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Roxburgh J.

The next question arises out of gifts (13) and (14), namely whether the legatees are charitable institutions within the meaning of those words as used in the residuary gift contained in clause 3 (*b*) and, therefore take shares of the residue. This is a question of some difficulty. I will now read all the gifts in clause 3. "(1) To Doctor Barnardo's Home for Orphan and Destitute Children of London the sum of £1,000 for the "general purposes of such Institution." [His Lordship read (2) and (3) and continued.] Then "To the Blinded Soldiers "and Sailors Hostel £250 for the general purposes of such "Hostel"; then "To the Home for Aged Artists £250 for "the general purposes of such Home"; then "To the Royal "Society for the Prevention of Cruelty to Children the sum "of £250 for the general purposes of such Institution"; then "To Noble's Isle of Man Hospital and Dispensary the sum of "£100 for the general purposes of such Hospital"; then "To "the Isle of Man Homes for Destitute and Orphan Children "the sum of £50 for the general purposes of such Institution"; and then (9), to which I draw some particular attention, "To "the Manx Blind Welfare Society the sum of £100 for the "general purposes of such Institution." Pausing there, that seems to me to be an enlarged or extended use of the word "institution." Then she continued: "To Mr. Elliot the sum "of £250, to Miss Dunn the sum of £250, to Ivy Sharp the "sum of £250," and then the two which I now have to construe and discuss: [His Lordship read No. (13) and No. (14) and continued.] Then: "To the Royal Victoria School for the "Blind £100 for the general purposes of such Institution; to "Mrs. Teare £50; to Mrs. Huddlestone £25; to my Trustee if he "accepts the office of trustee the sum of £100"; and then: "Subject to the payment of the foregoing legacies and all "legacy duty (if any) my trustee shall pay or transfer the "residue of the said money in equal shares between the charit-"able institutions referred to"—and I emphasize those words—"by me in this my will." Then the will continues: "I declare "that the receipt of the treasurer for the time being of the "foregoing charitable institutions shall be a good and sufficient "discharge to my trustee for any moneys bequeathed by this "my will to any such charitable institutions."

Now the question is whether or not the Unity Churches at Torquay and Newcastle respectively are entitled to participate in the residuary estate of the testatrix, which, I think is a difficult question. I have already noticed in passing that the testatrix has used the word "institution" in a somewhat enlarged sense. The Manx Blind Welfare Society, while obviously a charity, is hardly what a normal person would describe as an institution. I think that that is perhaps some guide. It would be difficult, I think, to say that a church was not an institution if the Manx Blind Welfare Society is one, and the testatrix has said that it

is. Then as to the word " charitable "; on what ground can it be said that the Unity Church is not charitable? I think that it is unnecessary to look at the Statute of Elizabeth I to answer that question. I think that any ordinary lay man or woman would regard a church as a charitable institution. Therefore, prima facie, I should have thought that these two churches were charitable institutions within the meaning of this will, as they undoubtedly are in the intent of the general law.

Now clause 4, to which I shall return in a moment, has caused me great difficulty; but I would like to stress that the residuary gift is not " to the charitable institutions to which I have made bequests by this my will " and in that respect differs noticeably from clause 4. It is " to the charitable institutions " referred to by me in this my will." I regard that as a point of importance. I could not possibly have held that gifts (13) and (14) constituted bequests to the respective churches. It seems to me that they are nothing of the kind. They are bequests to two named persons or their successors in office, but it is quite plain that those persons cannot take beneficially. On the contrary, they take as trustees, and their trust is to apply the money for the benefit of the church; so that the position is that these words are strictly apposite for the situation if the churches are included. The churches are referred to in her will, but they are not directly the recipients of bequests up to this point. Of course, the moment that they come within the category enumerated in clause (3) (*b*), they become residuary legatees and therefore the churches—and it is a different gift, in my view—become included in the category of residuary legatees. Then clause 4 fits precisely. It applies to them. They are now charitable institutions to which money was bequeathed by the will. They have so become by reason of the construction which I place on clause 3 (*b*). Then their treasurers can give receipts. I do not think that the Reverend C. W. Townsend or the Reverend H. Barnes have anything to do with the gift of residue unless they happen to be treasurers or unless, pursuant to something in the nature of a scheme, I were to direct payment to them as trustees for the general purposes of the church. In my view, clause 4 can and does apply to the bequest of residue to, inter alia, the churches and that that bequest differs to that extent. It is a technical difference rather than a difference of substance, but the bequest of residue is not to the two ministers at all, but to the churches, because they have been referred to in the will.

That is my conclusion. I have reached it with doubt, but, on the other hand, I feel that it is extremely difficult to say that these two churches were not charitable institutions referred to in her will; very difficult, indeed, especially having regard to the fact that the testatrix has included the Manx Blind Welfare Society and described it as an institution.

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Roxburgh J.

I must now deal with the question whether or not the English estate duty on the Australian assets has to be borne in proper proportions by the legatees. It is conceded that there is authority binding on me that it must be so borne unless there is any direction in the will to the contrary. Therefore, the question is: Is there a direction in this will to the contrary? I think that there is. Clause 3 provides: "My trustee shall out "of the moneys to arise from such sale and conversion of my said "real and personal estate and out of my ready money pay my "funeral and testamentary expenses death duties and legacy "duties (if any) and my debts and shall stand possessed of the "residue upon trust to pay thereout the following legacies." In my view it would be impossible to construe the phrase "death "duties" so as to include estate duty on English assets and to exclude estate duty on Australian assets. I see no reason for construing it as meaning only those death duties which are testamentary expenses. Indeed, so to construe it would make the phrase entirely otiose, because testamentary expenses have already been mentioned. Therefore, I feel no doubt that there is a direction to pay this particular estate duty (or, rather, to pay estate duty including this particular estate duty) before any legacies are payable and before the fund is constituted out of which the legacies are payable.

The argument to the contrary was to this effect, that the testatrix had said "the following legacies free of all legacy duty "(if any)" so that it was unnecessary to free them from legacy duty, because that had already been done if the words were intended to affect beneficial interests. It may be unnecessary, but it is logically consistent so to do. Having directed that the legacy duties were to be paid, she then said that they were not to have legacy duty deducted from their legacy and then, subject to the payment of the foregoing legacies and all legacy duty (if any), the residue was to be dealt with as directed. That is quite consistent with the view that there was complete exoneration from legacy duty throughout. In other words, it was to be paid before the fund was ever constituted, and the only thing out of which the payments were to be made was the net fund after payment. As regards death duties other than legacy duty—that is to say, estate duty in particular—there is nothing else in the will. There is no exoneration of anything from death duties. I should not expect to find any; but I cannot myself construe the absence of any further exoneration of legacies from death duties as an indication that they were to be freed from such death duties as were testamentary expenses and subject to such death duties as were not. That seems to me to be an entirely artificial approach to the problem. In my view, this testatrix meant that

all death duties were to be paid before any fund was constituted, without any right of recoupment to any one beneficiary from another.

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*Declaration accordingly.*

Solicitors: *Fournier & Roberts—Hyde, Mahon & Pascall for Clayton & Gibson, Newcastle-upon-Tyne; Ranger, Burton & Frost; Arthur E. & C. Burton for Samuel Phillips & Co., Newcastle-upon-Tyne; Hyde, Mahon & Pascall for Ralph W. T. Lubbock, Newcastle-upon-Tyne; Solicitor of Inland Revenue; Treasury Solicitor.*

J. L. D.

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[LEEDS ASSIZES.]

## * STEBBINGS *v.* HOLST & CO. LD.

1953
*Mar.* 13, 16.

Donovan J.

*Practice—Writ—Fatal Accidents Acts—Writ issued by "widow and "administratrix" before grant of letters of administration—Claim as widow—Title of suit—Indorsement of writ—R.S.C., Ord.* 2, *r.* 3, *and Ord.* 3, *r.* 4—*Fatal Accidents Act,* 1846 (9 *&* 10 *Vict. c.* 93), *ss.* 2, 4—*Fatal Accidents Act,* 1864 (27 *&* 28 *Vict. c.* 95), *s.* 1.

The plaintiff, who was one of the dependants of her deceased husband, brought an action for damages in respect of his death by accident. She had not at the time when the writ was issued taken out letters of administration, but described herself in the title of the action as "widow and administratrix" of the deceased and in the indorsement of the writ claimed damages "under the Fatal "Accidents Acts and the Law Reform (Miscellaneous Provisions) "Act, 1934, as widow and administratrix" of the deceased. The particulars of the persons on whose behalf the action was brought were not shown on the indorsement of the writ but were included in her statement of claim in the action. The defendants contended that the writ was a nullity. The plaintiff conceded that the writ was a nullity so far as the claim under the Law Reform Act was concerned. As regards the claim under the Fatal Accidents Acts:—

*Held*, that (1) the words "widow" and "administratrix" in the description of the plaintiff in the title simply described the plaintiff's personal status and did not declare the capacity in which she brought the action; (2) a fair and grammatical interpretation of the indorsement of the writ was that the claim under the Fatal Accidents Acts was brought by her as widow and the claim under the Law Reform Act as administratrix; alternatively, the words "as administratrix" could be treated as an error and disregarded; (3) the indorsement stated sufficiently the plaintiff's representative capacity and nothing in R.S.C., Ord. 3, r. 4 (1), required the identity of those whom she represented to be added to the indorsement. The defendants' objection to the writ was therefore overruled so far as concerned the claim under the Fatal Accidents Acts.

*Hilton* v. *Sutton Steam Laundry* [1946] K.B. 65; [1945] 2 All E.R. 425, distinguished.

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[Reported by G. M. SMAILES, Esq., Barrister-at-Law.]

1953

Stebbings v. Holst & Co. Ld.

Action.

The plaintiff by a writ dated January 24, 1952, claimed damages in respect of the death of her husband who died on June 15, 1951. In the writ the title of action was stated as: "Between Winifred May Stebbings (Widow and Administratrix "of the Estate of Alfred Stebbings), Plaintiff, and Holst and "Company Limited, Defendant," and the indorsement (so far as material) was: "The plaintiff's claim is for damages under the "Fatal Accidents Acts and the Law Reform (Miscellaneous "Provisions) Act, 1934, as Widow and Administratrix of the "estate of Alfred Stebbings deceased. . . ." The names of the dependants on whose behalf the action was brought were not stated in the indorsement of the writ but were shown in the statement of claim. On February 2, 1952, the plaintiff was granted letters of administration of her husband's estate.

The defendants by way of preliminary objection contended that the writ was a nullity, and the plaintiff agreed that this plea was good as against the cause of action under the Law Reform Act, but not as against the cause of action under the Fatal Accidents Acts. The case is reported only on this preliminary point, on which Donovan J. gave judgment at the end of the case, having heard all the evidence on the other issues.

*E. J. Parris* for the plaintiff.

*Geoffrey Veale Q.C.* and *G. S. Waller* for the defendants.

Donovan J. The plaintiff by her writ in this action claims damages under the Fatal Accidents Acts and under the Law Reform (Miscellaneous Provisions) Act, 1934, in respect of the death of her late husband. The defendants take the preliminary point that the writ is a nullity, and they base their argument on these grounds. The deceased died on June 15, 1951. The action was commenced on January 24, 1952. Letters of administration were not granted to the plaintiff until February 2, 1952. Therefore, say the defendants, the plaintiff began this action in a representative capacity which she did not at that time possess, and the decision of the Court of Appeal in *Hilton* v. *Sutton Steam Laundry* [1] is relied on.

The plaintiff agrees that the plea is good as against the cause of action under the Law Reform Act. That means that she will have to start again under that Act, as she still has time to do. As regards the claim under the Fatal Accidents Acts, the plaintiff replies that she has brought the claim "as widow" and she was entitled to bring it "as widow" notwithstanding the absence of any grant of letters of administration. The defendants' answer to that is that the plaintiff has not sued "as widow" and that, even if she has, the writ is still a nullity because she did not name in it the dependants on whose behalf she sued. This last

[1] [1946] K.B. 65; [1945] 2 All E.R. 425.

objection is of course technicality with a vengeance. But I am not concerned that it is a technicality devoid of merits. I have to decide the issue strictly as one of law.

The starting point must be the language of the relevant provisions of the Fatal Accidents Acts. That of 1846 provides by section 2 that the action should be brought " by and in the " name of the executor or administrator of the person deceased " and must be for the benefit of the wife, husband, parent and child of the deceased. The Act of 1864 by section 1 provided that if there should be no executor or administrator or, if there were an executor or administrator and no action were brought by him within six months after the death of the deceased, then an action might be brought by and in the name or names of all or any of the persons (if more than one) for whose benefit such action would have been, if it had been brought by and in the name of such executor or administrator. One notices in both sections the distinction drawn between the person who is to bring the action and the person or persons for whose benefit the action is to be.

Turning to the writ in the present case, the title of the action is: " Between Winifred May Stebbings (Widow and Adminis- " tratrix of the Estate of Alfred Stebbings), Plaintiff, and Holst " & Company Limited, Defendant." I regard the words " widow " and " administratrix," where they appear in the description of the plaintiff, simply as describing the plaintiff's personal status and not as declaring the capacity in which she brings the action. It is to be observed that R.S.C., Ord. 2, r. 3, and the form of writ which is specified in Appendix A. Part I, do not expressly require that a plaintiff's personal status should be shown after his name.

The indorsement to the writ, so far as is material, is as follows: " The plaintiff's claim is for damages under the Fatal " Accidents Acts and the Law Reform (Miscellaneous Provisions) " Act, 1934, as Widow and Administratrix of the estate of Alfred " Stebbings, deceased. . . ." The defendants contend that this should be construed as a declaration that the plaintiff is suing simply as administratrix in relation to both causes of action. It is against common sense, they say, to regard her as suing in two capacities when she must have thought at the time that her one capacity of administratrix would have served for both causes of action, which it would have done had that capacity in fact existed.

That contention, in effect, asks me to erase the words " as widow " from the indorsement. The words " as widow " are wholly appropriate. The plaintiff was the widow. She was entitled under the Act of 1864 to bring her claim as widow. She was not entitled under the Law Reform Act to bring her claim as widow. Nevertheless, I am asked to disregard these words because they are found in conjunction with the words " and " administratrix." If any words ought to be disregarded, it is these latter words, for the plaintiff was not administratrix at the

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DONOVAN J.

time. That being so, it seems to me to be sense and not nonsense that the two capacities are referred to in the indorsement, for whether or not the claim under the Law Reform Act turned out to be premature because of the absence of a grant of representation, the claim under the Fatal Accidents Acts would nevertheless still have been effectively begun by her "as widow." It seems to me to be a fair and reasonable and indeed grammatical interpretation of the indorsement that the claim under the Fatal Accidents Acts is brought by her "as widow" and the claim under the Law Reform Act "as administratrix of the estate." Alternatively, the proper thing to do, in my view, would be to treat the words "as administratrix" simply as an error and to disregard them.

The defendants then say: Even so, the writ is still a nullity, because the statement of claim discloses that there are dependants other than the widow herself and, by virtue of R.S.C., Ord. 3, r. 4, she should have stated her representative capacity in the indorsement. The first answer to that contention is that the plaintiff has done so by saying that she sues "as widow." This is the capacity in which the Act of 1864 allows her to sue. The identity of the persons for whom, in that capacity, she sues is a different consideration. Order 3, r. 4 (1), provides: "If the "plaintiff sues . . . in a representative capacity, the indorse- "ment shall show, in manner appearing by such of the Forms "in Appendix A, Part III, s. 7, as shall be applicable to the "case, or by any other statement to the like effect, in what "capacity the plaintiff . . . sues." There is nothing in the rule itself requiring the identity of those whom the plaintiff represents to be added to the indorsement, either in general or in particular terms. Reference to Part III, s. 7, of Appendix A, to which the rule refers, discloses no such form requiring such information. Examples of what is there required are that "the plaintiff's "claim is as executor" or "as trustee" or "as public officer "of [a company]" and so on.

In this case the plaintiff's claim is "as widow" of Alfred Stebbings, deceased. If Ord. 3, r. 4, applies, I think that it has been complied with. That view is reinforced by the circumstance that the Fatal Accidents Act, 1846, requires the particulars of the dependants for whom the action is brought to be shown in quite another manner. Section 4 of the Act provides: "In "every such action the plaintiff on the record shall be required, "together with the declaration, to deliver to the defendant or "his attorney a full particular of the person or persons for whom "and on whose behalf such action shall be brought, and of the "nature of the claim in respect of which damages shall be "sought to be recovered." In conformity with the section these particulars were shown in the statement of claim in the present case.

The plaintiff contends that Ord. 3, r. 4, does not apply in this case at all, because no action is a representative action within

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that rule if the plaintiff is himself an interested party. I doubt the soundness of that view, but it is unnecessary for me to consider it. I might say, however, that, if I had thought that rule 4 had not been complied with, I should have given leave to amend the indorsement. Non-compliance with a rule does not render proceedings void unless the court or judge so direct: see Ord. 70, r. 1. To allow an amendment such as I have indicated would not have deprived the defendants of any benefit which had already accrued to them under section 3 of the Act of 1846, because an action had already been effectively begun by the plaintiff as widow.

Finally, the decision in *Hilton* v. *Sutton Steam Laundry* [2] affords, in my view, no assistance to the defendants. There both causes of action, that is, both under the Fatal Accidents Acts and under the Law Reform Act, were the subject of a writ which in the indorsement simply proclaimed that the plaintiff brought the action as administratrix, when she had not in fact at the time taken out letters of administration. The writ was therefore treated as a nullity. There was nothing which indicated that she had brought the action under the Fatal Accidents Acts as widow of the deceased. Here there is such an indication. For these reasons the preliminary objection is overruled.

[His Lordship then considered the case on its merits.]

*Judgment for plaintiff.*

Solicitors: *Philip Niman, Middlesbrough; Cohen, Jackson & Scott, Stockton-on-Tees.*

[2] [1946] K.B. 65.

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[QUEEN'S BENCH DIVISION.]

1953
*Mar.* 30.

Lord Goddard C.J., Byrne and Parker JJ.

* REGINA *v.* GOVERNOR OF H.M. BEDFORD PRISON AND OTHERS. *Ex parte* AMES.

*Husband and Wife—Justices—Maintenance—Committal order—Suspension on conditions — Conditions not complied with — Release of suspension — Committal warrant — Validity — Habeas corpus — Money Payments (Justices Procedure) Act*, 1935 (25 & 26 *Geo.* 5, *c.* 46), *s.* 11.

The applicant, who had been arrested and detained in prison for default in payments due to his wife under a maintenance order, applied for an order of habeas corpus on the grounds that the committal warrant had not been made in his presence and was irregular and contrary to section 11 of the Money Payments

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[Reported by Mrs. E. M. WELLWOOD, Barrister-at-Law.]

1953

Regina v. Governor of H.M. Bedford Prison. *Ex parte* Ames.

(Justices Procedure) Act, 1935.[1] The committal order had been made in the applicant's presence but suspended on conditions that he made the payments ordered.

*Held*, that the justices were entitled to issue the warrant in the absence of the applicant when he failed to comply with the terms of the order. As the sum named in the warrant as due from the applicant at the time of his arrest did not, however, take into account payments made by him since the order was made the warrant was invalid and the applicant was discharged.

Motion for order of habeas corpus.

The applicant, Herbert Dudley Doone Ames, had been committed to prison by Swansea justices for default in making payments due to his wife under a maintenance order made in December, 1948. His payments being in arrears, in March, 1952, he was arrested and appeared before the justices when he was examined as to his means. The arrears due were £103 4s. 6d., and the justices made an order committing him to prison for three months, but the order was suspended so long as he paid the amount of the order, namely, £1 a week, and 2s. 6d. off the arrears. After that date the applicant made payments amounting in all to £39 1s. 6d., but he then defaulted.

On February 11, 1953, the wife appeared before the justices and made an application for the release of the suspension of the committal order. The applicant was not present. The justices issued the committal warrant, in which the sum named was £126 13s. 0d., which sum included the arrears due and the costs of the warrant. The applicant was taken in execution and lodged in Bedford prison. He applied for an order of habeas corpus on the grounds that the issue of the warrant had been irregular as he had not been present before the justices when they issued the warrant.

*T. H. K. Berry* for the applicant.
*Barry Sheen* for the wife.
*R. J. Parker* for the governor of Bedford prison.
*Elwyn Jones* for the justices.

No cases were cited in argument.

Lord Goddard C.J. delivered the judgment of the court. In this case the court gave leave to move for an order of habeas corpus. The applicant was one Herbert Dudley Doone Ames,

[1] Money Payments (Justices Procedure) Act, 1935, s. 11: "(1) For "the purpose of enabling inquiry to "be made in his presence—(*a*) as to "the means of a person to whom time "has been allowed for payment of a "sum adjudged to be paid by a con- "viction of a court of summary juris- "diction and who has made default "in the payment of that sum; . . . "a justice of the peace having juris- "diction . . . may at any time issue "a summons to that person to appear "before that court . . . and, if he "does not appear in obedience to the "summons, may issue a warrant for "his arrest or, without issuing a "summons issue in the first instance "a warrant for his arrest."

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REGINA v. GOVERNOR OF H.M. BEDFORD PRISON. *Ex parte* AMES.

who had been committed to prison by the justices of Swansea for his default in making payments under a maintenance order. The circumstances appear to show that in March, 1952, the justices, who had the applicant before them, made an order that he was to pay the arrears, which at that time were £103 4s. 6d., and they suspended the operation of the warrant of commitment which they then ordered, provided that he paid £1 a week and the sum of 2s. 6d. a week off the arrears. He made some payments. Between March 5, 1952, and February 11, 1953, he made payments totalling in all £39 1s. 6d., and those payments, in accordance with the decision of this court in *Reg.* v. *Miskin Lower, Glamorgan JJ.; Ex parte Young*,[1] must go in the first instance, unless they are appropriated otherwise, to the payment off of the arrears.

As he was then in default in making any further payments, an application was made to the justices for the removal of the suspension, and the justices did so. The warrant was accordingly placed in the hands of the police for execution, and Ames was taken in execution and lodged in Bedford gaol.

The point made on his behalf was that the committal warrant was irregular because under the Money Payments (Justices Procedure) Act of 1935 it is provided that applications to commit must be made in the defendant's presence, and if he does not appear when he is summoned so to do the justices can issue a warrant for his arrest, or they can issue a warrant for his arrest in the first instance on the application of the wife.

The court thinks that the justices had power to issue the warrant in February of this year, because the husband had not complied with the terms under which the issue of the warrant had been suspended. He had been examined by the justices, and the examination as to his means had taken place in his presence. The justices' adjudication was that he should be committed to prison for three months, which was suspended as long as he paid the sum of £1 2s. 6d. a week, namely, £1 on the order and 2s. 6d. off the arrears. He failed to do that, and therefore there was no reason why the warrant should not issue and he should not be lodged in prison.

The difficulty is that the warrant was for a wrong amount. The sum named in it was £126 13s. 0d., which was arrived at by adding the costs of the warrant. This was perfectly right, except that the applicant should have been given credit off the £103 4s. 6d., which was the original amount due, for all the sums which had been paid during the interval between the adjudication and the actual issue of the warrant. Accordingly, the sum named in the warrant was wrongly stated by £39 1s. 6d., and as the governor of the prison was ordered to hold this man for three months unless he paid that sum earlier, it follows that the warrant is bad, and therefore we must discharge it.

[1] [1953] 2 W.L.R. 409; [1953] 1 All E.R. 495.

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It would probably have been very much more in the defendant's interest if he had served his sentence, and then he would have wiped off all the arrears. He has not done that, and proceedings will start afresh against him. If he does not appear before the justices, or if the wife applies again to the justices, they can issue their warrant at once under section 11 of the Act to have him brought before them. He will be brought down to Swansea, and the justices can then issue their committal order if they choose. As it is, we are bound to hold that the warrant is bad, and that therefore the man must be discharged.

*Order of habeas corpus.*

Solicitors: *Field, Roscoe & Co., for C. C. Bell & Son, Bedford; John T. Lewis & Woods, for W. G. Christians & Sons, Swansea; Treasury Solicitor; E. Rhodri Harris, Clerk to the Swansea Justices.*

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[COURT OF APPEAL.]

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*Mar.* 17, 18.

Singleton, Jenkins and Hodson L.JJ.

* NORTH CENTRAL WAGON AND FINANCE CO. LD. *v.* A. W. FIFIELD (Inspector of Taxes).

*Revenue—Income tax—Profits of trade—Whether company carrying on one trade or two—Discontinuance of certain trading activities—Profits from letting machinery—Assessment to tax—Income Tax Act,* 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Cases I and VI of Sch. D—Finance Act,* 1936 (26 *Geo.* 5 *&* 1 *Edw.* 8, *c.* 34), *s.* 22.

A finance company, whose trading activities included the letting out of wagons on hire and on hire purchase, appealed against the assessment for income tax purposes of the company's trading profits on the ground that the assessment included profits derived from the simple hire of wagons which, the company alleged, was in fact a trade or business separate and distinct from the other trading activities of the company, and which, as a result of the Transport Act, 1947, had been discontinued within the period to which the assessment related. The Commissioners of Income Tax confirmed the assessment. On appeal to the High Court the company contended that not only on the facts was the letting of wagons on hire a separate trade, but also that it was required by section 22 (2) of the Finance Act, 1936, to be assessed separately from the other activities of the company under Case VI of Sch. D of the Income Tax Act, 1918, whereas the profits and gains derived from the other activities were properly assessable under Case I of Sch. D. On appeal from Harman J. who dismissed the appeal:—

*Held,* first, that on the facts the letting of wagons was not a separate trade or business. Secondly, that section 22 of the Finance Act, 1936, did not have the effect contended for by the company of taking out of Case I of Sch. D the profits derived from the letting out of wagons on simple hire. That section, having regard both

to the context and to the wording used, was concerned with assessments under Sch. A and was providing for the taxation of non-rateable plant and machinery, which, as a result of a divergence between the assessments for rating purposes (following on the Rating and Valuation Act, 1925) and the assessments for income tax under Sch. A, had been temporarily and inadvertently excluded from taxation. Subsection (2) of section 22 of the Act of 1936 referred to " machinery the value of which is not taken into account for the " purpose of assessment to income tax under Sch. A " but that phrase was limited by reference back to subsection (1) to non-rateable machinery not taken into account for purposes of assessments under Sch. A. The subsection was not concerned with the profits derived from hiring machinery which were not then, or now, assessable under Sch. A but under Case I of Sch. D as profits of a trade. Therefore the letting out of wagons was not a separate source of revenue.

Decision of Harman J. affirmed.

APPEAL from Harman J.

The following statement of facts is taken from the judgment of Jenkins L.J. and from the stated case: The appellant company, North Central Wagon and Finance Co. Ld., was formed in February, 1861, and was registered as a limited company in March, 1894. Its objects, as stated in its memorandum of Association, were to carry on a number of trades or businesses, including " purchasing, taking on lease or licence, hiring or other-" wise acquiring (a) wagons, carriages, locomotives, engines and " vehicles of all kinds," and " to sell, let on hire, lease or licence " . . . supply and deal with all or any of the things hereinbefore " specified."

The business of the company originally consisted wholly or mainly in acquiring railway wagons and hiring them out. They extended their business to road transport vehicles after the war of 1914 to 1918, and, in addition, to various kinds of plant and machinery. So far as the railway wagons were concerned, for many years down to 1933 the company carried on a business of letting out railway wagons on " simple hire," as distinct from hire purchase; and also of letting out railway wagons on hire purchase terms. When, after the war of 1914 to 1918, the company enlarged its activities, the hire purchase method of disposing of railway wagons was extended to road transport vehicles and to other plant and machinery in which the company dealt. In 1933, as the result of an arrangement with other companies concerned in trades of a similar kind, the company gave up the letting out of wagons on simple hire. In 1941, the company resumed business in the simple hire of wagons, and on January 1, 1948, or immediately before that date, they had upwards of 10,000 railway wagons which they were turning to account by means of simple hire. Those wagons became vested in the Transport Commission on January 1, 1948, by virtue of the Transport Act, 1947, and, accordingly, that particular trading activity of the company came to an end.

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For taxation purposes the company was assessed year by year with a single assessment under Case I of Sch. D. of the Income Tax Act, 1918, on the aggregate profits of all activities carried on by the company in the financial year ending June 30 immediately preceding the year of assessment. For the year 1948–49 the company was assessed under Sch. D on the sum of £167,220 (including a balancing charge of £39) less capital allowances of £63,960. For the year 1947–48 the assessment was £152,395 less a capital allowance of £76,889. The company appealed against those assessments on the ground that there had been included profits derived from a trade (the letting of wagons on simple hire) which had been wholly discontinued as from January 1, 1948. The Commissioners for the General Purposes of Income Tax for Upper Strafforth and Tickhill Division in the County of York confirmed the assessments.

At the hearing before the commissioners the company gave notice to the Solicitor of Inland Revenue in the following terms that they intended to raise a new point before the judge: "At "the hearing of this appeal a new point, not before the Appeal "Commissioners, will be raised by counsel for the above-named "appellant, namely, that under section 22 (2) of the Finance "Act, 1936, the profits of the appellant from the letting of its "hired wagons fell to be assessed under Case VI of Sch. D of "the Income Tax Act, 1918; that sections 20 and 22 of the "Income Tax Act, 1945, constitute statutory recognition of that "position; that the notional trade of the appellant in respect of "the letting out of wagons recognized by section 20 (2) of the "Income Tax Act, 1945 (videlicet a trade separate from any "other trade carried on by it, the profits and gains of which "were properly assessable under Case I of Sch. D of the Income "Tax Act, 1918), came to an end on January 1, 1948, and that "there was a permanent discontinuance of such notional trade "of wagon letting within the meaning of the Income Tax Acts "on that date, and that, accordingly, the decision of the Appeal "Commissioners that the appellant's wagon letting did not "constitute a separate trade within the meaning of the Income "Tax Acts and was not permanently discontinued within such "meaning on such date is wrong and cannot be maintained."

Harman J. affirmed the decision of the commissioners. The company now appealed.

*Cyril King Q.C.*, *John Senter* and *Barber* for the appellant company.

*J. Millard Tucker Q.C.* and *Sir Reginald Hills* for the Crown.

The following cases were referred to in argument:—*Scales* v. *George Thompson & Co. Ld.*[1]; *Gloucester Railway Carriage and Wagon Co. Ld.* v. *Inland Revenue Commissioners*[2]; *St. Aubyn*

[1] (1927) 13 T.C. 83.

[2] [1925] A.C. 469; 41 T.L.R. 320; 12 T.C. 720.

v. *Attorney-General*[3]; *Cohen* v. *South Eastern Ry. Co.*[4]; *Crawford* v. *R. S. Hudson Ld.*[5]; and *Shaw* v. *Great Western Ry. Co.*[6]

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SINGLETON L.J. I will ask Lord Justice Jenkins to give the first judgment.

JENKINS L.J. In this case a company called the North Central Wagon and Finance Co. Ld. appeals from a judgment of Harman J. dismissing the company's appeal from a decision of the General Commissioners for the Upper Strafforth and Tickhill Division in the County of York, confirming assessments made on the company to income tax for the years 1947–48 and 1948–49. The objection made to those assessments, according to the company's case as presented before the commissioners, was to this effect. It was claimed that the company carried on not one business but two businesses, and it was said that one of those businesses had been wholly discontinued on January 1, 1948, and consequently that it was wrong, as had in fact been done, to bring into the computation of the company's profits for those two years the profits of the business which had been discontinued, the objection going to the whole of the year 1948–49 and, approximately, three months of the year 1947–48.

It is agreed by Mr. King for the company that the question whether there are two businesses or only one business is a question of fact. It follows that the commissioners' conclusion on that question must not be disturbed, unless it can be said that there was no evidence on which the commissioners could reach the conclusion at which they arrived. [His Lordship referred to the facts substantially as set out above and continued:] The question is whether there was any evidence on which the commissioners could properly hold that there were not two businesses but one business, or, perhaps, one should rather say, whether there was any evidence which obliged the commissioners, as a matter of law, to hold that there were two businesses and not only one.

I have found it impossible on reading this case to take the view that there was no evidence to justify the conclusion to which the commissioners came. Some facts are mentioned which can be described as consistent with the view that there were two businesses, but I find no facts at all which can be said to be inconsistent with the view that there was one business only, of which the simple hiring of railway wagons was a branch or department. Mr. King referred the court to a number of matters on which he particularly relied. He pointed out that it appears from the case that the wagons were treated as capital assets. I fail to see why they could not be treated as capital assets if there was only one business and not two. Another

[3] [1952] A.C. 15; [1951] 2 All E.R. 473.
[4] (1877) 2 Ex.D. 253.
[5] (1935) 19 T.C. 434.
[6] [1894] 1 Q.B. 373; 10 T.L.R 176.

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point was that separate capital accounts were kept in respect of the simple hire vehicles on the one hand, and the vehicles disposed of on hire purchase terms on the other hand. It appeared, further, that the wagons were carefully selected when simple hire transactions were resumed in 1941, and that particular wagons were allocated to the simple hire business. Finally, it appeared that one director did extra work in connexion with the resumption of the simple hire arrangements, and that he received additional remuneration for this service. None of these circumstances seems to me to be inconsistent with the view that the business of hiring out wagons on simple hire was part of one business carried on by the company. Indeed, Mr. King did not in the end put his case so high as to claim that any of the particular points to which he called our attention could be said to be really inconsistent with the view that there was only one business. On the other hand, I should have thought that the business of letting out wagons on simple hire was a business so closely allied to letting out wagons on hire purchase, or, indeed, to any business of dealing in wagons or other vehicles that to establish the existence of two separate businesses it would be necessary for the company to adduce some clear evidence of separation between the two. That, so far as I can see, the company entirely failed to do, and in my view the commissioners were well justified in the conclusion to which they came, and their finding must not be disturbed. Therefore, in my view, the case as originally presented to the commissioners before them and before Harman J. rightly failed, and so far as that ground is concerned this appeal must also fail.

[His Lordship then read the notice given by the appellants to the Solicitor of Inland Revenue that they intended to raise a question as to the effect of section 22 of the Finance Act, 1936, on appeal to the High Court, and he continued:] Mr. King's main argument on section 22 of the Finance Act, 1936, if I understand him correctly, was that, on its true construction, it had the effect of making the business of letting plant and machinery of all kinds, including such things as railway wagons, a source of profit which was no longer taxable as trade profits in the ordinary way under Case I of Sch. D, but came under Case VI of Sch. D as a source of profit not chargeable to tax under any other schedule. He claimed that that effect was reinforced by the sections of the Act of 1945 referred to in the notice which I have just read.

So far as his main argument on this point was concerned, he said, in effect, that, if it was shown that hire received by means of the simple letting of railway wagons ought to be taken out of Case I of Sch. D and to come into Case VI, then he reached by another road the same result as if he had succeeded in establishing that, in fact, the company carried on two separate businesses; for on this view of the case the wagons would have been recognized by the relevant taxing enactment as a separate

source of revenue, and that separate source of revenue having gone, it would follow that in the years under appeal there was no income from it which could properly be made the subject of tax.

To appreciate the nature of the argument under section 22 of the Act of 1936, it is necessary to consider briefly the circumstances in which that enactment was passed. Mr. King warned us against straying from the narrow path of construction into the morass of speculation concerning the probable intentions of the legislature when section 22 was enacted. I agree that it is the function of the court to construe a statute primarily by reference to the words to be found in the enactment itself. Prima facie, that is the proper course, and there are dangers in departing from it and in speculating about possible Parliamentary intentions. I accept all that; but, on the other hand, I would be sorry to hold that, where amending legislation is concerned, it is not perfectly right and legitimate for the purpose of construing the amendment to consider the law as it stood before the amendment was made, and to deduce from that consideration the defect or omission in the existing law which the amendment was designed to correct. That is surely a legitimate aid to construction, as was recognized in *Shaw* v. *Great Western Ry. Co.*,[1] which Mr. Millard Tucker cited for the observations of Wright J.[2]

The position in the relevant field of income tax law at the time of the passing of section 22 was this. Down to 1936, when section 22 came into operation, the annual value of land, tenements, hereditaments or heritages for the purposes of tax under Sch. A of the Income Tax Act, 1918, was ascertained, to put it very shortly, on the basis of the notional rent which a hypothetical tenant would be prepared to pay for them. In estimating that rent, there were taken into account any things attached to the hereditaments, such as fixed plant and machinery. The notional rent was arrived at by including all such things, and the tax was assessed on that rent. An actual tenant paying rent for the hereditament was entitled to deduct from it the tax, for which he was liable in the first instance, up to the amount of the tax assessed on the hereditament, or the amount representing tax at the appropriate rate on the rent payable by him, whichever was the less.

Down to 1925, when the Rating and Valuation Act, 1925, came into force, the valuation for rating purposes pursued the same course, and fixed plant and machinery was taken into account for the purposes of ascertaining the rateable value, just as it was for the purposes of the Sch. A assessment. Section 24 (1) of the Rating and Valuation Act, 1925, provides: "(1) For "the purpose of the making or revision of valuation lists . . . "the following provisions shall have effect with respect to the

[1] [1894] 1 Q.B. 373. [2] Ibid. 382, 383.

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"valuation of any hereditament other than a hereditament the "value of which is ascertained by reference to the accounts, "receipts or profits of the undertaking carried on therein:— "(*a*) All such plant or machinery in or on the hereditament as "belongs to any of the classes specified in the Third Schedule "to this Act shall be deemed to be a part of the hereditament: "(*b*) Subject as aforesaid, no account shall be taken of the value "of any plant or machinery in or on the hereditament." That, I think, is the whole of the material provision for the present purpose. The Third Schedule to the Act was later replaced by an Order of 1927[3]; but it is enough for the present purpose, putting it very shortly, to say that the effect of section 24 in conjunction with the Third Schedule, and subsequently in conjunction with the Order of 1927, was to divide fixed plant and machinery into two classes, of which one (comprising, inter alia, plant used for the provision of power) was to be included in the valuation as forming part of the hereditament, while the other (comprising, inter alia, machinery used for manufacturing purposes) was to be excluded from the valuation.

The effect of that enactment, as will be readily seen, was to produce a serious discrepancy between the Sch. A annual value ascertained in the way I have indicated, and the rateable value ascertained in the new manner prescribed by section 24 of the Act of 1925. This discrepancy occasioned much inconvenience and difficulty, for the practice had been for the Sch. A assessments to follow the rateable value. Attention was called to that difficulty in *Crawford* v. *Hudson*,[4] which was decided on April 8, 1935.

Those were the circumstances in which section 22 of the Finance Act, 1936, was enacted. That section provides: "(1) No "account shall be taken of the value of non-rateable machinery "in ascertaining the annual value—(*a*) of any property in Great "Britain according to the general rule of No. 1 of Sch. A; or "(*b*) of any property whatsoever for the purpose of rule 5 of the "rules applicable to Cases I and II of Sch. D, or for the purpose "of section 18 of the Finance Act, 1919. (2) The profits arising "to any person from the letting of any machinery the value of "which is not taken into account for the purpose of assessment "to income tax under Sch. A shall be deemed to be profits "chargeable to income tax under Case VI of Sch. D. (3) In this "section—(*a*) the expression 'property' means lands, tenements, "hereditaments and heritages; (*b*) the expression 'machinery' "includes plant, machines, tools, and appliances; (*c*) the expres- "sion 'non-rateable machinery,' in relation to any property, "means machinery of any description the value whereof is not "taken into account for the purposes of rating under the relevant "rating enactment, or would not be so taken into account if that

[3] Plant and Machinery (Valuation for Rating) Order, 1927 (S.R. & O., 1927, No. 480).

[4] (1935) 19 T.C. 434.

" enactment had effect with respect to the valuation of the " property; (*d*) the expression ' relevant rating enactment ' means " —(i) in relation to property in England or outside the United " Kingdom, paragraph (*b*) of subsection (1) of section 24 of the " Rating and Valuation Act, 1925."

Considering the section as a whole, and in the light of the circumstances which I have mentioned as regards the contemporary state of the law, it seems reasonably plain that the intention underlying the section was to assimilate the method of ascertaining the annual value of a hereditament for the purposes of Sch. A to the method introduced for rating purposes by section 24 of the Act of 1925 by excluding non-rateable machinery from the valuation; and to provide, consequentially, under Case VI of Sch. D for the taxation of the profits arising from the letting of non-rateable machinery, which, ex hypothesi, would no longer be included in, or be reflected by, the annual value on which the Sch. A tax was assessed.

I think that Mr. King would so far find nothing in what I have said from which he would dissent. He would agree, I think, that the primary purpose of section 22 is such as I have described. But he says that that does not harm his case, for his case depends on the natural meaning of subsection (2) of the section. He says that, whatever the object in view when the change in the law was made, subsection (2) of section 22, according to the natural and ordinary meaning of the language used, has the effect of making the letting of machinery of all kinds, including loose chattels, such as railway wagons, a subject of assessment under Case VI of Sch. D and no longer assessable under Case I of that Schedule as the profits of a trade. The effect of so construing subsection (2) of section 22 would be far-reaching. Several examples were given in argument of its consequences. For the result would be that in every case in which any trader, as part of his trading activities, hired out goods to other persons, then his hiring operations must be excluded from his trade in the income tax sense and taxed specially as a separate source of income under Case VI of Sch. D. The consequences would be so far-reaching that it is difficult really to foresee their whole extent. But it is plain enough that the effect of this construction of the subsection would be revolutionary.

The words on which Mr. King relies are " from the letting of " any machinery." He says that there is no ground for limiting that reference to non-rateable machinery. He says that they are apt to include machinery of all kinds and should be so construed. As to the words, " the value of which is not taken into " account," he says that they exactly fit his case, for such things as railway wagons are not taken into account for the purposes of assessment to income tax under Sch. A. He further relies on the change of language, and points out that, whereas subsection (1) speaks of " non-rateable machinery," subsection (2) substitutes the expression " the value of which is not taken into account for

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" the purpose of assessment to income tax under Sch. A." Puting all those considerations together, Mr. King says that subsection (2) taken alone, and construed according to its plain terms, produces the result for which he contends, and that if the language is apt to produce that result, then—ruat coelum—effect must be given to that result.

I cannot accept Mr. King's argument, though it was presented with his usual care and persuasiveness. I think that one is entitled, and, indeed, bound to read subsection (2) in its context, and, when read in its context, it seems to me to be reasonably plain that the enactment is directed to Sch. A assessments, and to altering the extent to which fixed plant and machinery are to be included in Sch. A assessments, or in the annual value of land, tenements and hereditaments, for income tax purposes. One gets that in clear terms from sub-paragraph (*a*) of subsection (1), which refers to the Sch. A ascertainment of annual value, and from sub-paragraph (*b*) of subsection (1), which refers to the annual value of premises on which a business is carried on, which traders are entitled to exclude from their profits under Case I of Sch. D. The context thus seems to me to be strongly against Mr. King's construction. This is not the context in which one would expect to find a provision making a radical alteration in the law of the kind for which he contends.

But the matter does not rest there. It seems to me that the natural meaning of subsection (2), according to the language used and construing it with due regard for the context, is that it is providing for the taxing of non-rateable machinery which, owing to the alteration in the basis of the Sch. A valuation, would no longer be automatically subject to tax on the annual value ascertained in accordance with Sch. A. The word " letting " seems to me in this context to suggest the letting of some hereditament. That is perhaps a slight indication. Then there is the phrase " any machinery the value of which is not taken into account for " the purpose of assessment to income tax under Sch. A." I attach no importance to the change there from the expression " non-rateable machinery." It may be said that the two phrases are interchangeable; but I would add that the description of the machinery in subsection (2) as " machinery the value of which " is not taken into account . . ." rather than as " non-rateable " machinery " is at that point appropriate, inasmuch as subsection (2) makes provision for taxing the profits of letting it, and does so for the very reason that under subsection (1) of the section, that machinery is not taken into account for the purposes of assessment to income tax under Sch. A. Further, the words " is not taken into account " in subsection (2) invite the reader to refer back to the words at the beginning of the section, " no " account shall be taken of the value of non-rateable machinery," and so on. I think that strongly indicates that the machinery " the value of which is not taken into account " in subsection (2)

is machinery whose value is not taken into account by reason of the provisions of subsection (1).

I think that another indication is to be found later in subsection (2). It is concerned with the profits from the letting of any machinery " not taken into account for the purpose of assessment " to income tax under Sch. A," and goes on to say that they " shall be deemed to be profits chargeable to income tax under " Case VI of Sch. D." But the profits derived from the letting of machinery of the various kinds which Mr. King says are included in subsection (2) were, as the law stood when section 22 was passed, the subject of assessment as profits of a trade under Case I of Sch. D. So, if machinery of that kind was being referred to, it seems to me the language of subsection (2) would be inappropriate, for machinery of that kind was not, and never had been, taken into account for Sch. A purposes. It had nothing whatever to do with Sch. A. Profits derived from hiring it would be taxable as profits of a trade under Case I of Sch. D. So the reference here, without explanation, to Case VI of Sch. D is inapposite if the intention was to tax under that case the profits of letting machinery of a kind never theretofore taxed under Sch. A, and the profits of letting which were, and had always been, chargeable to tax under Case I of Sch. D. But, if the section refers only to non-rateable machinery, all is clear. Subsection (2) is, in effect, saying this: " As the result of the change in the law made by subsection (1), " certain machinery will no longer be taken into account for the " purposes of assessment to income tax under Sch. A, and, " therefore, would, but for this enactment, escape tax altogether. " To prevent that result, the profits arising from the letting of " such machinery ' shall be deemed to be profits chargeable to " ' income tax under Case VI of Sch. D,' that being the case " which sweeps up all income not taxed under any other " schedule."

For these reasons, I find myself unable to accept Mr. King's argument on section 22 of the Act of 1936. Indeed, it seems to me to be reasonably plain that its intention and effect are that contended for on behalf of the Crown.

As regards Mr. King's further argument based on sections 20 and 22 of the Income Tax Act, 1945, I hope he will not think me disrespectful to it if I content myself with saying that, after giving the best attention to it that I could, I can find nothing in the later sections to which he referred us to lead me to form any different opinion as regards the construction of section 22 of the Act of 1936.

Accordingly, for the reasons which I have stated, I am of opinion that Harman J. reached a right conclusion on this point also and that the appeal fails on both points and should be dismissed.

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Hodson L.J. I agree, and I have nothing to add.

Singleton L.J. I agree.

*Appeal dismissed.*
*Leave to appeal to the House of Lords refused.*

Solicitors: *Drury, Hopgood & Co. for Pashley & Hodgkinson, Rotherham; The Solicitor of Inland Revenue.*

E. D.

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[court of appeal.]

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Singleton, Denning and Romer L.JJ.

## *LEES *v.* MOTOR INSURERS' BUREAU.

*Practice and Procedure—Appeal—Compromise—Settlement on terms before hearing—Payment in full of appellant's claim and costs by respondents—Application by appellant for order that appeal be dismissed—Order for stay of further proceedings on appeal substituted.*

Where an appellant applied to the court for an order that her appeal might be dismissed because there had been a settlement on the terms that the respondents should pay the whole of her claim and costs, the proper order for the court to make was an order that further proceedings on the appeal should be stayed, except for the purpose of enforcing the terms.

Application by the appellant for an order that her appeal from Lord Goddard C.J. should be dismissed.

By an agreement of June 17, 1946, made between the Minister of Transport and the Motor Insurers' Bureau, the latter undertook to satisfy any judgment "in respect of any liability "... required to be covered by a policy of insurance ... under "Part II of the Road Traffic Act, 1930" if such judgment had not been satisfied within seven days.

A firm of employers held a policy of insurance in respect of a motor-lorry owned by them, which covered liability for the death of, or bodily injury to, any person caused by or arising out of the use of the lorry, but excluded "liability in respect of death "arising out of and in the course of his employment of a person "in the employment of the insured."

An employee of the firm drove the lorry negligently and was responsible for an accident which resulted in the death of a fellow employee, whose widow brought an action in February, 1949, against the driver, and obtained judgment in default of defence for £1,200 and taxed costs of £79 13s. 6d. That judgment remained wholly unsatisfied. The widow then claimed that

by virtue of the agreement of June, 1946, she was entitled to recover the sum for which judgment had been given from the Motor Insurers' Bureau. The dispute was referred to arbitration, and the arbitrator held that the judgment in favour of the widow was a liability which required to be covered by a policy of insurance under Part II of the Road Traffic Act, 1930, and he made an award in her favour. Both parties requested the arbitrator to state his award in the form of a special case.

On appeal by the bureau by special case stated, Lord Goddard C.J., on July 16, 1952 (*Lees* v. *Motor Insurers Bureau* [1]), held that the judgment in the action by the widow against the driver was not a judgment in respect of a liability to be covered by the policy of insurance within the meaning of the agreement of June 17, 1946, and gave judgment for the bureau.

The widow gave notice of appeal. On January 20, 1953 (before SINGLETON and HODSON L.JJ. and LLOYD-JACOB J.), *Michael Lee*, for the widow, made an application for an order that the appeal be dismissed, stating that the bureau had agreed voluntarily to pay the whole of the widow's claim together with her costs.

SINGLETON L.J. said that the widow had been kept out of her money since 1949. It seemed unusual that the respondent bureau, having obtained judgment, which had been reported,[1] should agree that the unsuccessful party should have the full amount of her claim and the costs, and that at the same time her appeal should be dismissed.

THE COURT adjourned the application to consider the proper form of order to be made in the circumstances.

On March 30, 1953 (at a hearing before SINGLETON, DENNING and ROMER L.JJ.), SINGLETON L.J. said that when the original application had been made, it had seemed to the court to be a contradiction in terms that where the successful respondent had agreed to pay the whole of the appellant's claim and all the costs, an order should be made that the appeal be dismissed.

DENNING L.J. said that an appeal could not be allowed by consent, for that would be reversing the judgment of Lord Goddard C.J. without hearing the appeal.

*Humfrey Edmunds*, for the respondent bureau, said that the real dispute here was between motor insurers and employers' liability insurers. What the bureau wanted was a ruling to the effect that motor insurers were not obliged to insert in their policies an extension clause which would charge them solely with the financial responsibility for motor accidents to an employee when he was being carried in a motor-vehicle by his employer's servant. That they had obtained.

[1] [1952] 2 T.L.R. 356; [1952] 2 All E.R. 511; [1952] W.N. 409.

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The court then made the following order, which had been proposed by the court and agreed between the parties: "And "the appellant and the respondents by their counsel stating that "they have agreed to the terms of the settlement of this action "set out in the schedule hereto and consenting to this order "this court doth order that all further proceedings in the said "matter and on the appeal be stayed except for the purpose of "enforcing the said terms for which purpose the parties are to "be at liberty to apply to a judge in chambers, and that the "costs of the appellant be taxed if they are not agreed between "the parties as between party and party, being her costs (a) of "the arbitration and (b) of the special case before the Lord Chief "Justice, (c) of this appeal to this court; and that the costs of "the appellant in this appeal to this court be taxed as between "solicitor and client in accordance with the provisions of the "third schedule to the Legal Aid and Advice Act, 1949."

Solicitors: *A. E. Wyeth & Co. for Ernest Brown & Co., Wednesbury; Stanley & Co.*

M. M. H.

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[COURT OF APPEAL.]

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*Feb.* 27;
*Mar.* 2, 3, 31.

Evershed M.R., Jenkins and Romer L.JJ.

## * METROPOLITAN WATER BOARD *v.* BOROUGH OF HERTFORD. BOROUGH OF HERTFORD *v.* METROPOLITAN WATER BOARD.

*Rating — Water undertaking — Valuation of river intake — "Profits "basis"—Relevance of value attributable to altitude of intake.*

In assessing for rating purposes a hereditament of a water board which consisted of an intake from the river Lea and appurtenances — a hereditament admittedly of the indirectly productive class—the proper application of the "profits basis" of valuation, which was admittedly applicable to the hereditament, necessitated ascertaining the aggregate net annual value of the indirectly productive hereditaments comprised in the whole of the board's undertaking and attributing a fair proportion of that total to the individual hereditament in question. The net annual value of the indirectly productive hereditaments was to be arrived at by calculating the percentage which the net annual value of the whole undertaking bore to the total capital value. That percentage had then to be applied to the capital value of each indirectly productive hereditament in order to arrive at the net annual value.

*Kingston Union* v. *Metropolitan Water Board* [1926] A.C. 331; 42 T.L.R. 275 applied.

In ascertaining the capital value of the hereditament no account should be taken of the use which the board made of the land in conjunction with the other parts of its undertaking. It was, however, correct to take into account advantages which were inherent in the hereditament itself and which made it specially fit for the purpose for which it was actually used by the board, such as the natural channels, the proximity to the river, and the

altitude in so far as it narrowed the range of hereditaments on the river amongst which the board seeking an intake would be likely to make its selection. The amount of water which the board in fact received through the intake and what was done with the water afterwards were both, however, irrelevant, as was the fact that owing to the altitude of the intake the board was able to save pumping costs in distribution of the water.

*Metropolitan Water Board* v. *Chertsey Assessment Committee* [1916] A.C. 337; 32 T.L.R. 168 followed.

APPEAL from Lands Tribunal.

The Metropolitan Water Board were assessed for rating purposes in respect of their occupation of a hereditament in the parish and borough of Hertford including the Chadwell Spring, a portion of New River, an intake from the River Lea, various buildings, sluices, channels and land, etc. The water board alleged that the valuation as shown on the valuation list was excessive and proposed an alternative reduced valuation. The Corporation of Hertford and the valuation officer objected to the proposed reduction, and the water board appealed against the objections. At a hearing in March, 1951, the local valuation court of the South Middlesex Local Valuation Panel amended the figures in the valuation list. The corporation appealed to the Lands Tribunal; the water board and the valuation officer then appearing as respondents.

Before the Lands Tribunal the corporation, the water board and the valuation officer each submitted a valuation, those of the water board and valuation officer being applications of the normal method of valuing public utility undertakings spreading over several rating areas. That method, known as the "profits "basis," involved the ascertainment of the proportion which the net annual value of the whole undertaking (the "cumulo") bore to the total capital value. That percentage was applied to the capital value of the part of the undertaking which was indirectly productive in order to arrive at the net annual value of that part of the undertaking. The net annual value of each individual indirectly productive hereditament (of which the hereditament in question was one) was then arrived at by apportionment of that total. A further step in the valuation on that basis was to find the net annual value of the directly productive hereditaments, and that was done by apportionment of the balance of the cumulo remaining after the total net annual value of the indirectly productive hereditaments had been deducted.

The corporation, on the other hand, estimated the net annual value of the hereditament in question directly, without regard to the value of the undertaking in cumulo, and then adjusted their valuation to fit the cumulo and to take account of the special fitness of the hereditament for the board's purposes and to the statutory right of the board to take water from the river at that point, from whence it flowed by gravity to a higher point than would have been possible from any other intake.

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The Lands Tribunal in substance apparently approved the method of valuation adopted by the water board and by the valuation officer, but they added that it was not practicable to ascertain the net annual value of the hereditament truly relative to the cumulo " purely by a process of estimating and comparing " respective capital values." Further, they were of opinion that the capital value ought to reflect the special fitness of the hereditament for the use in fact made of it by the board, in conjunction with the rest of the undertaking, by reason of its altitude.

The water board and the valuation officer appealed and the Lands Tribunal stated their findings in a case stated.

The relevant paragraphs of the case stated and the figures of the various valuations are set out in the judgment of Jenkins L.J.

*Harold Williams Q.C.* and *C. Scholefield* for the Metropolitan Water Board.

*Maurice Lyell* for C. W. Pote, the valuation officer.

*Michael Rowe Q.C.* and *R. Willis* for the Corporation of Hertford.

The following cases were referred to in argument: *Reg.* v. *West Middlesex Waterworks* [1]; *Kingston Union* v. *Metropolitan Water Board* [2]; *Talargoch Mining Co.* v. *St. Asaph Union* [3]; *Liverpool Corporation* v. *Llanfyllin Assessment Committee* [4]; *New River Co.* v. *Hertford Union* [5]; *Metropolitan Water Board* v. *Chertsey Assessment Committee* [6]; and *Reg.* v. *Overseers of Mile End Old Town.* [7]

*Cur. adv. vult.*

March 31. Evershed M.R. In this case I have had the advantage of seeing the judgment prepared by Jenkins L.J. to which I feel I could not usefully add anything save to state my agreement with it. I am authorized by Romer L.J. to say that he also has had the like advantage, and he also desires to add nothing.

Jenkins L.J. These are appeals by the Metropolitan Water Board and the valuation officer from a decision of the Lands Tribunal concerning the assessment of a hereditament described as " Chadwell Spring, portion of New River, gauge house, sluices, " appurtenances and intake from River Lea," being that part of the undertaking of the board which lies in the Parish of Hertford in the borough of Hertford.

[1] (1859) 1 E. & E. 716.
[2] [1926] A.C. 331; 42 T.L.R. 275.
[3] (1868) L.R. 3 Q.B. 478.
[4] [1899] 2 Q.B. 14; 15 T.L.R. 349.
[5] [1902] 2 K.B. 597; 18 T.L.R. 780.
[6] [1916] 1 A.C. 337; 32 T.L.R. 168.
[7] (1847) 10 Q.B. 208.

The proceedings began with a proposal made by the water board on March 30, 1950, for the reduction of the assessment of the hereditament, which then appeared in the valuation list at a net annual value of £2,221 for land covered with water, with a rateable value of £1,777, and a net annual value (and rateable value) of £332 for land not so covered, to £274 net annual value and £219 rateable value for the land covered with water, and £241 net annual value (and rateable value) for the land not so covered. The Corporation of Hertford and the valuation officer both gave notice of objection on the ground that the existing values were not excessive and should not be altered, but the valuation officer later amended his notice so as to concede that the values ascribed to the hereditament were excessive and that some alteration should be made in them.

The water board gave notices of appeal against these objections, and their appeals were heard on March 19, 1951, by a local valuation court who, on March 29, 1951, directed that the valuation list should be altered to show a net annual value of £677 for land covered with water, with a rateable value of £542, and a net annual value (and rateable value) of £241 for land not so covered. From this decision the corporation appealed to the Lands Tribunal, the appeal being contested by the board with the support of the valuation officer, who, however, did not contend for the full amount of the reductions claimed by the board.

The case stated by the Lands Tribunal for the opinion of this court contains the following findings of fact: "We found the "following facts proved: (a) The hereditament consists of an "intake from the River Lea with screen, fender, gauge house "with measuring device and keeper's living accommodation, "sluice house and store hut, a natural spring of water known as "'Chadwell Spring,' about 1,950 yards of channel, an area of "land about 8 acres in extent, seven bridges, an iron post and "rail fence alongside the New River and round Chadwell Spring "and short lengths of 48in. and 30in. mains. (b) Water from "the River Lea flows through the intake and is then conveyed by "gravity first along a channel and thereafter by an artificial water-"course known as the New River to the filter beds of the board at "Stoke Newington, a total distance of about 24 miles. The board "can usually take about 22½ million gallons a day at this intake, "although in times of drought the amount so taken may fall to "a much lower figure. It has been as low as 10·4 million gallons "and, in times of flood, the amount abstracted has reached "32½ million gallons. The average abstraction, expressed in "millions of gallons per day, was 18·8 for 1948–49 (March 31), "14·9 for 1949–50 and 21·2 for 1950–51. The water taken from "the river is joined by any water emerging from Chadwell "Spring, which is an unreliable source of supply, has yielded "little in recent years, and has been dry, almost invariably, in "the summer months. In its course the New River passes 11

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"well stations where water is pumped and discharged into the "river, thus augmenting the flow. By the time all the well "stations have been passed the maximum capacity of the "New River is about 45 million gallons a day and the water, "flowing by gravity for the whole of its journey, is discharged "on to the board's filter beds at Hornsey or Stoke Newington. "(c) At the Stoke Newington filter beds the level of the filtered "water ready to be pumped into supply is 94 feet above ordnance "datum against 16 feet at the board's Lea Bridge works and "29 feet at the board's Walton works on the River Thames. "Water for the high altitude neighbourhoods to the west of and "near to Stoke Newington can, therefore, be pumped from the "94-feet level at Stoke Newington instead of the 16-feet level at "Lea Bridge, a saving of 78 feet, or taking into account the "board's main works on the River Thames, an average saving "of about 60 feet of pumping height. (d) So far as the altitude "of the said intake on the River Lea at Hertford renders it "possible for water to flow by gravity direct to the filter beds at "Hornsey and Stoke Newington, that advantage could, subject "to the necessary statutory or other power existing in or being "obtained by the board and subject to the construction of a new "intake with ancillary structures, be obtained at any point on "the stretch of the River Lea known as the Hertford-Ware "Pound extending to one and one-third miles, but could not be "obtained further downstream. (e) . . . The undertaking of "the board consists of works, reservoirs, etc., where water is "obtained, treated and stored, mains by which the water is "conveyed and distributed to consumers and ancillary subjects "such as offices, workshops, stores, dwelling-houses, etc. It "extends into seven counties and 98 rating areas and com-"prises some 255 individual hereditaments. There is no "dispute as to the net annual value in cumulo of the heredita-"ments comprised in the undertaking, all the parties having "accepted for the purposes of this appeal that it should be taken "to be £1,706,016. The controversy between the parties is as to "the amount of the assessment which should be placed upon the "hereditament in the Borough of Hertford forming part of the "undertaking."

It is not in dispute that the method of assessment appropriate to the many and various rateable subjects comprised in the undertaking of the board is the method of assessment commonly called "the profits basis" which, though not enjoined by any statutory provision, has long been recognized in practice and judicially approved as prima facie the proper method of arriving at the net annual values for rating purposes of the hereditaments comprised in a public utility undertaking such as that of the board with many rateable subjects situated in many different rating areas.

The nature and objects of "the profits basis" are authoritatively expounded in *Kingston Union* v. *Metropolitan Water*

*Board*,[1] and particularly in the speech of Lord Cave L.C.,[2] and the method is also recognized and approved in the much earlier cases of *Reg.* v. *Overseers of Mile End Old Town*[3] and *Reg.* v. *West Middlesex Waterworks*.[4] It can, I think, be described with sufficient accuracy for the present purpose as a special method of arriving at net annual values which involves as a general rule calculations of the following nature: (a) The ascertainment of the net revenue produced by the whole undertaking which is treated as representing the net annual value of the entire concern and is commonly known as "the cumulo value"; (b) a division of the hereditaments comprised in the whole undertaking between those directly productive of revenue and those only indirectly so productive; (c) the ascertainment of the net annual value of the indirectly productive hereditaments by the method commonly referred to as "the contractor's basis," that is to say, by estimating their respective capital values and taking an appropriate percentage thereon (now, I think, usually the same in a case of this kind as the percentage of the capital value of all the hereditaments comprised in the whole undertaking represented by the cumulo value) as representing the net annual value of all the indirectly productive hereditaments of the undertaking; (d) the deduction of the last-mentioned figure of net annual value from the cumulo value; (e) the apportionment to the indirectly productive hereditaments in each rating area of their individual net annual values ascertained as above, and (d) the allocation to the directly productive hereditaments in each rating area of their proper shares of the balance of the cumulo value in proportion to the amounts of revenue arising in the several rating areas.

The hereditament here in question is admittedly of the indirectly productive class, so that no question as to the allocation of the balance of cumulo value attributable to directly productive hereditaments arises in this case, but references to that essential feature of "the profits basis" method of assessment is necessary in order to appreciate the part played by the assessment of the indirectly productive hereditaments in the entire process, designed as it is to ensure that the hereditaments in each rating area, whether directly or indirectly productive, should be fairly assessed, and at the same time that the aggregate of all the assessments in all the areas should not exceed, but should as nearly as may be equal, the cumulo value.

As appears from the case stated the following valuations were submitted to the tribunal by the corporation, the board and the valuation officer respectively. The corporation submitted a valuation of £5,000 as representing the net annual value of the hereditament ascertained in accordance with section 22 (1) (*b*) of the Rating and Valuation Act, 1925, without regard to the value of the undertaking in cumulo, but (apparently in recognition of the applicability of "the profits basis") reduced that figure by

[1] [1926] A.C. 331.
[2] Ibid. 338, 339.
[3] (1847) 10 Q.B. 208.
[4] (1859) 1 E. & E. 716.

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one-third, i.e., to £3,333 " to fit in with the cumulo and to fit " in with a reduction from 5 per cent. to 3·32 per cent. on capital " values estimated on a 1939 basis adopted on behalf of the " valuation officer in the apportionment of the value in cumulo " in the 1950 re-assessment of all the hereditaments comprised " in the board's undertaking." It should be noted that in submitting this valuation the corporation claimed to have taken into account, inter alia, that the intake was a point determined by statute of access to a supply of about 22½ million gallons of water a day, which was necessary to the board, and which would flow by gravity without any pumping to a point 60 feet above the height where elsewhere pumping would normally have to start, and also said that the value attributable to the intake had been regarded as " not being capable of being reliably estimated by a " process of calculation or by reference to area of land and " structural values but as a matter of skilled professional judg- " ment." The corporation further described this valuation as intended to represent the value of the hereditament taking into consideration its special fitness for the board's purposes, and said that " the special value had been regarded as lying in a small " area of about 210 square yards of land, being the intake and " the site of the gauge house and not in the channels on the " hereditament any more than in the course of the New River all " the way up to London."

The board submitted a valuation giving a net annual value (as defined by section 22 (1) (*b*) of the Act of 1925) of £429 for land covered with water (with a rateable value of £343) and £221 for land not so covered, making a total net annual value for the hereditament of £650. The board's calculation, as described in the case stated, is more explicit in its acceptance of " the profits " basis." It begins with the agreed cumulo value of £1,706,016. It then expresses that figure as a percentage of the capital value of the entire undertaking arrived at by taking land at its estimated 1939 value and adding double the 1939 effective cost value for structures, plant and mains. The capital value thus estimated being £103,042,380, the resulting percentage is 1·656 per cent. The calculation then proceeds to apply the same percentage to the capital value (ascertained in the same way) of the indirectly productive assets (amongst them the hereditament now in question) included in the £103,042,380, presenting the result as the net annual value of all the indirectly productive hereditaments out of which the like percentage of the capital value of the particular hereditament now in question represents the net annual value of that hereditament.

The main matter of controversy in the board's calculation is the capital value placed on the hereditament in question. This appears to have been arrived at by taking the value of the land as agricultural land at £200 per acre, adding £456 per acre on account of certain natural channels (which made a total of £5,248 for the eight acres) and adding a further sum unspecified

for buildings and other structures at double their estimated 1939 cost value. In the view of the board there was no special fitness in the land apart from the natural channels, and in particular the altitude of the intake, and consequent benefit of gravity in the conveyance by way of the New River of the water passing through it was irrelevant.

The valuation officer submitted a valuation giving a net annual value of £677 (rateable value £542) for land covered with water and £288 for land not so covered, making a total net annual value of £965. Apart from the actual valuation of the hereditament in question his calculation proceeded on substantially the same lines as that of the board, except that in arriving at his capital figure for the entire undertaking he made no allowance for the increased cost value of buildings and other structures since 1939, so that his figure of capital value came out at £51,392,778 instead of £103,042,380, and the percentage resulting from the application of the cumulo value to his capital value was 3·32 instead of 1·656. His valuation of the hereditament in question was arrived at by taking £50 per acre for the land, adding the estimated 1939 cost value of buildings and other structures, and allowing for the special fitness of the hereditament generally a sum of £10,800, arrived at by what appears to be the somewhat arbitrary method of taking "a capital figure of £35 a yard for the first 360 yards "of channel instead of an ordinary figure of £5 a yard." The case stated thus summarizes his views on the subject of special fitness: "The land was regarded as being fit for its purpose but "no fitter than almost all the other land of the undertakings, the "intake would be useless without the channels behind it, the "whole hereditament in Hertford would be worthless without the "other 24 miles of New River, the whole of the New River would "be worthless without the filter beds and reservoirs of Stoke "Newington, and those filter beds and reservoirs would be worth-"less if mains did not lead to the water taps of the consumers."

The tribunal expressed its conclusions as follows [paragraph 19]: "We were of opinion that the question in issue should be "determined in accordance with the principle laid down in "*Great Central Railway Co.* v. *Banbury Union*,[5] that—to quote "Lord Loreburn—'Each section is indispensable to the working "'of the system; and I think the resulting inquiry is, if the "'whole system were to be let at once, though it be in separate "'sections, how much of the rent that a tenant would give for "'the whole is applicable to the particular section which is to "'be assessed?' We were further of opinion that in estimating "the value of the Hertford section of the board's undertaking—"to quote Lord Shaw of Dunfermline in *Metropolitan Water "Board* v. *Chertsey Assessment Committee*[6]—'Land and "'buildings should be taken account of just as they are, to the "'eye of a hypothetical tenant, that is to say, with all their "'advantages, fitnesses, facilities and capacities.'"

[5] [1909] A.C. 78, 86.

[6] [1916] 1 A.C. 337, 357.

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Paragraph 20: "We came to the following conclusions: "(a) The conditional rights, granted under a number of statutes, "to take waters from the Thames and the Lea and exercised by "the board for the purposes of fulfilling their statutory obligations with respect to the supply of water are rights in gross "springing from the statutes and not from the ownership of "lands and they are not rateable subjects. (b) The lands with "the Chadwell Spring and the well stations to which we have "referred are rateable subjects, as also are the various other "lands with the buildings, works, fixed plant, mains, etc., which "enable the board to take, convey, treat and store water and to "distribute it to consumers. (c) the cumulo net annual value "of the whole system of rateable subjects comprised in the "board's undertaking represents, in principle, the rent which "the board, with statutory obligations to fulfil and themselves "owning and possessing the rights in gross to which we have "referred, might reasonably be expected to pay for that system "if they were not the owners. (d) In dealing with the above "mentioned proposals in Hertford and other rating areas there "fell to be ascertained a net annual value for each separately "rateable hereditament to represent the rent which the board "might reasonably be expected to pay for it, subject to a "condition that the total of all such net annual values would not "exceed, or be less than, the cumulo. (e) The assessment of "the hereditament in Hertford must not include the value of "the board's statutory right to take water from the River Lea, "nor may the actual user of the land or works for purposes "authorized by statute be taken into account in arriving thereat, "but, in our opinion, there should be taken into account (by "way of enhancement of parochial rental values) the inherent "advantage and fitness in the Hertford intake and channel "which, in conjunction with the New River throughout its length, "enables the board to bring to practical account a potentiality, "due to altitude, of the waters of the River Lea at Hertford and "so to achieve a saving, compared with water from other intakes, "of 60 feet of pumping height. (f) It is not practicable to "ascertain a net annual value for the hereditament in Hertford "truly relative to the agreed rental value of the whole undertaking purely by a process of estimating and comparing "respective capital values."

Paragraph 21: "Bearing in mind the agreed amount of the "net annual value of the undertaking in cumulo and giving effect "to our view that the value of the hereditament at Hertford is "enhanced by its fitness for assisting the board to achieve the "saving in pumping height at Stoke Newington to which we have "referred, we decided to place a net annual value of £1,200 with "a rateable value of £960 upon the land covered with water and "a net annual value (and rateable value) of £300 upon land not "so covered. To this extent we allowed the corporation's "appeal. The question for the decision of the Court of Appeal

" is whether in so deciding we came to a correct determination " in point of law." These conclusions are claimed by the board and the valuation officer to be erroneous in law in two respects.

First, it is said that the " profits basis " method of assessment being admittedly applicable, the application of this method involves as a matter of law the ascertainment of the aggregate net annual value of all the indirectly productive hereditaments comprised in the undertaking of the board and the allocation to the indirectly productive hereditaments in each rating area of their due proportion of this aggregate sum; for such ascertainment and allocation are indispensable to the attainment of the essential objects of the " profits basis " method, which are to ensure that the aggregate net annual value attributed to all the hereditaments (directly and indirectly productive) comprised in the entire undertaking does not exceed the cumulo value and at the same time that subject to this overriding limitation the hereditaments (directly and indirectly productive) in each rating area are fairly assessed. It is said, further, that the proper, if not the only, way of achieving such ascertainment and allocation, so far as indirectly productive hereditaments are concerned, is (to take the instant case) by estimating the aggregate capital value of all the indirectly productive hereditaments in the entire undertaking, applying to that capital value an appropriate percentage which, it is claimed, should be the same as the percentage of the total capital value of the undertaking represented by the cumulo value, and attributing to the indirectly productive hereditament in question a net annual value equal to that percentage of its capital value. It is said that the tribunal in their conclusions did not follow this procedure, and that in failing to do so they committed an error in law.

Secondly, it is contended that the tribunal erred in law in regarding the altitude of the hereditament as a factor enhancing its net annual value, or, at all events, in taking such altitude into account as enhancing such net annual value by reason of the actual use made of the hereditament by the board, that being, in the submission of the appellants, the effect of their conclusions on this point.

As to the first objection, it must be borne in mind that the " profits basis " has no statutory authority, and sets up no new standard of rateable value, the one and only standard (so far as is here material) being the rent at which the hereditament might reasonably be expected to let from year to year on the terms stated in section 22 (1) (*b*) of the Act of 1925. The " profits " basis " is no more than an aid to the ascertainment of that rent in cases of a particular class. It lays down no inflexible code; the manner of applying its general principles no doubt admits of variation to suit the peculiarities of individual cases, and no doubt there may be cases in which there are special circumstances sufficing to justify its total exclusion. Nevertheless, the " profits " basis " has behind it the sanction of long practice and of

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judicial approval over many years, and at the present time it may, I think, be said that as a matter of law it is prima facie the right method to apply in a case of this kind, the onus of showing special circumstances justifying a departure from it being upon those who advocate such departure. See *Kingston Union* v. *Metropolitan Water Board*,[7] and in particular the speech of Lord Cave L.C.[8]: "My Lords, it is obvious that, in view of "this long practice favourable to the profits basis, those who "contend for the application of a different rule undertake a "difficult task"; and that of Lord Buckmaster[9]: "It does "not follow that it has ever been laid down that such method "is exclusive and must be of universal application. No such "principle has, in my opinion, resulted from the decisions, but "what does result is that a company undertaking the business "of supplying water should prima facie be assessed upon this "well-known plan, and it would lead to confusion and endless "multiplication of difficulty if this were not done, but as regards "a company which, either by reason of its special and peculiar "statutory restrictions or by reason of any other fact, cannot "be regarded in the same light as that of an ordinary water "company, it is open to consider whether other methods of "valuation may not properly be adopted. The special facts, "however, on which any such alternative method is adopted "should be found in the special case stated by quarter sessions, "in order that it may be considered whether they are adequate to "entitle a deviation from a well-recognised rule"; and[10]: "It "has been established by more than one authority, that not-"withstanding such a fact the method for which the respondents "contend can and should be applied, and if the quarter sessions "intend to decide otherwise the decision would be wrong. It "is at least open to argument that existing circumstances are "such as to render the ordinary method of rating inapplicable, but "such circumstances must be set out in a special case and made "the subject of substantive argument before the courts."

As I have said, it is not disputed in this case that the "profits "basis" should be applied, and it appears from paragraphs 19 and 20 of the case stated that the tribunal regarded it as applicable. But if the "profits basis" is to be applied it follows that the net annual values attributed to all the hereditaments (directly or indirectly productive) must not exceed the cumulo value, and it follows further that to achieve this end consistently with a fair apportionment of the cumulo value amongst the hereditaments in the several rating areas, and, in particular, with the attribution of a fair proportion of it to the indirectly productive hereditament here in question, an aggregate net annual value must be placed upon all the indirectly productive hereditaments in the undertaking, and a fair proportion of that net annual value

[7] [1926] A.C. 331.
[8] Ibid. 340.
[9] Ibid. 352.
[10] Ibid. 353.

must be attributed to this hereditament. There may be other ways of doing this, but the obvious way, and I should have thought prima facie the right way, is to estimate the aggregate capital value of all the indirectly productive hereditaments, compute the appropriate percentage thereon in the way contended for by the appellants, and take that percentage of the capital value of this hereditament as constituting its net annual value. While saying in paragraph 20 (d) of the case that "In dealing "with . . . proposals in Hertford and other rating areas there fell "to be ascertained a net annual value for each separately rate-"able hereditament . . . subject to a condition that the total "of all such net annual values would not exceed or be less than "the cumulo," and again in paragraph 21 that they have "borne "in mind the agreed amount of the net annual value of the "undertaking in cumulo," both of which statements are wholly consistent with the adoption of the procedure above described, the tribunal, as I understand their conclusions, have in the end not adopted it, and have given no reason for not doing so beyond the bare statement in paragraph 20 (f) of the case stated that "It is not practicable to ascertain a net annual value for the "hereditament in Hertford truly relative to the rental value of "the whole undertaking purely by a process of estimating and "comparing respective capital values."

I do not follow this. Obviously, if an annual value can be placed upon the hereditament in question with all its "advan-"tages, fitnesses, facilities and capacities" there can be no impossibilty in placing upon it a capital value duly reflecting the benefit of all such special features. If what is meant is that no capital value which could reasonably be placed on this hereditament would produce an adequate net annual value for it, on the application to such capital value (in common with the capital values of all the other indirectly productive hereditaments) of the appropriate percentage, then this seems to me to involve a departure from the normal treatment of indirectly productive hereditaments on the "profits basis" of assessment, without any findings of fact to justify such departure; and I think this does amount to an error in law. The conclusion of the tribunal on this point invites the inference that, notwithstanding their very proper statement in paragraph 20 (c) of the case stated to the effect that the actual user of the hereditament by the board for purposes authorized by statute should not be taken into account, they have in fact made some addition to the annual value of the hereditament which is not attributable to the hereditament itself but is attributable to the specially advantageous use in fact made by the board of this hereditament in conjunction with the other parts of its undertaking, by reason of the altitude of the intake from the River Lea and the consequent saving in pumping costs in respect of water derived from that source. This would be clearly wrong, as appears from *Metropolitan Water Board* v.

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*Chertsey Assessment Committee* [11]; but the inference that the tribunal may in the end have done it is supported by the latter part of paragraph 20 (e) of the case stated.

I have to some extent anticipated consideration of the second objection in dealing with the first. The question how far, if at all, the altitude of the hereditament should be taken into account in ascertaining its value must be answered in accordance with the principles stated by the House of Lords in the case just cited of *Metropolitan Water Board* v. *Chertsey Assessment Committee*.[11] In reading the speeches in that case it must be borne in mind that the price actually paid for the land there in question, and the amount actually expended in the erection of buildings upon it, were proved, and that their Lordships' observations were in part directed to the question (which they answered in the affirmative) whether such price and cost did not automatically include all elements of special fitness proper to be taken into account, so that all that remained to be done was to apply the appropriate percentage to those figures. Here the actual figures of price and cost are not available, so that a proper estimate of the value of the hereditament with all its "advantages, fitnesses, "facilities and capacities" (to quote again Lord Shaw of Dunfermline's phrase in *Metropolitan Water Board* v. *Chertsey Assessment Committee* [12]) must be made de novo.

Nevertheless, much of what was said by their Lordships in the *Chertsey* case [12] is, I think, directly in point. Lord Loreburn said [13]: "When these parties accepted cost price of some years "ago as the basis, they might reserve a right to say that the land "had become saleable for more money now by reason of a rise in "prices or by reason of minerals having been found on it, if "such had been the case, or of something else inherent in the "land itself. But how could they say that something should be "added either to the capital value or the annual value by reason "of such things as its proximity to the river or its special fitness "for some industrial purpose? All this had been included in "the cost price. Or why should anything be added 'in respect "'of the user made of the intake,' a phrase of which I do not "grasp the meaning, beyond seeing clearly that this is not a "rateable subject at all? Or how can it be said that anything "should be added because the person who bought the land or who "now owns it has a statutory right, personal to himself, of using "it in a particular way, and drawing water through it from the "Thames? For that does not make the land itself more value-"able. It only makes the owner or occupier of it more able to "make profits. You might as well say that a piece of land is "more valuable because the tenant of it has a valuable patent "which he works on the land."

Lord Atkinson after referring to a number of authorities, and in particular citing with approval *Reg.* v. *Mile End Old Town*

[11] [1916] 1 A.C. 337.
[12] [1916] 1 A.C. 337, 357.
[13] Ibid. 346.

*Overseers* [14] and *Reg.* v. *West Middlesex Waterworks*,[15] said [16]: "The contention of the respondents is that it is not merely the "adaptability of the land for the purposes to which the appellants "or their predecessors were empowered by statute to devote it "which is to be taken into account, but the actual use of it when "acquired and devoted to that purpose, almost as if their "statutory powers, when put in action, were a rateable hereditament. The value of the user of the lands for the purpose "authorized might be enormous. It might be estimated by the "profits made by the sale of the water taken into their reservoirs "and distributed in altogether different taxable areas. And it "would appear to me that the struggle of the respondents in the "present case is, in fact, a struggle to get these works valued to "some extent on the basis of receipts or profits made in a parish "or parishes different from that in which the works to be valued "are situated. It is urged on behalf of the respondents that the "decision of the Court of Appeal in the case of *New River Co.* v. "*Hertford Union* [17] is an authority in support of their contention, "and much time was spent in the minute criticism of the "judgment delivered by the Master of the Rolls in that case. "If this be so, the decision is entirely out of harmony with a "current of authority extending from the year 1847 down to the "year 1914, and as the case is not a binding authority on this "House, I would for myself say unhesitatingly that I decline to "follow it; but it is perfectly plain to me that, correctly "understood, the case is in entire harmony with the weighty "authorities which preceded it, and gives no support whatever "to the respondents' contention. No doubt, in the language "employed by the learned Lords Justices, the distinction between "the actual use and fitness for that use is not steadily kept in "view, but the conclusion to which the reasoning of the judgment "of the then Master of the Rolls leads up is succinctly stated by "him at the end of his judgment in these words: 'I think the "'standard of structural value is not the true one to apply to "'such a case. There is an added element of value in this case "'by reason of the special fitness of the land for a particular "'profitable purpose.' That statement of the law is entirely "consistent with the earlier authorities, and it is clear, I think, "that the learned Master of the Rolls never intended to cover by "the words 'special fitness' the actual user of the land or works "for the authorized purposes."

Lord Atkinson further said [18] (after referring to *Talargoch Mining Co.* v. *St. Asaph Union* [19]): "This is a case upon which "the Master of the Rolls based his judgment. It is a clear and "emphatic authority that it is the adaptability, or special fitness, "of a hereditament for the purpose to which it is to be put, and

[14] 10 Q.B. 208.
[15] (1859) 1 E. & E. 716.
[16] [1916] 1 A.C. 337, 350.
[17] [1902] 2 K.B. 597; 18 T.L.R. 780.
[18] [1916] 1 A.C. 337, 353.
[19] (1868) L.R. 3 Q.B. 478.

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" not its actual user for that purpose, that is to be taken into " account as enhancing its value. The *Hertford* case,[20] therefore, " so far from being an authority in favour of the respondents' " contention, is, like every other case which has been cited, in " truth and fact a direct authority against it. In my opinion the " contention is hopelessly unsound."

Lord Parker said[21]: " My Lords, great stress was laid by the " respondents' counsel on the *Hertford* case,[22] which they " maintained was an authority to the effect that in applying " the rule something must be added to ' value as land ' and " ' structural value.' I confess I have been unable to follow the " reasoning of the learned judges who decided the *Hertford* case,[22] " but if and so far as it supports the proposition for which it is " cited I cannot think it is good law. I am inclined to think that " it is based on the same confusion of thought to which I have " already referred. My Lords, the order of the Divisional Court, " approved by the Court of Appeal, in this case is open to the " same criticism. It expresses an opinion that in assessing the " rateable value of the hereditaments in question there is, in " addition to structural value and value as land, an element of " value to be taken into consideration by reason of, inter alia, its " proximity to the river and its special fitness for the purposes " therein mentioned. If this only means that in valuing a " hereditament you must take into account its position and its " fitness or adaptability for all purposes for which it can be used, " including that for which it is used, it is obviously correct, but " taken in connexion with this case its meaning really is that in " applying the empirical rule you have to add something to the " usual percentages on the cost of the land and of the structure, " which, for the reasons I have stated, appears to me to be " wrong. My Lords, the order of the Divisional Court refers " also to an additional element of value by reason of the ' user ' " made of the intake and the statutory right of the appellants to " take water from the River Thames by means thereof. In these " respects also the order is, in my opinion, wrong. It is true " that in the *Hertford* case[22] Lord Collins M.R. mentions the " ' user ' of the hereditament in question as an element of value, " but it appears that he employed this expression as meaning " ' fitness for the purpose for which the hereditament was " ' actually used.' In this sense the ' user ' can legitimately be " taken into account as an element of value, but the fact that " any particular use is made of a hereditament is not otherwise " material to its value. Again, the right of the appellants to take " water from the River Thames being a right in gross and not " appurtenant to the land, or passing with the land to any owner " or occupier thereof, cannot enhance the value of the land. " I do not think that the *Hertford* case,[22] if it decides otherwise,

[20] [1902] 2 K.B. 597.
[21] [1916] 1 A.C. 337, 362.
[22] [1902] 2 K.B. 597.

"can stand. So far as any statutory power of the appellants is "relevant at all, it has already been taken into account in "treating the appellants with their statutory powers as a possible "tenant of the hereditament in question and proceeding to apply "the rule on this footing. Moreover, even if either of these "points were proper to be taken into account as a matter of "valuation, this would be no reason for treating them as "elements the value of which ought to be added when the annual "value had been ascertained by an application of the rule."

Applying these observations to the present case, I think that it follows that, in estimating the capital value of the hereditament by reference to which the hypothetical rent is to be calculated, it is right to take into account all such characteristics inherent in the hereditament itself as make it specially fit for the purpose for which it is actually used by the board, that being the purpose for which the board as hypothetical purchaser or tenant would presumably be seeking to buy or rent it. That purpose being the taking of water from the River Lea and passing it into the New River, the proximity of the hereditament to the River Lea and the New River and the presence upon it of natural channels facilitating the passing of water from the one to the other are obviously characteristics which make it specially fit for the purpose in view. The relevance of altitude to the special fitness of the hereditament as such is less obvious. Altitude absolutely considered is of little materiality; it is only of importance when regarded in relation to the lay-out and levels of other parts of the board's works. But (as appears from the *Chertsey* case [23]) the actual value to the board of the use to which the hereditament is actually put must not be taken into account. It is thus not legitimate to attribute (as the corporation in effect claimed should be done) a special value to the hereditament on account of the altitude of the intake, measured by reference to the pumping costs saved by the board by passing the water received through the intake into the New River, and along it by gravity to the filter beds at Stoke Newington, whence it can be distributed (still by gravity) to the consumers in certain relatively low-lying parts of the board's area. The amount of the water in fact received by the board through the intake and what is in fact done with it by the board after it passes from the hereditament into the New River are alike circumstances irrelevant to the value of the hereditament for the present purpose. They are in no sense elements of special fitness inherent in the hereditament itself, any more than the advantage the board in fact takes of the relative altitude of the intake, the Stoke Newington filter beds and the premises of the consumers supplied by the latter.

Accordingly, I am of opinion that the altitude of the hereditament is only relevant to the extent that, considered as one of the characteristics of the hereditament in point of situation, it makes the hereditament better suited to the board's purpose of taking

[23] [1916] 1 A.C. 337.

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water from the River Lea and passing it into the New River, in the general sense that it is more advantageous to a water undertaking to take water in their system at a high rather than a low level. In the result, therefore, I should describe the altitude of the hereditament as in effect relevant only in the sense that it narrows the range of hereditaments on the River Lea from which the board, seeking hereditaments on the River Lea for the purpose in view, would be likely to make its selection, and by narrowing the range increases to some extent the price which the hypothetical vendor would be likely to require and which the board might reasonably be prepared to pay. It would be wrong, in my view, to measure this increase by reference to the loss the board would sustain if deprived of the advantageous use it in fact makes of the water received through the intake by reason of the layout and relative levels of other parts of its system.

Mr. Williams said that he was in this court bound to admit that (as mentioned by Lord Collins M.R. in *New River Co.* v. *Hertford Union* [24]) the point at which the board takes water from the River Lea is fixed by statute, nor (I think) did he, or could he in this court, dissent from the observation of the Master of the Rolls on the same page of the report just cited that this point "is presumably the point best adapted to their needs." That observation seems to me adequately to cover every element of special fitness inherent in the hereditament in point of situation, including, for what it is worth, the element of altitude.

The tribunal have not made it clear to what extent they have taken altitude into account, but in the final paragraph of the case they say they have given effect to their view that the value of the hereditament "is enhanced by its fitness for assisting the "board to achieve the saving in pumping height to which we "have referred." This seems to me to indicate that the tribunal have taken into account the advantageous use in fact made by the board of the altitude of the intake in conjunction with the layout and relative levels of other parts of their works, and for the reasons I have endeavoured to state I think that this involves an error in law.

Accordingly, I would remit the case to the tribunal with directions: (i) unless they are of opinion that there are special circumstances justifying a different course, to ascertain the net annual value of the hereditament in accordance with the procedure indicated in this judgment; (ii) if they are of such opinion to find and state the facts constituting the special circumstances on which their opinion is based, and to indicate the procedure they have adopted in ascertaining the net annual value of the hereditament; and (iii) to make such revision in their valuation as they find necessary having regard to the above directions and to the observations contained in this judgment as to the extent

[24] [1902] 2 K.B. 597, 608.

to which the altitude of the hereditament may properly be taken into account.

Given a correct application of principles, the figures are, of course, entirely a matter for the tribunal. So is the percentage to be applied to capital value, though as to this latter point the parties seem to be agreed as to the way in which the percentage should be arrived at, and, as I have said above, that seems to me to be prima facie a proper way of arriving at it.

*Appeal allowed. Case remitted.*
*Costs of the Metropolitan Water Board in the Court of Appeal to be paid by the Borough of Hertford. No order as to costs of valuation officer. Costs of first and further hearing before tribunal at discretion of tribunal.*
*Leave to appeal to the House of Lords granted.*

Solicitors: *H. R. McDowell; Solicitor for the Board of Inland Revenue; Sharpe, Pritchard & Co. for Longmores, Hertford.*

E. D.

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[QUEEN'S BENCH DIVISION.]

* W. F. MARSHALL LD. *v.* BARNES & FITZPATRICK.

1953
*Feb.* 23;
*Mar.* 27.

Pearson J.

[1950 W. No. 2688.]

*Legal Aid—Costs—Taxation—Country solicitor—Scale of costs allowable — Judgment against assisted defendant — Sum ordered to be paid—Negotiations between solicitors as to method of payment—Whether "incidental" to proceedings—Whether covered by legal aid certificate—Legal Aid and Advice Act,* 1949 (12 & 13 *Geo.* 6, *c.* 51), *s.* 1 (5)—*Legal Aid (General) Regulations,* 1950 (*S.I.* 1950, *No.* 1359), *regs.* 5 (2), 3 (3)—*R.S.C., Ord.* 65, *r.* 27 (29).

The rule of practice that the costs of the attendance of a country solicitor on a trial in London are, as a general rule, to be disallowed and are only to be allowed in exceptional circumstances, is applicable to a taxation as between solicitor and client under Sch. III to the Legal Aid and Advice Act, 1949, of the costs of a legally assisted person, with the qualification that a more generous attitude is to be adopted in deciding whether a particular case is exceptional.

Where a legal aid certificate is granted to a defendant for the purpose of "defending an action . . . and to counterclaim thereunder and to the enforcement of any order made thereon," the latter words refer to the enforcement of an order made in favour of the defendant on any counterclaim set up by him or, to the enforcement of any order made in his favour in respect of costs, and

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cannot be taken as referring to resisting on behalf of the defendant the enforcement of an order made against him.

Negotiations, after judgment, between the solicitors for the plaintiff and the defendant regarding the manner in which a sum awarded to the plaintiff shall be paid, are not steps "incidental to "any proceedings" within the meaning of section 1 (5) of the Legal Aid and Advice Act, 1949, and costs incurred in regard to such negotiations are not covered by the legal aid certificate.

Summons (adjourned into court).

In an action tried in the King's Bench Division of the High Court of Justice judgment was given on June 21, 1951, for the plaintiff for the sum of £100 and also on the counterclaim by the defendants, with costs on the claim and counterclaim up to January 19, 1951, on which date a legal aid certificate was granted to the defendants. An order was made for the taxation of the defendants' costs as between solicitor and client in accordance with Sch. III to the Legal Aid and Advice Act, 1949. On the taxation of the costs, two distinct sets of items of costs were dealt with by the taxing master. The first set of items related to the costs of the attendance of the country solicitor of the defendants in London for the purposes of the trial, and the second to the making and carrying out of arrangements for the payment of instalments by each of the defendants on account of the judgment debt, including costs. The disputed items were all disallowed by the taxing master, and a summons for a review of the taxation was taken out by the defendants, and, as the questions raised appeared to involve questions of principle which might be of general application, the summons was adjourned into court. The nature of the objections by the defendants to the disallowance by the taxing master of the disputed items, and the reasons for his decision in regard to them, are set out in the judgment.

*Stuart Shields* for the defendants.

*Colin Duncan*, as amicus curiae, representing the legal aid fund.

In addition to those referred to in the judgment, the following cases were cited in the arguments: *In re Dixon, Tousey* v. *Sheffield* [1]; *Wallis* v. *Wallis* [2]; *In re Foster, ex parte Dickens* [3]; *Reed* v. *Gray*.[4]

*Cur. adv. vult.*

March 27. Pearson J., after stating the nature of the questions raised by the summons, continued: There are two quite distinct sets of items of costs to be considered. The first set of items relates to the attendance of the country solicitor for the purposes of the trial in London. The first item is: "1951.

[1] [1898] 2 Ch. 443; 14 T.L.R. 536.

[2] [1952] 1 T.L.R. 865; [1952] 1 All E.R. 915; [1952] W.N. 189.

[3] (1878) 8 Ch.D. 598.

[4] [1952] Ch. 337; [1952] 1 T.L.R. 114; [1952] 1 All E.R. 241.

"June 14. Attending Royal Courts of Justice, London, with "counsel when case not reached." The amount claimed in the bill of costs is £3 3s. 0d., and the amount allowed is 10s. 0d. The reasons for the objections by the defendants are as follows: "(i) The case was in the list for hearing at 10.30 a.m. on this "date and it was necessary for the defendants' solicitor to travel "from Horley to be at court with counsel at that time. This "case was not reached, and about 3 p.m. the parties were "released for the day. (ii) The sum of 10s. 0d. is totally "inadequate for the attendance of a principal of a firm of "solicitors at court for the period mentioned above. (iii) This "is a permitted item which should be allowed upon a taxation "on a solicitor and client basis."

The remaining items of this first set are for "Paid travelling "expenses from Horley" on June 14 and on each day of the trial. For each day the amount claimed in the bill of costs is £1 1s. 0d. and nothing is allowed. The reasons for objections in relation to each of these items are as follows: "(i) It is sub- "mitted that this is a proper charge for expenses of the defen- "dants' solicitor to attend hearing in London. (ii) This is a "permitted item which should be allowed upon a taxation on a "solicitor and client basis."

The taxing master's answers to the defendants' objections relating to the first set of items are as follows: "1. There was "in my view no necessity for the country solicitor to attend "court. I have considered the allowance which should be made "and see no reason to increase the sum of 10s. 0d. provided by "item 170 of Appendix N to the Rules of the Supreme Court, "which apply as well between solicitor and client as between "party and party. 2 to 7 (inclusive). These costs are taxed in "accordance with the third schedule to the Legal Aid and Advice "Act, 1949, as between solicitor and client out of a common "fund. The attendance of a country solicitor at the trial will "only be allowed under very special circumstances (see Master's "Practice Note No. 15 (1952), Annual Practice, p. 2833). While "this applies in its strictest sense as between party and party it "would seem right according to the dictum of Pearson J. in *In "re Storer*[1] that the taxing master should satisfy himself that "the attendance of the country solicitor was necessary. I have "carefully considered the facts of this case and allowed, as "between solicitor and client, an extra conference with counsel "shortly before trial which the clients attended. In my view "the presence of the country solicitor at the trial was not neces- "sary. These costs have been incurred through over-caution and "could only be allowed as between solicitor and own client "(Ord. 65, r. 27 (29))."

The reasons given in the taxing master's answers were criticized in two respects: (1) It was pointed out that the

[1] (1884) 26 Ch.D. 189.

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judgment of Pearson J. in *In re Storer* [1] does not contain any dictum expressly to the effect that the taxing master should satisfy himself that the attendance of the country solicitor was necessary. The judgment, however, does tend in that direction, and the word "necessary" is the word used in another case, namely, *The Soto*.[2] (2) It was pointed out that Ord. 65, r. 27 (29), should have been applied in its entirety, and it should have been considered not only whether the expense of the attendance of the country solicitor was "necessary" but also whether it was "proper."

To ascertain whether there was any error in the taxing master's decision on the objections relating to these items, it is necessary to set out the most relevant provisions and refer to some of the decided cases. Paragraph 4 (1) of the Third Schedule to the Legal Aid and Advice Act, 1949, provides, so far as material, "... costs shall be taxed for the purposes of this "schedule according to the ordinary rules applicable on a taxation "as between solicitor and client where the costs are to be paid "out of a common fund in which the client and others are "interested."

The meaning and effect of this provision were considered, and the relevant authorities were reviewed, by Havers J. in *Gibbs* v. *Gibbs*.[3] In that case the decree nisi contained a direction that the costs of the petitioner be taxed as between solicitor and client in accordance with the provisions of the third schedule to the Act. Havers J. said [4]: "The question, therefore, which I "have to decide is the principle which the registrar ought to "adopt in taxing a solicitor's bill of costs, having regard to "Ord. 65, r. 27 (29) and the third schedule to the Legal Aid "and Advice Act, 1949, bearing in mind the various authorities "which I have already cited. In my view the principle which "the taxing master ought to adopt is as follows: (1) Under the "order for taxation it is in my view the duty of the taxing "master to adopt as his normal standard the direction in Ord. 65, "r. 27 (29). (2) That at the same time he should make more "generous allowances than he would on a taxation as between "party and party. In making more generous allowances the "taxing master, in my judgment, is permitted not only to allow "items which can be properly included in a party and party "taxation at a higher figure but also to allow additional items "which would not be allowed on a taxation as between party and "party. The taxing master has, of course, a very wide discretion. "(3) The order, in my judgment, cannot be construed as an "order for taxation as between solicitor and own client." That passage under heads (1) and (2) was cited with approval by Birkett L.J. in *Lyon* v. *Lyon*.[5]

[1] (1884) 26 Ch.D. 189.
[2] [1893] P. 73, 75, 76, 78.
[3] [1952] P. 332; [1952] 1 T.L.R. 1143; [1952] 1 All E.R. 942.
[4] [1952] P. 332, 363.
[5] [1953] P. 1, 10; [1952] 2 T.L.R. 775; [1952] 2 All E.R. 831.

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Order 65, r. 27 (29), provides: "On every taxation the taxing "master shall allow all such costs, charges and expenses, as shall "appear to him to have been necessary or proper for the attain- "ment of justice or for the defending the rights of any party, "but save as against the party who incurred the same no costs "shall be allowed which appear to the taxing master to have "been incurred or increased through over-caution, negligence or "mistake or by payment of special fees to counsel or special "charges or expenses to witnesses or other persons, or by other "unusual expenses." The present form of this sub-rule was introduced by amendment in January, 1902 (see *McIver & Co. Ld.* v. *Tate Steamers Ld.*[6]), and, therefore, any principles laid down in previously decided cases should be regarded with caution unless confirmed in cases decided after that amendment was made.

The proper construction of the sub-rule has been explained in a passage, with which I respectfully agree, in the judgment of Roxburgh J. in *Reed* v. *Gray*,[7] where he said: ". . . the proper "test which the taxing master ought to have applied to that "item was sub-rule (29). He ought, first of all, to have con- "sidered whether it was necessary or proper, and, if he arrived "at the conclusion that it was neither necessary nor proper, "then, of course, he was right in disallowing it and that would "have been an end of the matter. But if he came to the con- "clusion that it was proper, then he had to consider whether it "was a charge excluded by the latter part of the rule and, if he "came to the conclusion that it was not, then he ought to have "allowed something and I say not what."

The fees set out in Appendix N to the Rules of the Supreme Court are referred to in rules 8, 9 and 10 of Ord. 65. The taxing master may, in certain circumstances, allow fees on the higher scale set out in Appendix N, and has a further discretion under sub-rule (29) of rule 27 to allow higher fees than those prescribed by Appendix N: *McIver & Co. Ld.* v. *Tate Steamers Ld.*[8] and *In re Ermen, Tatham* v. *Ermen.*[9]

The practice notes of the taxing masters made under Ord. 65, r. 27 (37), are set out in the Annual Practice, 1952, at p. 2831 onwards. On page 2833, in note 15, it is stated that the attendance "of country solicitor at trial or on taxation will only be "allowed under very special circumstances, and in that case no "allowance whatever will be made for the London agent's "attendance." That note can be taken as defining the practice which as a general rule will be followed by the masters on taxations (*In re Ermen, Tatham* v. *Ermen*[9]), and it is also supported by decided cases, one of which is after the amendment of Ord. 65, r. 27 (29), in the year 1902.

[6] [1902] 2 K.B. 184, 187; 18 T.L.R. 653.

[7] [1952] Ch. 337, 353; [1952] 1 T.L.R. 114; [1952] 1 All E.R. 241.

[8] [1902] 2 K.B. 184; 18 T.L.R. 653.

[9] [1903] 2 Ch. 156.

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In *The Soto* [10] Gorell Barnes J., after referring to previous cases, said: "The result of these cases appears to me to be, that "the allowance for the attendance of the country solicitor at the "hearing in London is within the discretion of the taxing officer, "and that, although as a general rule no allowance will be made, "yet, such an allowance may be made in exceptional cases, "where it is necessary that the solicitor who has had the conduct "of the case from the commencement, and is acquainted with all "the facts, should be present at the trial." In *Perry & Co. Ld.* v. *T. Hessin & Co.*[11] Eve J. said: "The master had to deal with "the objection as it stands, and he begins his answer by stating "the general rule quite correctly: 'It is only in very exceptional "'cases that the country solicitor is allowed to attend the trial.'"

In my judgment, the principle or rule of practice that the costs of the attendance of a country solicitor on a trial in London are as a general rule to be disallowed and are only to be allowed in exceptional cases, is applicable on a taxation under Sch. III to the Act of 1949, with the qualification that a more generous attitude is to be adopted in deciding whether the case is exceptional. In the present case the objections do not state or suggest any exceptional features whatsoever. Therefore, the general rule governs the situation, and the costs in question were rightly disallowed by the taxing master and there were no materials before him to justify the allowance of those costs. There is the further point that the taxing master found that the costs were incurred through over-caution. As no exceptional features were shown, that finding, in my judgment, cannot be eliminated and is in itself a sufficient basis for disallowance.

The second set of disputed items relates to the making and carrying out of arrangements for the payment of instalments by each of the defendants on account of the judgment debt, including costs. The first of these items is dated nearly three weeks, and the last of them nearly four months, after the date of the judgment in the action. As the judgment debt was £100 and costs, and each of the defendants agreed to pay only £2 per month, and their solicitors were, after the agreement had been made, collecting the money from the defendants and forwarding it to the plaintiffs' solicitors, the incurring of such costs might have continued for several years.

The first of these items is: "1951. July 11. Attending "defendants as to the method of payment of the judgment debt "and costs. They agreed to consider matter." The amount claimed in the bill of costs is 6s. 8d. and nothing is allowed. The reasons for objections are as follows: "(i) After the hearing "of this case the question of payment by the defendants of "the judgment debt and costs was discussed at court with the "plaintiffs' solicitors. It was then agreed that the defendants "would consider their position with a view to making an offer.

[10] [1893] P. 73, 75, 76.

[11] (1913) 30 R.P.C. 193, 199.

"The defendants were by this time about to dissolve this partnership. (ii) It was therefore necessary to see the defendants to obtain their instructions upon this aspect of the case. (iii) This is a proper and permitted item which should be allowed on a solicitor and client taxation. (iv) It is submitted that this item is covered by the legal aid certificates granted by the Law Society and it was necessary to do this work for the proper conduct of the matter. (v) At this time it was most essential to the defendants to have the assistance of a solicitor to deal with the payment of the judgment debt and costs which had been awarded against them."

The other items are for letters and attendances for the purposes which I have stated above, and the reasons for objections are the same, with the addition, in relation to the second of the items, of a statement that "By this date" (July 31, 1951) "the plaintiffs' solicitors were pressing for satisfactory arrangements to be made for payment within seven days." All these items are disallowed.

The taxing master's answers to these objections are as follows: "The legal aid certificate was granted for 'defending 'an action. . . .' In my view, unlike a plaintiff's certificate, which normally is to prosecute an action and to enforce any judgment, the solicitor's authority ends when the action has been defended, judgment given, and completed if necessary by the taxation of costs. Costs incurred as in this case in negotiating the method of payment of the judgment debt are not costs of defending the action and are not covered by the legal aid certificate."

The legal aid certificate issued in favour of the defendant Barnes on January 19, 1951, certified that he was entitled, in accordance with the Act and the regulations and scheme made thereunder, to legal aid as defendant in connexion with the following proceedings: "Defending an action for breach of contract now proceeding in the High Court of Justice, King's Bench Division, in an action intituled W. F. Marshall Limited, plaintiffs, and Barnes and Fitzpatrick (a firm) and to counterclaim thereunder, and to the enforcement of any order made thereon." A legal aid certificate was issued on the same day, and with the same wording as set out above, in favour of the defendant Fitzpatrick.

The words "and to the enforcement of any order made thereon," which are not in proper grammatical relation with the preceding words, must, in my view, agreeing with that put forward by Mr. Colin Duncan, be taken by reason of the provisions of the Act and regulations as referring to the enforcement of any order made in favour of the defendants on the counterclaim and to the enforcement of any order made in favour of the defendants in respect of costs, and cannot be taken as referring to resisting on behalf of the defendants the enforcement of an order made against the defendants. So far as is material for

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the present purpose, each of these certificates was for legal aid in connexion with defending the action and prosecuting the counterclaim.

It was contended that the taxing master's answers were open to criticism in two respects. In the first place it was contended that the solicitor's authority does not end "when the action has "been defended, judgment given, and completed if necessary by "the taxation of costs," but continues until the certificate is discharged or revoked, and normally the certificate is not discharged until under regulation 11 (2) (*c*) of the Legal Aid (General) Regulations, 1950 (S.I. 1950, No. 1359), the appropriate area committee are satisfied, after considering any report of the assisted person's solicitor, that the proceedings to which the certificate relates have been disposed of, and they give the discharge. In connexion with this contention, and to show that the authority is not terminated by the giving of judgment in the action, reference was made to section 1 (5) and (7) of the Act and to Ord. 7, r. 2 (1), of the Rules of the Supreme Court, and to *Lady de la Pole* v. *Dick*,[12] *Bagley* v. *Maple & Co. Ld.*,[13] and to Halsbury's Laws of England (Hailsham Edition), vol. 31, pp. 97 and 110. Secondly, it was contended that under section 1 (5) of the Act and the certificates given in this case, the taxing master should have considered not only the question whether the costs claimed were costs of defending the action but also the question whether they were incidental to defending the action.

These contentions are formally correct, but I have to consider whether they are sufficient to invalidate the decision on the facts of this case. Subsections (5) and (7) of section 1 of the Act provide: "(5) Legal aid shall consist of representation, on the "terms provided for by this Part of this Act, by a solicitor and "so far as necessary by counsel (including all such assistance as "is usually given by a solicitor or counsel in the steps preliminary "or incidental to any proceedings or in arriving at or giving effect "to a compromise to avoid or bring to an end any proceedings). ". . . (7) Save as expressly provided by this Part of this Act or "by regulations made thereunder,—(*a*) the fact that the services "of counsel or a solicitor are given by way of legal aid shall not "affect the relationship between or rights of counsel, solicitor "and client or any privilege arising out of such relationship; and "(*b*) the rights conferred by this Part of this Act on a person "receiving legal aid shall not affect the rights or liabilities of "other parties to the proceedings or the principles on which the "discretion of any court or tribunal is normally exercised."

Regulation 5 of the above-mentioned regulations, made under section 12 of the Act, provides by paragraphs (1) and (2): "(1) A certificate may be issued in respect of the whole or a "part of—(*a*) proceedings in a court of first instance; or (*b*) pro- "ceedings in an appellate court. No certificate shall relate to

[12] (1885) 29 Ch.D. 351.

[13] (1911) 27 T.L.R. 284.

"proceedings (other than interlocutory appeals) both in a court "of first instance and in an appellate court. (2) A certificate "shall not relate to more than one action, cause or matter, but "may include proceedings for the enforcement of any such order "or agreement as is referred to in paragraph (3) of regulation 16."

Paragraph (3) of regulation 16 refers to an order or agreement providing for the recovery or preservation of property for the benefit of an assisted person, and to an order or agreement for the payment of costs to an assisted person. It does not refer to any order or agreement for the recovery of property from an assisted person or for the payment of costs by an assisted person.

The extent of the authority of a solicitor acting under the Act must depend not only on the duration, but also on the scope, of his retainer, which is limited by regulation 5, in the case of a certificate for defending an action, to proceedings in the court of first instance. Therefore the provisions of Ord. 7, r. 2 (1), of the Rules of the Supreme Court, under which the authority of a solicitor normally continues "till the final conclusion of the "cause or matter, whether in the High Court or the Court of "Appeal," cannot be relied on as defining the extent of the authority of a solicitor acting under the Act. Equally, the decisions as to the authority of a solicitor retained in an action must be applied subject to the special provisions of the Act and regulations. Also, questions as to the extent of a solicitor's authority may arise in different connexions, and I do not think that it should necessarily be assumed that the extent of his authority for the purpose of being served with documents is in all respects the same as the extent of his authority to incur costs recoverable from the legal aid fund. That is a point which may have to be determined in other cases.

The question here arises under section 1 (5) of the Act, and the proposition on behalf of the defendants must be that the work referred to in the disputed items ought to have been regarded as "incidental" to defending the action. On the facts of this case, to which I have referred above, that seems to me an untenable proposition. The judgment put an end to the action and created a new situation in which the defendants owed a debt to the plaintiffs and had to make and carry out arrangements for paying it. It may be, though I am not expressing any opinion on this point because it does not arise in the present case, that a discussion taking place immediately or very soon after the giving of the judgment and relating to the payment of the judgment debt might be regarded as reasonably incidental to defending the action, on the ground that such assistance is normally given and arises naturally as a pendant to and substantially in association with the assistance given in the action itself. The taxing master has a wide discretion, and the allowance of a charge in respect of such a discussion may or may not be within his discretion. But the work done in the present case was clearly

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dissociated from the work of defending the action and was concerned solely with the new situation in which the defendants were debtors to the plaintiffs, and was therefore not incidental to defending the action.

It was suggested, however, that the natural meaning of the word "incidental" is enlarged by its context in section 1 (5), where the wording is "including all such assistance as is usually "given by solicitor or counsel in the steps preliminary or "incidental to any proceedings or in arriving at or giving effect "to a compromise to avoid or bring to an end any proceedings." The suggestion was that "the steps preliminary or incidental to "any proceedings" are parallel to "arriving at or giving effect "to a compromise to avoid or bring to an end any proceedings," and that, just as giving effect to a compromise includes making and carrying out arrangements for the payment of the sum agreed upon, so steps incidental to the proceedings should be held to include making and carrying out arrangements for the payment of the sum adjudged. This is an attractive contention, but in my view the parallelism is incomplete and the suggested result does not follow. I understand "compromise" to mean an agreement to settle an action or threatened action. It may be an agreement to apply for a consent judgment, and effect is given to it by applying for and obtaining the consent judgment. Or it may be an agreement that the dispute shall be settled on certain terms and that application shall be made for an order that the action be stayed with liberty to apply, and such order is applied for and made: in that case the action merely becomes dormant, and the stay may be removed if the terms are not carried out. Or it may be an agreement to avoid a threatened action, and if the agreement is not carried out the action may still be brought. The parties have not reached finality or fully disposed of the proceedings or intended proceedings when they make their compromise agreement; further steps are required to effectuate the compromise and to give it finality On the other hand, a judgment has finality, fully and effectively terminating the action. I am not seeking to decide what costs may be charged in the case of a compromise, but only to point out the difference of principle between a compromise agreement and a judgment, because that difference invalidates the suggested parallelism. It is natural that in the case of a compromise the chargeable costs should include the costs of giving effect to the compromise agreement as well as the costs of arriving at it. But it does not follow that the costs incidental to defending an action include the costs of subsequent arrangements for payment of the judgment debt.

The provisions of regulation 5 (2), which has been set out above, and of the certificates in this case, expressly including proceedings for the enforcement of any order in favour of the assisted person, tend by implication to exclude arrangements for complying with or postponing the enforcement of any order made against the assisted person.

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There is also to be considered subsection (6) of section 1 of the Act, which provides: "A person shall not be given legal "aid in connexion with any proceedings unless he shows that "he has reasonable grounds for taking, defending or being a "party thereto, and may also be refused legal aid if it appears "unreasonable that he should receive it in the particular circum-"stances of the case." Regulation 3 (3) was made for the purposes of this subsection. In deciding whether it is reasonable that the applicant should receive legal aid in the particular circumstances of the case, the probable costs of the proceedings must be one of the factors to be taken into account by the committee, and such costs would be incalculable if they might include the costs of making and carrying out arrangements for the payment of the judgment debt over a period of months or even years after the date of the judgment.

For the reasons which I have given I affirm the decisions of the taxing master, and the defendants' application fails.

*Application dismissed.*

Solicitors: *Lewis, Holman & Lawrence, for Ross & Son, Horley, Surrey; T. G. Lund (The Law Society).*

P. B. D.

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[QUEEN'S BENCH DIVISION.]

## * BARNES *v.* JARVIS.

1953
*Apr.* 16.

Lord Goddard C.J., Lynskey and Parker JJ.

*Sunday—Observance—Theatre—Sunday performance—Sketches with musical accompaniment—Whether "musical entertainment"—Sunday Entertainments Act,* 1932 (22 & 23 *Geo.* 5, *c.* 51), *ss.* 3, 5.

The performance of sketches by a comedian with a piano accompaniment does not constitute a "musical entertainment" within the meaning of sections 3 and 5 of the Sunday Entertainments Act, 1932.

CASE STATED by Blackpool justices.

The prosecutor, Harry Barnes, preferred two informations against the defendant, Harold Jarvis, the holder of a licence issued to him under section 51 of the Public Health Acts Amendment Act, 1890, for dancing, singing and music in respect of the Hippodrome Theatre, Blackpool, charging the defendant with committing a breach of one of the terms of the licence on Sunday, June 29, and Sunday, July 6, 1952, by permitting the premises to be used for an entertainment other than a musical entertainment

[Reported by MISS C. J. ELLIS, Barrister-at-Law.]

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as provided by section 3 [1] of the Sunday Entertainments Act, 1932, the term "musical entertainment" being defined in section 5 [2] of that Act.

At the hearing of the informations the following facts were proved or admitted: The licence granted to the defendant under section 51 of the Public Health Acts Amendment Act, 1890, in respect of the Hippodrome Theatre, contained a clause which provided: "The licensed premises shall not be used for public "music dancing singing or other public entertainment of the "like kind on Sunday except for musical entertainments as "defined by the Sunday Entertainments Act 1932 from 2.30 p.m. "to 10 p.m."

On June 29 and July 6, 1952, a public entertainment beginning at approximately 6.30 p.m. and finishing at approximately 8.15 p.m. was provided at the Hippodrome Theatre. There were six items on the programme. The final item was by Alfred Read, known professionally as "Al Read." He was introduced to the audience through the microphone system of the theatre, and when he came on to the stage he began by characterizing the manner in which two women would gossip to each other. After about two minutes of that he remarked to the audience that his act was a musical monologue. He was accompanied by a pianist. Alfred Read then gave a caricature of a wife nagging her husband to decorate the back bedroom as his mother-in-law was about to pay them a visit. He then described in dialogue and mime how a decorator made an inspection of the house. He then described two old ladies discussing a visit to Paris. His next sketch was a fairly lengthy one describing a newly married couple and how the husband insisted on going out every night to the "pub." He then imitated two drunken men in a public house trying to invite each other to their respective homes for a night out. He then left the stage and, after applause, returned and gave a short encore. The words used by Alfred Read were spoken, not sung, and were not in rhyme. The programme was substantially the same on both dates. Alfred Read spoke the words in his acts from memory after learning them from a script; on both occasions during his act a piano was being played on the stage by an accomplished pianist. The pianist, before the first performance, was handed a copy of the script from which Alfred Read was to give his performance, and he prepared a musical score which consisted of four bars to accompany the words and of different tunes appropriate to the subject-matter of

[1] Sunday Entertainments Act, 1932, s. 3: "The power of any authority in any area to grant licences "under any enactment for the regulation of places kept or ordinarily "used for public dancing, singing, "music, or other public entertainment "of the like kind, shall include power "to grant such licences in respect "only of musical entertainments on "Sundays, and the power to attach "special conditions in respect of such "entertainments on Sundays."

[2] S. 5: "'Musical entertainment' "means a concert or similar entertainment consisting of the performance "of music, with or without singing "or recitation."

different passages in the script, such as " There is a tavern in the town " to accompany the passage relating to a public house. Alfred Read and the pianist rehearsed for two hours before the first performance, the music being based on the script and having to be co-ordinated with the words of the recitation. The pianist had to adapt his accompaniment to fit in with the words, inflexion of the voice, the pauses and the subject-matter of the recitation, and so provide " atmosphere " for the spoken word in accordance with its context. Two musical numbers were played by the full orchestra as an introduction to the appearance of Alfred Read, and four bars of music were played by them to introduce his main sketch. At the end of each performance Alfred Read sang two songs accompanied by the full orchestra. The music, although not predominating, played an important part in each of the performances. Alfred Read performed mime and gestures throughout his act to illustrate the subject-matter of the themes.

The justices were of the opinion that the acts performed by Alfred Read and the pianist complied with the definition of a musical entertainment contained in section 5 [2] of the Sunday Entertainments Act, 1932, and dismissed both informations.

The prosecutor appealed.

*G. W. Guthrie Jones* for the prosecutor.

*J. M. E. di V. Nahum Q.C.* for the defendant.

LORD GODDARD C.J. referred to the charge and the terms of the licence and continued: The Sunday Entertainments Act, 1932, was an Act, to quote its long title, " To permit and regulate " the opening and use of places on Sundays for certain enter- " tainments and for debates, and for purposes connected with " the matters aforesaid." It was, in fact, an Act to mitigate somewhat the rigours of the old Sunday Observance Act. The marginal note of section 3 of the Act of 1932 is " Provision as to " musical entertainments." [His Lordship read the section and continued:] The first thing to observe is that under section 3 there is a distinction between public dancing, public singing and public entertainments other than music, and obviously, therefore, the intention of the Act was that the music was to be the governing or predominant feature. Then the power to attach special conditions in respect of such entertainments on Sundays is dealt with. [His Lordship read the definition of " musical " entertainment " and continued:] The definition does go on to say " with or without singing or recitation," but it must be a musical entertainment within section 3: it must be a concert or similar entertainment. I quite agree that in applying a definition of this sort there may be cases which are on the line—it may be that there are some cases in which there is a certain difficulty in deciding whether or not a case falls on one side of the line or the other. On the facts found by the justices in this case, however, it seems to the court clear that the performance given

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by Read was nothing but an ordinary music hall variety turn. To call it musical entertainment merely because he has somebody on the stage playing the piano at the same time as when he is on the stage giving one of these comic turns consisting of imitations, dialogues, and representations of two women nagging each other and two old ladies discussing their adventures and things of that sort, is simply to call it something which it is not.

A certain amount of common sense must be applied in construing statutes. The object of the Act has to be considered, and the object of the Act enabling these conditions to be attached, and giving this definition, is clearly to permit public entertainment to be given on Sundays of the nature of what anybody would call a concert. If a music hall artist is sent on the stage to give an entertainment consisting really of patter, then merely because there is somebody at the back of the stage playing a piano, or even if there is an orchestra which occasionally stops and goes on when he goes on and plays so softly that his words can be heard above the music, that entertainment cannot by any stretch of imagination be called a musical entertainment in the nature of a concert. In my opinion, the only conclusion to which the justices could have come on the facts if they had properly directed themselves as to the meaning of section 3 and the definition in section 5, was that this was not a concert or a similar entertainment insofar as, at any rate, this one particular turn was concerned.

The case must go back to the justices with a direction to convict.

LYNSKEY J. I agree and have nothing to add.

PARKER J. I also agree.

Solicitors: *Gibson & Weldon for Worden & Naylor, Blackpool; Denton, Hall & Burgin for Blackhurst, Parker & Co., Blackpool.*

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[HOUSE OF LORDS.]

H. L. (E.)† 1953 *Feb.* 16. 17, 18, 19; *April* 20.

* INLAND REVENUE COMMISSIONERS . APPELLANTS;

AND

CITY OF LONDON (AS EPPING FOREST CONSERVATORS) . . . . . RESPONDENTS.

*Revenue—Income tax—Charity—Statutory duty—Payment of annual sums to charity to meet expenses—"Annual payments"—Deduction of tax from payments—Epping Forest Act,* 1878 (41 & 42 *Vict. c.* ccxiii), *ss.* 39 (1), 41 (2)—*Income Tax Act,* 1918 (8 & 9 *Geo.* 5, *c.* 40), *Sch. D., Case III, All Schedules Rules, r.* 19.

† *Present*: LORD NORMAND, LORD OAKSEY, LORD MORTON OF HENRYTON, LORD REID and LORD COHEN.

About £250,000 was spent by the City of London between 1871 and 1878 in acquiring rights in Epping Forest to establish it as an open space for the public benefit. The Epping Forest Act, 1878, passed at the instance of the corporation, provided that it should be managed by the corporation as conservators, in which capacity they constituted a separate entity in law, on whom the duty of maintaining it for the public enjoyment was placed. Rents, licence fees, tolls, the sale of wood, fees for the use of a golf course provided the revenue of the conservators. The Act required the corporation to contribute, in such amounts as should be necessary, to the income of a fund to be applied to the expenses of the conservators. A committee established under the Act, consisting of members of the Common Council and the verderers of the forest, exercised all the powers of the conservators. Each year the corporation made a contribution to make good the deficiency on the income of the conservators and that contribution was paid wholly out of profits or gains on which the corporation had paid tax. In making the payment in the year 1948/9 the corporation deducted a sum for income tax. It was admitted that the conservators were a charity.

*Held*, that the contribution was an "annual payment" within rule 1 of the Rules Applicable to Case III of Schedule D, that under rule 19 (1) of the All Schedules Rules the deduction was permissible and that the conservators, as a charity, were entitled to repayment of the sum deducted.

Decision of the Court of Appeal [1952] W.N. 326, affirmed.

APPEAL from the Court of Appeal (Evershed M.R., Birkett and Romer L.JJ.).

This was an appeal by the Commissioners of Inland Revenue from an order of the Court of Appeal dated May 29, 1952, whereby an appeal by the respondents, the City of London Corporation as Conservators of Epping Forest, against an order of Donovan J. dated December 21, 1951, in an appeal by way of case stated from a decision of the Special Commissioners, pursuant to section 149 of the Income Tax Act, 1918, was allowed. The Special Commissioners had allowed the respondents' appeal. Donovan J. reversed their decision but his order was reversed by the Court of Appeal with costs there and below.

The facts are stated in the opinion of Lord Normand.

*Sir Lionel Heald A-G.*, *King Q.C.* and *Sir Reginald Hills* for the Crown.

*Tucker Q.C.*, *Mustoe Q.C.* and *R. R. D. Phillips* for the respondents.

Their Lordships took time for consideration.

April 20. LORD NORMAND. My Lords, the appeal arises out of a claim by the respondents for exemption from income tax for the year 1948–49 under section 37 (1) (*b*) of the Income Tax Act, 1918, and for recovery from the Inland Revenue of the sum of £7,202 15s. 6d., which had been deducted (professedly under rule 19 (1) of the All Schedules Rules) by the Mayor and Commonalty and Citizens of the City of London in paying to the

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respondents a contribution under section 39 (1) of the Epping Forest Act, 1878, for the year ended March 31, 1949, of £16,006 3s. 4d. The Court of Appeal decided in favour of the respondents, reversing a judgment of Donovan J. and reaffirming the determination of the Special Commissioners. Against the decision of the Court of Appeal this appeal is taken by the Commissioners of Inland Revenue.

The substantial question is whether the contribution paid to the respondents is an "annual payment" within the meaning of Case III of Sch. D. Under rule 1 applicable to Case III, income tax extends to "any interest of money . . . , or any annuity, or "other annual payment, whether such payment is payable . . . "either as a charge on any property of the person paying the "same by virtue of any deed or will or otherwise, or as a reser- "vation thereout, or as a personal debt or obligation by virtue "of any contract, or whether the same is received and payable "half-yearly or at any shorter or more distant periods." If the payment of the contribution falls within the words "annual pay- "ment," it follows on the facts of the case that the corporation is entitled under rule 19 (1) of the General Rules, on making the payment, to deduct and retain a sum representing the amount of the tax thereon at the rate in force during the period when the payment was accruing due, and, further, that the Conservators of Epping Forest, the respondents, can recover from the Inland Revenue the amount of the tax deducted. These consequences inevitably follow from these findings, which are now common ground:

(1) that the conservators, the recipients of the sum, are a separate legal persona from the City of London Corporation which pays them, though the members of the two bodies are the same;

(2) that the contribution was paid wholly out of profits or gains on which the corporation had paid income tax; and

(3) that the conservators are a body established for charitable purposes only, and therefore exempt from income tax on "annual "payments" forming part of their income.

In June, 1871, the Court of the Common Council of the Corporation of the City of London met the First Commissioner of Works and offered to abandon certain ancient rights of metage on grain and wares brought into the Port of London and to devote the revenue arising from a fixed duty, which it was proposed should be levied in lieu of metage, to the preservation of Epping Forest for the benefit of the public at large. This offer was voluntary, and it was accepted. In pursuance of this arrangement an Act was passed in 1872 abolishing compulsory metage and creating a fixed due called the "City of London grain duty." This Act also created a fund to be applied to the preservation of open spaces near London. In the meantime an inquiry was proceeding in order to ascertain what illegal enclosures had been made in the previous 20 years. There were legal proceedings for the purpose of staying further illegal enclosures and for the

purpose of obtaining a declaration that all owners and occupiers of lands and tenements within the regard of the Forest were entitled to rights of common pasture and pannage over the whole waste land of the Forest. These legal proceedings, in which the City Corporation took a part, were successful. Thereafter the corporation acquired by voluntary purchase the waste lands of certain manors in the Forest. The next step was the introduction by the Government of the day, by arrangement with the corporation, of a Bill which became the Epping Forest Act, 1878. It should also be mentioned that the corporation's interest in the preservation of open spaces for the benefit of the public was not confined to Epping Forest. That was, however, much the largest of the open spaces which the corporation was anxious to preserve.

The Act of 1878 is entitled "An Act for the Disafforestation "of Epping Forest and the preservation and management of the "uninclosed parts thereof as an open space for the recreation and "enjoyment of the public and for other purposes." It recites with much detail the steps which had led to its enactment. From these recitals I quote the following: "Whereas the Corporation "of London have made great exertions to preserve the Forest as "an open space for the recreation and enjoyment of the public, "and for that purpose they have purchased and hold a large "proportion of the waste lands, and have expended large sums "of money. . . . And whereas the Corporation of London are "desirous of being constituted Conservators of the Forest, and "are willing and able to defray such expenses as are to be borne "by the conservators."

Section 3 of the Act provides that Epping Forest shall be regulated and managed under and in accordance with the Act by the Corporation of the City of London, acting by the Mayor, Aldermen and Commons of the City in Common Council assembled, as the Conservators of Epping Forest. Section 7 requires the conservators at all times to keep the Forest uninclosed and unbuilt on, as an open space for the recreation and enjoyment of the public, and, inter alia, to preserve as far as possible the natural aspect of the Forest, ancient remains within it, and its natural amenities. There are provisions (section 30) providing for the appointment of verderers, and (section 31) of a committee, of which the verderers are ex officio members, with authority to exercise the powers of conservators. The powers and duties of the conservators are set out (section 33) and are designed to give the conservators authority and power to manage the Forest in order, inter alia, to safeguard and improve the Forest as a place of public resort and enjoyment, and they include powers to set apart such parts as they think fit for the use of the inhabitants to play at cricket and other sports, and to lay out cricket grounds and grounds for other sports and to enter into agreements with and to confer special privileges on particular clubs or schools, and powers to set apart and maintain bathing places. The obligation of the Corporation of London to contribute

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is dealt with in section 39. The material provisions of the section are: "(1) The Corporation of London shall from time to time "contribute to the capital and income of a fund, to be called "the Epping Forest Fund, such moneys as shall be necessary "out of the City of London grain duty or from other sources. "(2) The Fund shall consist of—. . . As regards income: . . . "(iv) The annual income arising from the investments of any "money, part of the capital of the Fund. (v) The half-yearly "or other periodical payments in respect of rent-charges. (vi) All "fines, penalties, proceeds of timber-cuttings and loppings, and "other moneys received by the conservators, other than capital "as aforesaid. (vii) The fees and income received for marking "the cattle of the commoners, and in respect of cattle and "animals impounded. (viii) All moneys contributed by the "Corporation of London, or by any person, to the income of "the fund."

It should be explained that the City of London grain duty referred to in section 39 (1) came to an end in 1902 and that the contributions to the Epping Forest Fund have since then been provided out of the City's cash, the income of which consists of the profits from the corporation's estates and markets and certain investments, all of which, in the hands of the corporation, are brought into computation for income tax purposes.

In every year since the Act of 1878 became law the other receipts of the Epping Forest Fund have been insufficient to defray the expenses of the conservators and the corporation has in each year transferred to the fund a sum equal to the deficiency. The burden had been increasing and this fact no doubt moved the corporation for the first time to deduct income tax in the year in question when it made the payment. The Chamberlain of the City of London is the banker of the corporation and he is also treasurer of the Epping Forest Fund. Bills are presented through the Epping Forest Committee and are examined by the accountant auditors, and a cheque or warrant is drawn on the Chamberlain in payment. As regards the wages of the Forest staff, an account is kept by the superintendent of the Forest, which the Epping Forest Committee keeps in funds by means of warrants drawn from time to time on the Chamberlain. The accounts of income and expenditure are gone through monthly, and at the end of the year the amount of the corporation's contribution from the City's cash necessary to make up the deficiency between the income and expenditure of the year is finally determined. Payment is made, in account, by the Chamberlain as banker and he makes the necessary transfer in his books from the City's cash account to the Epping Forest account. In the year 1948–49 the expenses were £22,660 19s. 2d., the receipts (other than the respondents' contribution), £6,654 15s. 10d. The deficiency was £16,006 3s. 4d., which was met by a net payment (that is, a payment after deduction of income tax), in account, of £8,803 7s. 10d. This payment was made on the footing that the respondents were entitled to

recover the tax deducted, amounting to £7,202 15s. 6d. from the appellants.

The Special Commissioners give their reasons and conclusion in the following paragraphs:—"In our opinion, once it is conceded "that the corporation's contributions to the Epping Forest Fund "are properly regarded as payments (in account) to a separate "body of persons (namely the conservators), the proper view of "sections 39 and 41 of the Epping Forest Act, 1878, is, not that "the corporation discharges debts of the conservators, nor that it "pays a mere 'balancing' sum in the nature of a trade receipt "against which must be set expenses, but that it makes contribu-"tions to the income of the conservators, and that, out of their "independent income and these contributions, the conservators "discharge their own debts. In other words, we think a reason-"able interpretation of these sections is that the corporation is "required to supplement the income of the conservators, so as to "ensure that such income, so supplemented, shall be sufficient to "enable the conservators to meet all expenditure on revenue "account incurred in the performance of their statutory duties.

"A sum payable (albeit out of capital) under a will to supple-"ment the income of an individual is itself 'income' (*Brodie's "Trustees* v. *Inland Revenue Commissioners* [1]) and in this respect "we see no difference in principle between this and a sum payable "(out of revenue) under a statute to supplement the income of a "body of persons.

"The question then arises whether this 'income' has the "characteristics of an 'annual payment.' The fact that the "annual amount is not fixed but variable is immaterial. The "sums in question are legally exigible, they have the quality of "recurrence, and, in our opinion are a 'pure income profit,' as "distinct from sums in the nature of trade receipts against which "have to be set the expenses of earning them. We therefore hold "that the contributions are 'annual payments' made by the "corporation to the conservators."

Donovan J. agreed with the Special Commissioners in the proposition that the respondents do not discharge the conservators' debts, but he found that the Special Commissioners' reasoning was fallacious because it assumed that, if a sum is paid by one person to supplement the income of another, the supplement is necessarily "profit income" in the hands of the recipient. He thought that the test was whether, on the facts as a whole, the contribution paid by the respondents was an item of revenue against which expenses must be set to determine whether the conservators had made a profit. He said [2]: "The conservators, "in whose hands it is alleged to be a profit, get the sum only "because they have performed duties which involve them in an "outlay of equivalent amount. If the charitable exemption were "abolished, I think the conservators would be astonished if the

[1] (1933) 17 Tax Cas. 432.

[2] (1951) 30 A.T.C. 402, 410–1.

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" Inland Revenue descended upon them and said ' Never mind " ' about your expenses, the £16,000 is all profit: pay tax on it.' "

The Master of the Rolls, who delivered the judgment of the Court of Appeal, rejected the test of Donovan J. In his view [3] " the vital element . . . is that the enterprise which the conser- " vators manage and conduct is a charitable enterprise to be " regarded in the same way as any other charitable enterprise " conducted with charitable funds by charitable trustees. The " conservators are not carrying on a trade; and in spite of " references in the argument, naturally enough, to ' subsidies ' " and ' balancing figures,' the enterprise which the conservators " conduct is, in our judgment, nothing like a trade. The question, " therefore—What if a profit were made?—seems to us not really " capable of being sensibly asked. For, by the statute, every " penny piece of income must be applied for the purposes (being " charitable purposes) of the Forest and no other purposes, and the " corporation's obligation is by the statute to pay what is required " to provide for the year's expenses and no more. There is, thus, " no real question or possibility of the conservators so conducting " the affairs of the Forest as to result in the production of ' profits " ' or gains ' within the meaning of the Income Tax Acts." Again, the learned Master of the Rolls says [4]: " It is of the essence of " the matter that the conservators are engaged upon a charitable " purpose." And yet again [5]: " It seems to us that the learned " judge treated the operations of the conservators as being of a " quasi-trading character or of a character capable of producing " ' profits or gains,' . . . For the reasons which we have given, " it is upon this matter that we have formed a different view. It " does not seem to us irrelevant (as the judge thought) whether " the conservators could be thought of as carrying on a trade or " not. It is, in our judgment, of the essence of the matter that " they do not do any such thing." In my view these passages make it clear beyond any doubt that the Court of Appeal decided the question, annual payment or not, on the ground that the conservators, being a body constituted for charitable purposes only and bound to apply their whole income to those purposes, was incapable in law of earning profits within the meaning of the Income Tax Acts, with the corollary that their accounts were not such as that " the idea of an annual profit and loss account " in respect of the year's operations was applicable."

My Lords, both in the judgment of Donovan J. and in the judgment of the Court of Appeal, reference was made to the well-known judgment of Scrutton L.J. in *Earl Howe* v. *Inland Revenue Commissioners* [6] and to the judgment of Lord Greene, M.R., in *In re Hanbury*.[7] In the first of these authorities Scrutton L.J. pointed out [8] that if someone agrees to pay his

[3] (1952) 31 A.T.C. 292, 296.
[4] Ibid. 297.
[5] Ibid. 298–9.
[6] [1919] 2 K.B. 336; 35 T.L.R. 461.
[7] (1939) 20 A.T.C. 333.
[8] [1919] 2 K.B. 336; 352.

butcher an annual sum for meat, the whole sum is not profit of the butcher. To find how much of the annual sum is profit, the butcher must deduct the cost of the meat. In his hands the sum paid is a gross receipt, not an annual payment under Case III. In *In re Hanbury*,[9] Lord Greene distinguished two classes of annual payments; one which the Income Tax Acts regard as " pure income profit " of the recipient, which is not diminished by any deduction, and which the payer is entitled to treat as a payment which goes out of his income altogether; and the other, a number of annual payments the very quality and nature of which makes it impossible to treat them as pure income profit of the recipient, the proper way of treating them being to treat them as an element to be taken into account in discovering what the profits of the recipient are.

The judgment of the Court of Appeal, after a timely reminder that the court must construe the Act itself and not a judicial paraphrase of it, expresses the opinion[10] that Donovan J. was misled by the words in Lord Greene's formula, " pure income " *profit*," into placing an undue emphasis upon the word " profit " in its business sense. I do not think that Donovan J. fell into any verbal trap or that his reasoning is vitiated by giving a false emphasis to the word " profit." I respectfully think that he addressed himself to a real and not a verbal distinction, whether the sum received by the respondents was an item of revenue or receipt in their hands against which their expenses have to be set, or whether it was income in their hands. It is not possible, and I think I would have the assent of everyone to this, to state the issue in a short and tidy formula, which shall have regard equally to the character of the payment from the payer's position and from the payee's position. But Lord Greene's formula, which would perhaps lose nothing by the omission of the words " pure profit " states the position, at any rate from the point of view of the payee, in terms which are not misleading, and I see no reason for thinking that the problem was not understood by Donovan J.

The ratio of the decision of the Court of Appeal was, we were told, not among the reasons put forward by the respondents in that court, nor does it appear among the reasons in their case. It was not supported by Mr. Tucker, and I must, with understandable regret, admit that a ratio, which would afford a short and clear-cut solution of our problem, is scarcely in line with the ratio of previous decisions of this House. It is, indeed, much too late to say that a charitable body, every penny of whose income must be applied to its exclusively charitable purposes, is incapable of earning profits or gains. I do not know how to reconcile this with *Brighton College* v. *Marriott*,[11] where the surplus earned by a charitable body in carrying on its trade of

[9] 20 A.T.C. 333, 334–5.
[10] 31 A.T.C. 292, 295.
[11] [1926] A.C. 192; 42 T.L.R. 228.

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education was held to be subject to tax though the surplus was dedicated to the charitable purposes of the college. It is true that, in my opinion, the respondents were not carrying on a trade as defined in section 237 of the Income Tax Act, 1918, that is, a trade, manufacture, adventure or concern in the nature of trade. But the activities they were carrying on are fairly within the category "analogous to trade," and if they had resulted in a surplus, the surplus would be profits and gains under Sch. D, Case VI, though it could only be applied for purposes which exclude "personal profit" to use the words employed by Lord Dunedin in *Forth Conservancy Board* v. *Inland Revenue Commissioners*.[12] That case was not concerned with a charity, and the Conservancy was not carrying on a trade or a concern in the nature of a trade and was not liable to tax under Case I of Sch. D. But it was carrying on an enterprise "analogous to "trade," and the dues it was entitled to levy exceeded its outgoings. The surplus was held to be subject to tax under Case VI. Lord Dunedin would have held, but for authority, that it was not liable to tax because [13] "Not a penny of the dues so levied can be "employed for any other purposes except only for the necessary "expenses of the trust. No one makes a personal profit out of any "of the moneys received." But Lord Dunedin conceded [14] that he was bound by the authority of *Mersey Docks and Harbour Board* v. *Lucas*,[15] in which "it was most definitely laid down in this "House that the purpose to which the money collected was "applied could not be considered in settling whether it was a "gain or profit or not." Now, the conservators in the present case might have had a surplus in some one year apart from any contribution by the Corporation of the City of London. That may have been improbable, but it was not impossible. They would not then, of course, have been entitled to any contribution from the corporation. The surplus would have been available in the next year or later for the charitable purpose of preserving the Forest as a public resort, but it would none the less have been a profit within the meaning of the Income Tax Act, Sch. D, Case VI. The question whether it would have been exempted from the liability is a different question; that depends on the scope of the exempting provisions of the Income Tax Acts, which themselves necessarily presuppose a profit that without them would be taxable. The result is that if the decision of the Court of Appeal is to stand, it must be supported by reasons other than those given in the judgment. The other reasons must show that, though the respondents may be regarded as carrying on an activity which might render a resulting surplus taxable under Case VI, they also received the sum in question as income within Case III, a sum, therefore, that does not come into the reckoning of its Case VI profits, but remains taxable separately under

[12] [1931] A.C. 540; 45 T.L.R. 83; 47 T.L.R. 429.
[13] [1931] A.C. 540, 548.
[14] Ibid. 549.
[15] (1883) 8 App.Cas. 891.

Case III without any deduction. That is a situation that the Income Tax Act contemplates and for which it has made provision.

The convenient course will be to turn to the other grounds which were put forward on the respondents' behalf.

The case in outline is as follows. The payment in question is an annual payment hardly distinguishable from an annuity. The matter has to be looked at both from the payees' point of view and from the respondents' point of view. Regarded as a payment it is a sum paid under a legal obligation and it makes no difference that the obligation is statutory and not under covenant. It has the characteristic of recurrency. It is true that unlike an ordinary annuity it fluctuates from year to year but that is immaterial (*Moss' Empires Ld.* v. *Inland Revenue Commissioners* [16]). It is paid wholly out of taxed money and it is a transfer of part of the income from the payee with its tax burden (*Perkins' Executor* v. *Inland Revenue Commissioners* [17]). It is calculated by reference to a rule prescribed in section 39 (2) of the Epping Forest Act, 1878, but "there is no relation between "the measure that is used for the purpose of calculating a "particular result and the quality of the figure that is arrived at "by means of the test" (*Glenboig Union Fireclay Co. Ld.* v. *Inland Revenue Commissioners* [18]). It cannot reasonably be regarded as payment for services rendered or for any consideration of any kind. Regarded as a receipt, the respondents take it as a sum at their own disposition to expend just in the same way as interest on their investments or rents received by them; and the fact that it was or even had to be expended in payment of debts incurred in the performance of their duties is irrelevant. Many of these propositions are not in dispute. The controversy indeed settled down on the question whether the sum is income in the hands of the respondents. On this the Crown submitted that it was a balancing item in the respondents' profit and loss account or an account of the nature of a profit and loss account. This account was kept in accordance with the provisions of section 39 (2) of the Epping Forest Act, 1878, which stamped the payment with the character of a trade receipt. Moreover, the payment only filled up a deficit and it could, therefore, unlike the sum paid to shareholders in *Moss' Empires Ld.* v. *Inland Revenue Commissioners*,[19] never be a profit in the pocket of the recipient. Apart from that it was a payment in return for the performance of the duties laid on the recipients by the Epping Forest Act, 1878, and in effect a payment in discharge of debts thereby incurred and not income or pure profit in the hands of the respondents.

My Lords, it is evident that the decision of the appeal, subject to the effect of the authorities, largely hinges on the proper

[16] [1937] A.C. 785; 53 T.L.R. 867; [1937] 3 All E.R. 381.
[17] (1928) 13 Tax Cas. 851, 860.
[18] 1922 S.C.(H.L.) 112, 115.
[19] [1937] A.C. 785.

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construction of the Epping Forest Act and especially of section 39. But in view of the Crown's contention that the payment was made in return for services or some advantage received by or on behalf of the corporation, it is necessary to recall the circumstances antecedent to the passing of the Act and those recitals of the Act which I have quoted. I will deal with this aspect of the Crown's case first. It may in limine be said that there is no finding that the corporation received any consideration, or money's worth in any form, in return for the payment. But I go further and say that no such finding could have been made consistently with the evidence laid before the Commissioners and accepted by them. In the first place, it seems necessary to repeat that the whole actions of the corporation which led up to the passing of the Act were disinterested and sprang from a desire to preserve this forest, among other open spaces, for the benefit of the public. That was the motive which induced the corporation to undertake the obligation and to agree to have it embodied in the statute. But satisfaction of a motive must not be confused with consideration. To come to the Act itself, the duties laid on the respondents were duties which they owed to the public, not to the corporation. In view of some of the argument addressed to us it may be well to add that the public, who are the beneficiaries of the Act, are the public at large, and that the sparse dwellers among the offices, warehouses and public buildings in the City of London are today but a microscopic part and even in 1878 must have been only a small proportion of those who enjoy the open spaces of Epping Forest. I dismiss as a fantasy the notion that the corporation was in some way, direct or indirect, the beneficiary of the respondents' performance of their duties, and that the sum has the quality of a payment for services or the like.

I turn next to examine the question whether section 39 imparts to the sum the character of a trade receipt in a kind of profit and loss account. Now, in my opinion, the character of the payment cannot depend on the place which it takes in the account even though that account is statutory. The account does not bind the Inland Revenue when it comes to assess the taxable income of the respondents. Nor are the respondents bound by the account in their discussions with the Inland Revenue. The question between them is whether the sum ought to be dealt with as a trade receipt or an item of that nature in an account properly framed to arrive at the taxable profit of the respondents, assuming them to have been carrying on a trade (Case I) or some enterprize analogous to a trade (Case VI), or whether it ought to be dealt with as a Case III profit or income. We cannot advance towards a decision merely by asking how the accounts of the respondents have been framed or how they must be framed under their statute. But, secondly, this contention of the Crown is, in my opinion, based on a misconstruction of section 39. The first subsection creates the obligation to contribute to the capital and

income of the Epping Forest Fund "such moneys as shall be "necessary." The question immediately occurs, how to measure what is necessary, and the answer is found appropriately in the immediately following subsection. It provides the measure of what must be paid to the income of this fund. I do not attach any importance to the description "income" in section 39 for the reasons already explained, that the use of such a word in the statute or in the account cannot affect the issue. Nor do I attach the least importance to the fact that the sum is a balancing figure. It is that, of course, but the purpose of coming to a balance is merely to measure what is "necessary." It is to be noted, moreover, that among the credit figures in the account are the income from investments and payments of rentcharges, which are not of the nature of trade receipts.

My Lords, a reading of the recitals and of the Act convinces me that the approach of the Crown's argument to the issue is faulty and involves a perverted view both of the duties of the respondents and of the means at their disposal to achieve the purposes for which the Act was passed. From the first the respondents had large duties thrust upon them, duties which might be discharged in a niggardly, penurious way, or in a generous and liberal way. They had a very small income apart from the corporation's contribution. Without that contribution they would have been able to do little to achieve the purpose of the Act. They certainly could not fulfil that purpose unless they had at their command an income on a scale which would enable them to follow a policy for the management of the forest involving a certain magnitude of expenditure. It was there that the corporation were willing to help, not by defraying the annual debts, or part of them, incurred by the conservators, but by giving the assurance, under sanction of statute, that the conservators would have an income of the order required for their task. Since the members of the corporation were also the conservators there was a practical safeguard against the burden thus assumed becoming unmanageable. That is my reading of the Act, and it is worth noticing that section 39 (viii) contemplates the possibility that persons other than the corporation would contribute to the income of the fund. What can this mean except that other persons might desire, like the corporation, to contribute recurrent gifts of money to the conservators, and what would such gifts be but benevolent contributions of income to income? It is here that I must respectfully part company from Donovan J. He says that the conservators get the sum only because they have performed duties which involve them in outlay of equivalent amount. I think that the truth is that the conservators performed their duties in a manner which involved them in a considerable outlay only because they had the assurance of this income contribution from the corporation. In the next succeeding sentence Donovan J. poses the question what would happen if the charitable exemption were abolished? Here I think the Court of Appeal has given the

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correct answer. A larger sum would then be " necessary " within the meaning of section 39, and it would be arrived at by " grossing up " the £16,000 and then deducting the income tax. But this, again, is not relevant to the issue. It is merely a matter of measuring the sum " necessary."

The last point with which I must deal before coming to the authorities is the Crown's contention that since the contribution only filled a gap between receipts and expenditure it never could be the income of anyone. The Crown used *Moss' Empires Ld.* v. *Inland Revenue Commissioners* [19] by way of contrast, and said that there the sums paid were in fact income in the shareholders' pockets, but whose pockets does the corporation's contribution reach except the pockets of the respondents' trade creditors as payment of the debts due to them? This argument was met by the respondents' counsel with a short but cogent answer. Though the respondents paid away the whole sum of £16,006 3s. 4d. to their creditors, they were better off to the extent of £16,006 3s. 4d. by receiving it. That they paid it to creditors is in no way inconsistent with its being the respondents' income. The argument is inconsistent with the principle that you cannot determine the nature of a payment by inquiring what becomes of it or even what must become of it after the payee has received it.

My Lords, I am satisfied with the way in which the Special Commissioners have dealt with the question and with their reasons. I am also in agreement with much that is said in the judgment of the Court of Appeal, though I have differed from it on the actual ground of the decision. The sum, in my opinion, is in no different position from a sum (having the requisite quality of recurrence) paid without conditions or counter stipulations out of taxed income under a covenant by a private individual to any charitable body. The Crown would neither admit nor deny that such a payment would be an annual payment to the charity within the meaning of Case III, or that the party paying it would be entitled to retain the tax, or that the charity would be entitled to recover it. We were implored to be guarded in our opinions on covenants in favour of charities. I can only say that I am compelled to follow where the argument leads. If the payment under covenant were made by an individual to a body not a charity it could still be an annual payment, but the question whether it was in return for some consideration would probably be much more prominent and acute. If it were an annual payment the payer would be entitled to deduct tax under rule 19 but the payee would not be entitled to recover the tax.

If my analysis of section 39 of the Epping Forest Act, 1878, and my interpretation of that Act as a whole is correct, it will be apparent that the conservancy case (*Humber Conservancy Board* v. *Bater* [20]), in which a lump sum paid to a conservancy board by a railway company which participated in the benefits of the

[19] [1937] A.C. 785. [20] [1914] 3 K.B. 449.

board's operations was held to be of the nature of a trade receipt, has little to do with the matter. Nor, in my opinion, are the decisions in the so-called subsidy cases relevant. The facts were far removed from the facts in this case, if I am right in my presentation of them. In *Lincolnshire Sugar Co. Ld.* v. *Smart* [21] the company's trade consisted in the manufacture and sale of sugar made from beet grown in this country. The industry was new and there had been a sharp fall in the price of sugar. The effect of this would, from the national point of view, have been unfortunate, for the company might not be able to pay the farmers their contract prices for the beet, and the whole policy of growing beet for sugar and manufacturing it in this country might collapse in insolvency. To meet the difficulty a statute was passed under which " advances " were made to the company in respect of the sugar manufactured by them from home-grown beet during a period of one year up to a maximum fixed at 300,000 cwt. of manufactured sugar and at a rate not exceeding 1s. 3d. per cwt. It was provided that no advance was to be made unless the Minister was satisfied that the price paid to the grower was not less than the price specified in a schedule to the Act. There were certain conditional provisions for repayment which never came into operation. The question to be decided was whether the advances were loans and therefore not subject to income tax, or trade receipts. There was no contention that they were annual payments, and no discussion of that question. This House took the view that the grants were not loans but were artificial supplements of the trading receipts, or, in other words, of the price which the company received for its sugar, and that the supplement partook of the nature of the price supplemented. The Attorney-General, however, fastened on the words employed by Lord Macmillan [22]: " It was with the very object of enabling " them to meet their trading obligations that the ' advances ' " were made; they were intended artificially to supplement their " trading receipts so as to enable them to maintain their " trading solvency." He said: " Strike out the word ' trading ' " and every word applies literally to the payments in this case." This is an extreme instance of construing not the Act of Parliament but judicial dicta. The argument is particularly subject to this objection because the words were used with reference to a wholly different issue from the issue whether there was an annual payment. But in substance the answer to the Attorney-General's argument is that in the present case there is nothing corresponding to the sugar, nothing corresponding to the price of the sugar and nothing corresponding to a supplement of the price of the sugar. I need not take up much time with the *Pontypridd and Rhondda Joint Water Board* v. *Ostime*.[23] The facts are

[21] [1937] A.C. 697; 53 T.L.R. 306; [1937] 1 All E.R. 413.
[22] [1937] A.C. 697, 704.
[23] [1946] A.C. 477; 62 T.L.R. 295; [1946] 1 All E.R. 668.

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complicated but the essence of the matter is that the water board was selling water. It could not raise the price payable by its customers and there was a deficit in its accounts. The urban district councils, many of whose constituents were among those supplied, granted a subsidy to the board, levying on their ratepayers. The question at issue was not whether the subsidy was an annual payment or a trade receipt. The issue was whether the lump sum payments were receipts of trade or the equivalent of a rate levied by a local authority to meet a deficit on its own undertaking. This House solved the question in the same way as it had solved *Lincolnshire Sugar Co. Ld.* v. *Smith*.[24] It held that the payments were a supplement to the water board's trading receipts, that is, to the payments for the supply of water, and Lord Macmillan's words above cited were used by Lord Thankerton to define the purpose and character of the payments.

I find it unnecessary to deal with the cases on payments out of trust funds, one of which (*Inland Revenue Commissioners* v. *Miller*[25]) is referred to by the Special Commissioners. They were cited and relied on by counsel for the respondents and it is not suggested that the Crown can gain any comfort from them. They are decisions upon trust law and I think they add little to the discussion of the principles involved in this case.

I would dismiss the appeal with costs.

LORD MORTON OF HENRYTON. My Lords, I concur and my noble and learned friend, Lord Oaksey, has asked me to say that he also concurs. We have both had an opportunity of reading the opinions of Lord Normand and Lord Reid.

LORD REID. My Lords, the real question in this case is whether the payments which the City of London make to the Conservators of Epping Forest under the Epping Forest Act, 1878, are or are not annual payments within the scope of the Income Tax Act, 1918, Sch. D, Case III, r. 1. The appellants contend that they are not and the first argument adduced in support of this contention is that payments in return for services are not annual payments, and that these payments are made in return for services rendered by the conservators, because the Epping Forest Act and the whole circumstances show that the City undertook to make these payments in order to have these services performed and to obtain benefit for the citizens of London. I agree with your Lordships that this argument is unsound. The conservators are a charity and the beneficiaries are the public as a whole. The City were anxious to have Epping Forest preserved for public purposes, they were responsible for obtaining the Act which set up this charity, and they undertook heavy financial responsibilities in order to achieve this result. But I cannot see any relevant distinction between this case and a case where a private benefactor has taken a leading part in founding

[24] [1937] A.C. 697.
[25] [1930] A.C. 222; 46 T.L.R. 207.

a charity and has undertaken to pay to the charity each year such sum as may be necessary to meet any deficit from its operations. It is not admitted that sums payable under such an obligation would come within the scope of Case III, at least where the charity carries on trading operations or operations of such a kind that if a surplus were produced in any year it would be taxable under Case VI of Sch. D. I shall assume in favour of the appellants that the conservators carry on such operations.

It is, I think, clear that the sums payable by the City have all the necessary characteristics of annual payments, taking "annual" in the sense in which that word is generally used in the Income Tax Act; but it is equally clear that by no means all payments which have those characteristics fall within the scope of Case III. There is no qualification or limitation of the words annual payment expressed in the rules applicable to Case III, but a limitation must be implied so as to exclude certain kinds of annual payments. The Act must be read as a whole and construed so as to produce, so far as possible, a coherent scheme; and it is settled that Case III does not apply to payments which are in reality trading receipts in the hands of the recipients although such payments take the form of annual payments. One reason is that income tax is a tax on income and trading receipts are not income: a trader's income from his trade can only be determined after he has deducted his expenditure from his receipts and it cannot be supposed that sums which are not income are to be taxable under Case III. But in my judgment the payments in this case are not trading receipts in the hands of the conservators even if they are carrying on a trade or something in the nature of a trade. Trading receipts are generally received in return for something done or provided by the recipient for the payer, but, as I have said, that does not appear to me to be the case here.

So if the appellants are to succeed it must be because the payments in this case fall within some other class of annual payments which, as well as annual payments received as trading receipts in return for something done or provided or to be done or provided, must for some reason be held to be excepted from the scope of Case III. But before considering this difficult question I think it well to consider certain annual payments, not related to any benefit to the payer, which in my opinion are clearly within the scope of Case III. That most relevant to the present case is an annual subscription under covenant to a charity by a donor who gets no advantage to himself in return for it. If the charity is not trading or carrying on anything in the nature of a trade I cannot see how such a payment can be excluded from the scope of Case III. What reason can there be for excluding it? Charities are not excluded from the scope of the Income Tax Acts: certain provisions entitle them to certain particular exemptions from tax, but that is all, and it was not suggested that any of those provisions affect this matter.

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Then on what ground can it be said that such a subscription is not income in the hands of the charity? What else could it be? It cannot be a trading receipt because I am dealing for the moment only with a charity which is not carrying on anything in the nature of trading operations. But such a charity spends money and may need its subscriptions to meet its current expenditure. A donor might base the amount of his annual subscription on the needs of the society or might undertake to pay such a sum in each year as might be necessary to balance the accounts. Would the money which he paid not be income in the hands of the society although other subscriptions in ordinary form were income? I see no escape from the conclusion that such payments to non-trading charities come within the scope of Case III. Can it then be held that the nature of the payment is essentially different if the charity happens to carry on some trading operation?

Two cases were cited by the appellants as decisive in their favour—*Lincolnshire Sugar Co. Ltd.* v. *Smart*,[26] and *Pontypridd and Rhondda Joint Water Board* v. *Ostime*.[27] Neither case dealt with payments to a charity and in neither case was the issue raised whether the payments there in question came within the scope of Case III: the importance of these cases lies in the fact that in both it was held that payments made without any direct return to the payer must be taken into account for income tax purposes and treated as trading receipts.

The *Lincolnshire Sugar Co.'s* case[28] was concerned with payments by the Treasury to the company under the British Sugar (Subsidy) Act, 1925, and the British Sugar Industry (Assistance) Act, 1931. It was admitted that payments under the former Act were trade receipts but it was contended that payments under the latter Act, which were called advances, were really loans and should not be taken into account at all for income tax purposes: the company had not needed to use these payments and had not carried them to its profit and loss account. I think that the grounds of the decision of the House are to be found in the following passages from the speech of Lord Macmillan,[29] with which the other noble and learned Lords agreed. "What to my mind is decisive is that these payments "were made to the company in order that the money might "be used in their business. . . . If the company had not happened "to be able to pay for its raw material otherwise it could "properly have used the 'advances' for this purpose. It "was with the very object of enabling them to meet the trading "obligations that the 'advances' were made; they were intended "artificially to supplement their trading receipts so as to enable "them to maintain their trading solvency." The payments in question were made during 1931-32 and it was not until 1934 that it was certain that they would not have to be set off against

[26] [1937] A.C. 697.
[27] [1946] A.C. 477.
[28] [1937] A.C. 697.
[29] Ibid. 704.

later payments of subsidy. After dealing with that matter Lord Macmillan said [30]: "But I do not find it necessary to rest my "judgment on wisdom after the event. I prefer to rest it on "my view of the business nature of the sums in question which "the company received in 1931-32. I think that they were "supplementary trade receipts bestowed upon the company by "the Government and proper to be taken into computation in "arriving at the balance of the company's profits and gains for "the year in which they were received."

In the *Pontypridd* case [31] the rates received by the Water Board were not sufficient to meet its expenditure and the board was entitled to issue precepts to its "constituent authorities," two urban district councils, for amounts necessary to meet estimated deficits. It is settled that if a surplus results in any year from a public authority having collected more rates from its ratepayers than is necessary to meet current expenses that surplus is not taxable as income, and it was argued for the board that the sums received from its constituent authorities were analogous to rates collected from ratepayers. But this contention was rejected and it was held that the sums in question must be brought into account as trading receipts. Viscount Simon said [32]: "Payments in the nature of a subsidy from "public funds made to an undertaker to assist in carrying on "the undertaker's trade or business are trading receipts, i.e., are "to be brought into account in arriving at the balance of profits "or gains under Case I of Schedule D," and he cited the *Lincolnshire Sugar Co.'s* case [33] as an illustration of this. Lord Thankerton, quoting words used by Lord Atkin in an earlier case, said [34] that these sums were received "as a sum which "went to make up the profits or gains of their trade" and he also relied on the *Lincolnshire* case.[35]

While it is true that no one contended in these cases that the payments there in question were annual payments within the scope of Case III and no reference was made to Case III, it might now be difficult to argue, in face of clear statements that those payments were trade receipts, that similar payments can now be treated as annual payments. But it is another matter to treat these cases as laying down a general rule that no payment can come within the scope of Case III if words used in this House in these cases can be applied to it. These cases dealt with payments in the nature of a subsidy. Lord Macmillan rested his judgment in the *Lincolnshire* case [36] on "the business nature of the sums in question" and Viscount Simon in the *Pontypridd* case [37] referred to payments "to assist "in carrying on the undertaker's trade or business." In my opinion the payments in the present case were not of a business

[30] Ibid. 705.
[31] [1946] A.C. 477.
[32] Ibid. 484.
[33] [1937] A.C. 697.
[34] [1946] A.C. 477, 492.
[35] [1937] A.C. 697.
[36] Ibid. 705.
[37] [1946] A.C. 477, 484.

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nature—they were of a benevolent nature—and they were not primarily made to assist in carrying on any trade or business—they were made primarily to achieve a public benefit of a charitable nature. If the appellants are right the result would be far-reaching and in my opinion anomalous. Many if not all subscriptions to a charity which achieves its charitable object by trading could properly be described as intended to supplement its trading receipts or to assist it in carrying on its trade. But if that were the sole criterion, the result would be an unreal distinction between charities which do not trade and those which do: in the one case subscriptions would be part of their income and within Case III and in the other case not. If one reason and perhaps the main reason for excluding from Case III payments which apparently fall within its scope is to produce a coherent scheme of taxation, I cannot see anything coherent or reasonable in so distinguishing between charities which do trade and charities which do not. But on the other hand to treat all business payments alike whether or not the payer gets any direct return for them seems to me to be eminently reasonable. I would reserve my opinion about a payment which is primarily benevolent but which brings some incidental benefit to the donor.

The appellants also submitted a rather different argument. This was, as I understand it, that a payment which is destined to go into the profit and loss account of the recipient cannot be within the scope of Case III. Case III only deals with payments which are profit income in the hands of the recipient and if a receipt has to go into a profit and loss account and be set against outgoings it cannot be all profit. The appellants point out that no part of the sums paid by the City in this case can ever be profit in the hands of the conservators because the amount of any sum payable is measured by the amount of the conservators' deficit and therefore the whole of it must go to pay expenses and no part of it can ever be profit. This argument appears to me to be based on some misunderstanding of what the Act means by income or profit. Such cases as *Forth Conservancy Board* v. *Inland Revenue Commissioners* [38] and *Mersey Docks and Harbour Board* v. *Lucas* [39] make it clear that a receipt or surplus is none the less income although the recipient is bound to use it in a particular way and cannot enjoy it as a profit in the ordinary sense. Reference was made to a judgment of Lord Greene M.R. in *In re Hanbury.*[40] There Lord Greene contrasted annual payments "which the Acts regard and treat as being pure "income profit of the recipient" with those "the very quality "and nature of which make it impossible to treat them as part "of the pure profit income of the recipient, the proper way of "treating them being to treat them as an element to be taken

[38] [1931] A.C. 540.
[39] 8 App.Cas. 891.
[40] 20 A.T.C. 333, 335.

" into account in discovering what the profits of the recipient " are." The phrase " pure income profit " is appropriate in the sense that the rules applicable to Case III permit no deductions and I think that the context shows that Lord Greene was referring to this: I cannot think that he meant that Case III only applies to payments which are pure profit in the sense that the recipient is free to use them as he pleases. He does not say that because a payment has to go into a profit and loss account therefore it is not pure profit income. He puts it the other way round, and says in effect that if you find payments " the very " quality and nature of which make it impossible to treat them " as part of the pure profit income of the recipient " then you treat them as an element in the profit and loss account. So one must first inquire into the quality and nature of the payment and not as to its destination. Not every receipt by a trader in the course of his business is a trading receipt in the income tax sense. For instance, " Interest of money " is specially mentioned in Case III as falling within the scope of that Case. It may be a business receipt which would appear in the trader's profit and loss account made up for ordinary business purposes. But, having been already taxed at source, it must be excluded from his profit and loss account for the purpose of Case 1 or otherwise it would be taxed twice. So, in my opinion, neither the fact that the amount of the payments in this case is measured by the amount of the conservators' deficit, nor the fact that the conservators cannot use these payments as they please but must carry them to the profit and loss account to extinguish that deficit can determine whether or not these payments come to them as income. For the reasons which I have given I am of opinion that these payments are income in the hands of the conservators and fall within the scope of Case III. I therefore agree that this appeal should be dismissed.

LORD COHEN. My Lords, I also concur.

*Appeal dismissed.*

Solicitors: *Solicitor of Inland Revenue; Comptroller and City Solicitors.*

[COURT OF APPEAL.]

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*Apr.* 15.

Evershed M.R., Birkett and Romer L.JJ.

## * PERERA *v.* VANDIYAR.

[Plaint No. H. 1769.]

*Landlord and Tenant—Trespass—Eviction—Electricity and gas cut off by landlord—Measure of damages—Damages for breach of contract —Whether additional damages payable on ground that landlord's action tortious.*

The plaintiff was the tenant of a flat within the protection of the Rent Restriction Acts of which the defendant was the landlord. The plaintiff lived in the flat with his wife and child aged two. On October 8, 1952, the defendant, without going into the flat, cut off the supply of gas and electricity to it and left the plaintiff without any alternative means of heating or lighting. The plaintiff, after two days' discomfort, went with his wife and family to stay with friends for five days, returning when the gas and electricity supply was restored on October 14. In this action the plaintiff claimed damages for breach of the terms of his tenancy agreement. At the end of the hearing and at the instance of the county court judge the particulars of claim were amended and a claim was added for damages for eviction. The judge awarded to the plaintiff £3 10s. special damages together with £25 general damages for the inconvenience caused to him. He further held that the plaintiff was entitled to punitive damages and awarded to him an additional sum of £25 on the basis that the defendant's conduct constituted a deliberate and malicious tort entitling the plaintiff to punitive damages. The defendant appealed on the ground that the damages awarded were excessive:—

*Held*, that the plaintiff had not proved any separate tort since, although so far as the plaintiff had been evicted the defendant's conduct was prima facie a breach of contract, the cutting off of the gas and electricity did not amount to a tort—it did not constitute an interference with any part of the demised premises and could not be regarded as a trespass; and that, the plaintiff not having brought himself within the head of tort, the award of the additional sum of £25 punitive damages could not stand.

*Lavender* v. *Betts* [1942] 2 All E.R. 72 considered and distinguished.

*Semble*, there is no separate tort of eviction. So far as eviction is wrongly achieved by a landlord it is prima facie a breach of contract.

Henry Cecil

APPEAL from Judge Leon sitting at Wandsworth County Court.

The defendant, C. W. Vandiyar, was the owner of a dwelling-house, No. 133, Trinity Road, Tooting, and the plaintiff was the tenant of two rooms, a kitchenette and cellar in that house at a weekly rent of £1 12s. 6d. On October 8, 1952, the defendant cut off the supply of gas and electricity from the plaintiff's premises by turning off the taps and switches which were in a cellar in the occupation of the defendant, and he locked the door to the cellar so as to prevent the supply being turned on again. The plaintiff had no alternative means of

heating and lighting and only a small oil stove for cooking. He lived in the premises with his wife and daughter aged two and, after two days' discomfort, left the premises with them to stay with friends for five days. On October 14, 1952, the gas and electricity supply was restored as a result of an interlocutory judgment granted by the county court.

In these proceedings the plaintiff claimed damages on the footing of a breach of the terms of his tenancy agreement. At the instance of the county court judge at the end of the hearing the particulars of claim were amended so as to include an allegation that the acts of the defendant " were done with the intent to " evict the plaintiff and did cause the eviction of the plaintiff."

The county court judge held that the cutting off of the gas and electricity was in breach of the plaintiff's tenancy agreement and awarded to the plaintiff £3 10s. special damages, £25 general damages for breach of contract, and a further sum of £25 punitive damages, making in all £53 10s. He dismissed the defendant's counterclaim.

The county court judge stigmatized the defendant's conduct as " cruel and wicked." In the course of his judgment he said: " In assessing general damages I gave the plaintiff no damages " in respect of any injury or inconvenience which his wife and " child may have suffered or in respect of any mental distress " which he may have felt about his wife and child. . . . I gave " him damages for the inconvenience actually suffered by him " while in the house and for the inconvenience he suffered by " having to move out of the house, live somewhere else and move " back again. If the claim had been only for breach of contract, " or if punitive damages had not been awarded, I should have " awarded the plaintiff £25 general damages for this inconveni- " ence. . . . The plaintiff, however, by an amendment of his " claim (which I deal with at the end of this note) claimed " damages for eviction. I was quite satisfied that he was forced " out of the house by the defendant's deliberate and malicious " act, just as much as though he had been turned out by force. " The defendant intended to evict him and succeeded. The " plaintiff was accordingly, in my view, entitled to punitive " damages over and above the amount I should have awarded " to him on the basis of inconvenience only. . . . Having " regard to all the circumstances I held that a further £25 " damages should be added on the basis that this was a deliberate " and malicious tort entitling the plaintiff to punitive damages."

At the end of the judgment he said: " The amendment of " the plaintiff's particulars of claim arose in this way. At the " close of the evidence of the defendant, I asked the plaintiff's " counsel why he had not pleaded the case in eviction and " whether, in view of the defendant's evidence, he desired to " apply for leave to amend to include such a claim. The " plaintiff's counsel applied for leave to amend to include this " additional claim."

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The defendant appealed on the ground that the amount of damages awarded was excessive.

C. W. Vandiyar, the defendant, appeared in person.
*Gilbert Rountree* for the plaintiff.

EVERSHED M.R., after stating the facts, continued: Mr. Rountree, for the plaintiff, intimated to us that by the amendment to the particulars of claim he was intending to allege, at the judge's invitation, a cause of action in tort for eviction. The authority for such a cause of action which had, I think, impressed the judge, is derived from a passage in Megarry on the Rent Acts, 6th ed., p. 187: "A landlord will be liable in damages (which in a proper "case will be punitive) if without an order of the court he evicts "a tenant protected by the Acts either forcibly or peacefully, or "removes the doors and windows so as to make the premises "uninhabitable." The authority as regards removal forcibly or peaceably is, apparently, to be found in *Johnston* v. *Fischer* [1] and *Tankard* v. *Twomey*,[2] being two New Zealand cases, which we have not seen. The authority for the liability when doors and windows are removed is *Lavender* v. *Betts*,[3] tried before Atkinson J. In that case the landlord, with the intention (which succeeded) of removing his rent-restricted tenant from the premises, removed the doors and the windows from the subject-matter of the tenancy. Atkinson J. used this language [4]: "That is his method of riding "rough-shod over these Acts of Parliament; and here today he is "claiming he has the right to do that. I have not the slightest "hesitation in saying he has no such right." Then a little later he said that counsel's argument for the landlord was: "He can take the doors off, the windows off, the roof off— "he can do anything that he thinks fit short of taking possession. "The plaintiff says this was a trespass upon their tenancy and "wrongful interference with their quiet enjoyment of the premises, "and, in my view, they have proved their case. Normally, "plaintiffs are only entitled to such damages as they prove; but "there are torts in respect of which the law permits a jury or a "court to give what are called punitive damages, where the court "is not limited to giving merely damages in respect of what we "call special damages. In *Cruise* v. *Terrell* [5] Lord Sterndale "M.R. said that punitive damages can be given if a high-handed "outrage has been perpetrated. In that particular case he held "that there were no aggravating circumstances; but he recognized "and affirmed the right of the court to give aggravated damages, "and quoted with approval what Bowen L.J. said in *Whitham* "v. *Kershaw* [6]: '. . . nothing we have said must be understood "'as in any way derogating from the principle that, when a

[1] [1921] N.Z.L.R. 529.
[2] [1922] N.Z.L.R. 79.
[3] [1942] 2 All E.R. 72.
[4] Ibid. 73.
[5] [1922] 1 K.B. 664, 670; 38 T.L.R. 379.
[6] (1886) 16 Q.B.D. 613, 618; 2 T.L.R. 281.

" wrongful act is done by a trespasser, or by a tenant to the " property of his reversioner, under circumstances which call for " vindictive damages, the jury may give vindictive damages." " Finally, Atkinson J. said: " This is a case for aggravated damages, " and, in my judgment, I think a jury might give very high " damages; but, for all that, one has to be as reasonable as one " can, and I assess the damages " at the figure he there mentions.

In my judgment, the plaintiff here has not proved any separate tort. I am not satisfied that there is a tort of eviction. In so far as eviction is achieved, it seems to me prima facie to be a breach of contract. Nor am I satisfied that there was any trespass here in relation to the gas and electricity. Finally, I am not satisfied (though I do not doubt that the judge's estimate of the defendant's behaviour was right) that this could fairly be called a high-handed outrage of the kind to which Lord Sterndale M.R. referred. For one or more of those reasons, therefore, I am not satisfied that there was here after the amendment had been made, and still less before, any basis on which a so-called punitive award of £25 could be made, and I think that that amount of damages cannot stand.

The result, therefore, in my judgment, is that the plaintiff is not entitled to more than £3 10s. 0d. for special damages and £25 for breach of contract, total £28 10s. 0d.

BIRKETT L.J. I am of the same opinion. In the course of the argument I ventured to say that the case struck me as one where there had been a duplication of damages. The result which has been just announced by my Lord, namely, a reduction of £25, would seem to give some colour to the accuracy of that view.

I entirely agree with the county court judge as to the conduct of the defendant in this case. Whether it should be designated as cruel and wicked, which are very strong terms indeed, I am not quite sure, but his conduct, to say the least of it, was most reprehensible. As I see the situation, the judge, who listened to the evidence on the case as pleaded, came to the conclusion that the acts of the defendant could be met by the award of £25 damages. If the claim had been only for breach of contract, or if punitive damages had not been awarded, the judge would have awarded £25 damages for this inconvenience. There, in the ordinary way, the case would have rested. There is no doubt, from the language which he employed, that the judge, having listened to the evidence, was very indignant because of the behaviour which the evidence disclosed. Indeed, he said in one passage that he must be careful to restrain indignation in a case of that kind. He then said: " If this had been a case where " punitive damages could have been awarded I should have " awarded more than £25." He thereupon said to counsel, Mr. Rountree, in effect, " If a case of eviction had been pleaded " punitive damages could have been awarded. Why has not that " been done? If you wish it now to be done, I will give you

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" an opportunity of doing so." Mr. Rountree thereupon accepted that invitation, and the amendment was made in due course.

The county court judge was careful to say, " I will, of course, " allow Mr. Perera to be recalled to give evidence upon this " matter," and he was recalled and did give evidence, because I see that he said, " When I caused the electricity to be cut off " my intention was with the agreement of the plaintiff. He had " suggested that he was going on a holiday. I did it not with " the intention of evicting him but of cutting off the gas and " electric light." The judge did not believe that and, on the faith of the note in Megarry on The Rent Acts, he held this to be on all fours with *Lavender* v. *Betts*,[7] decided by Atkinson J. Thereupon, no doubt with some satisfaction because he felt how wrongful the act of the defendant had been, he awarded the extra sum of £25. For myself, I am not sure that the county court judge ought to have allowed the amendment at that stage. It was an entirely different cause of action which permitted the heavier damages to be given, and I am not sure, for my own part, whether at the conclusion of the case he ought to have allowed it. For the reasons given by my Lord, I am not satisfied that there was, in fact, the cause of action which the judge allowed to be argued and decided. Therefore, I think that this sum of £25 which was added at the very end ought to be remitted.

ROMER L.J. I also agree. The county court judge, after assessing £25 as being the amount which, in his view, would be the right amount to award by way of damages for breach of contract, then held that a further £25 should be added on a certain basis. That basis was, in his own words, that the action of the defendant in cutting off the gas and electricity was a deliberate and malicious tort. That the defendant's action was deliberate is plain, and that it was malicious is, I think, reasonably plain, but I cannot for myself see that it amounted to a tort. It did not constitute an interference with any part of the demised premises and, therefore, could not be regarded as a trespass. It was merely a breach of contract, the object of which was to persuade or induce the tenant to go. That is not a tort. What the defendant did in *Lavender* v. *Betts*[7] was a tort, because it was a trespass. Although the intention of the defendant here was precisely the same as the intention proved in that case, the defendant in *Lavender* v. *Betts*[7] resorted to trespass for the purpose of getting his own way. It was not because he formed an intention to evict that damages were awarded in *Lavender* v. *Betts*.[7] They were awarded because he trespassed upon his tenant's property.

Eviction might, in certain circumstances, be a tort, and certainly would be if it involved also trespass, but the mere

[7] [1942] 2 All E.R. 72.

intention to evict cannot, as I see it, be a tort, nor does it become a tort merely because the person who forms the intention hopes to give effect to it by interfering with the tenant's contractual rights. That is what the defendant here did, and in respect of that the first sum of £25 was awarded against him. But he did not bring himself into the area of tort which would justify the awarding of a further sum under the head of punitive damages. Accordingly, though perhaps with some reluctance, I agree that the judgment of the judge went too far in awarding the second sum of £25, and the result which my Lord has already indicated must follow.

*Appeal allowed.*

Solicitor: *W. Timothy Donovan for the plaintiff.*

B. A. B.

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[QUEEN'S BENCH DIVISION.]

## *LONDON COUNTY COUNCIL *v.* HAY'S WHARF CARTAGE CO. LD.

1953
*Apr.* 14, 15, 16.
Gorman J.

[1947 L. 2081.]

*Road Traffic—Motor-vehicle—Licence—Duty—Vehicle carrying loose tools and equipment and fixed iron block as ballast when drawing loads—Haulage not "goods vehicle"—Fixed block included in unladen weight—Finance Act,* 1933 (23 *&* 24 *Geo.* 5, *c.* 19), *s.* 25, *Sched.* 7, *paras.* 4 (*e*), 5 (*c*)—*Road Traffic Act,* 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *s.* 26.

The defendants were the owners of a motor-vehicle to which was fitted a box in which were carried loose tools and equipment which, apart from their primary purpose, were used as ballast to secure road grip when the vehicle was towing heavy loads. On July 18, 1946, the vehicle was inspected by a representative of the plaintiffs, with whom it was registered, when, in addition to the loose equipment, a cast iron block weighing about 50 cwts. was found to be fixed in the box by means of six angle irons. The plaintiffs claimed that the vehicle was a haulage vehicle within para. 4 (*e*) of the Seventh Schedule to the Finance Act, 1933, or a goods vehicle within para. 5 (*c*) of that schedule, and that the ballast should be taken into account in determining its unladen weight as defined in section 26 of the Road Traffic Act, 1930, thereby increasing the excise duty payable on the vehicle from that paid by the defendants:—

*Held*, that the vehicle was constructed and used for haulage solely within para. 4 (*e*) of the Seventh Schedule, the loose ballast being necessary for its equipment: and that the fixed block was part of the vehicle and was necessary to and ordinarily used with it when working on the road and, therefore, should be included in the vehicle's unladen weight under section 26 of the Act of 1930.

*Lowe* v. *Stone* [1948] 2 All E.R. 1076 applied.

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ACTION.

The defendants, a firm of haulage contractors, were at all material times the owners of a vehicle which they used for towage purposes and which was registered with the plaintiff council. Behind the cab of the vehicle a box was fitted into which were put various pieces of metal of varying weights for the purpose, inter alia, of securing road adhesion adequate to the loads being drawn by the vehicle.

On July 18, 1946, an officer of the plaintiff council visited the defendants' premises and examined the vehicle, which had just been brought in from a journey. In the box was a block of cast iron which, according to the examining officer, was fixed to the vehicle by six angle irons, and around it were various pieces of metal and chain. Further examinations were made on November 3 and December 2, 1947, when the vehicle was seen to be carrying ballast in the form of metal, blocks of wood and chains.

The plaintiffs claimed that the vehicle was one which came within the provisions of section 25 of the Finance Act, 1933,[1] and was a haulage vehicle within para. 4 (*e*) (ii) of the Seventh Schedule to that Act, or, alternatively, was a goods vehicle within para. 5 (*c*) of that schedule. They alleged that the defendants, to enable the vehicle to be used, fitted as part of the vehicle the cast iron block as fixed and permanent ballast sufficient to bring the unladen weight of the vehicle, calculated in accordance with section 26 of the Road Traffic Act, 1930,[2] to a weight exceeding seven and a quarter tons, and that such ballast was necessary to and ordinarily used with the vehicle when used on the roads. The plaintiffs also claimed that in addition to the fixed ballast the defendants added further ballast consisting of pieces of metal, and that the maximum unladen weight of the vehicle, including the maximum ballast, was 10 tons 1 cwt. 16lbs. In the result they claimed the balance of excise duty alleged to be due and

[1] Finance Act, 1933, s. 25: "As "from January 1, 1934, s. 13 of the "Finance Act, 1920 (which imposes "duties of excise in respect of "mechanically propelled vehicles), "shall have effect as if the para- "graphs set out in Parts II and "III of the Seventh Schedule to this "Act were respectively substituted for "paras. 4 and 5 of the Second "Schedule to that Act."

Seventh Schedule, para. 4 (*e*): "Vehicles . . . which are constructed "and used upon roads for haulage "solely and not for the purpose of "carrying or having superimposed "upon them any load except such as "is necessary for their propulsion or "equipment." Para. 5: "For the "purposes of this paragraph, the "expression 'goods vehicles' means "vehicles . . . constructed or adapted "for use and used for the conveyance "of goods or burden of any descrip- "tion, whether in the course of trade "or otherwise. . . ."

[2] Road Traffic Act, 1930, s. 26: "For the purposes of this Part of "this Act, and of any other enact- "ment relating to the use of motor- "vehicles on roads, the weight un- "laden of any vehicle shall be taken "to be the weight of the vehicle "inclusive of the body and all parts ". . . which are necessary to or "ordinarily used with the vehicle "when working on a road, but "exclusive of the weight of water, "fuel or accumulators used for the "purpose of the supply of power for "the propulsion of the vehicle, and "of loose tools and loose equipment."

owing by the defendants under section 13 (1) of the Finance Act, 1920, and section 14 (1) of the Finance Act, 1922, in respect of the vehicle.

The defendants admitted that the vehicle was a haulage vehicle and that ballast was used on occasions, but not fixed ballast. They claimed that duty appropriate to the vehicle had been paid and denied that any balance was owing.

*H. V. Lloyd-Jones Q.C.* and *R. J. Harvey* for the plaintiffs.
*David Karmel Q.C.* and *S. B. R. Cooke* for the defendants.

The following cases were referred to in argument: *Darling* v. *Burton* [3]; *Lowe* v. *Stone*.[4]

GORMAN J. [having stated the facts, found that the articles other than the fixed block were primarily used as loose tools or equipment, and continued:] The first question is whether or not this was a haulage vehicle. Submissions were made to me in respect of para. 4 (*e*) of the Seventh Schedule to the Finance Act, 1933, which defines towing vehicles as: "Vehicles . . "which are constructed and used upon roads for haulage "solely. . . ." There is later in the same schedule a definition of "goods vehicles." Mr. Lloyd-Jones asks me to say here that the two definitions are not necessarily exclusive; but at any rate, so far as a haulage vehicle is concerned, the governing words of that definition are "constructed and used upon roads "for haulage solely." Then, having expressed the definition in that form, it goes on to say, "and not for the purpose of carrying "or having superimposed upon them any load except such as is "necessary for their propulsion or equipment." The governing words of that definition are "haulage solely," but it is conceded that even though a vehicle is "constructed and used for haulage "solely" it may be necessary to "carry or superimpose" something on it. But that which is carried or superimposed upon it must not, in my view, take away the essential function of that vehicle, which is, construction and use for "haulage solely." It is not straining the words of that definition to put it in this way: ". . . and not for the purpose of carrying or having super- "imposed upon them any load except such as is necessary for "their propulsion or their equipment." There is a difference between what one might call a common noun and an abstract noun. "Equipment" might refer to particular items, or it might refer to a state of being equipped, and it seems to me that what is postulated in that definition is that it must be used for "haulage solely," but if anything is put on it which is necessary either for its propulsion or properly to make it fit for purposes of haulage that shall not destroy its being a haulage vehicle. For instance, tools, blocks or ballast might be added to render the

[3] 1928 S.C.(J.) 11. [4] [1948] 2 All E.R. 1076.

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vehicle in a fit state of equipment for its work as a haulage vehicle.

I have also considered the definition of "goods vehicle," which is in wider terms. There are two expressions which add greatly to the width of it. One is "for the conveyance of goods "or burden of any description," and the other is "whether in "the course of trade or otherwise." My view is that this vehicle comes within the definition of a haulage vehicle in para. 4 (*e*) of the Seventh Schedule to the Act of 1933, and I reject the submission that it is a goods vehicle.

The next matter I have to consider is the applicability of section 26 of the Road Traffic Act, 1930, to this vehicle. It was submitted by Mr. Karmel that the ballast (using the word in its widest possible form) must be excluded from the unladen weight of a vehicle. He divided the section up into the positive and the negative parts, the positive part going down to the word "but," and he contended that the section was quite inapt to include anything by way of ballast. He said that ballast was not "parts" but was "equipment." Mr. Lloyd-Jones said that it was quite apt, having regard to the section as a whole, to include ballast. I find that on July 18, 1946, there was used on this lorry a fixed ballast block of an approximate weight of 50 cwts. I have no evidence whether on other occasions the ballast was fixed or unfixed.

I have been referred to *Darling* v. *Burton*,[1] which was an action brought under section 7 (6) of the Roads Act, 1920, which provides "that the weight unladen of any vehicle shall be taken "to be the weight of the vehicle inclusive of the body and all parts ". . . which are necessary to or ordinarily used with the vehicle "when working on a road, but exclusive of the weight of . . . loose "equipment." It was held that movable shelving, fitted to slide on brackets in a baker's van, and used to facilitate the delivery of goods to customers, was loose equipment within the meaning of the section, and did not fall to be included in the weight unladen of the vehicle.

Lord Clyde, the Lord Justice-General, said in his judgment that the respondent[2] "had brackets affixed to the inside of the "body—which thus became undoubtedly parts of the body, and "consequently added to 'the weight unladen' of the vehicle. "By means of these brackets he was able to slide or run into "the inside of the body trays, shelves, or boards containing his "products, and made of a size to fit the inside of the body." The question was whether they had to be included in the weight of the vehicle. "It will be observed," said Lord Clyde, "that "they play no part except as a facility for loading the van, and "perform no function except as holders, or containers of the "goods transported. Boxes, baskets, trays of one kind or "another, and cans are familiarly used in tradesmen's delivery

[1] 1928 S.C.(J.) 11. [2] Ibid. 13, 14.

" vans; but it would hardly occur to anyone to regard them as " parts of the unladen vehicle. . . . What, then, are they, in the " phraseology of the section? I see no difficulty in regarding them " as included under the statutory term ' loose equipment,' and " loose equipment is not to be included in the unladen weight." Lord Blackburn agreed. That was in 1928. I think that it is rather important in considering that case to bear in mind what Lord Clyde said, " that they play no part except as a facility for " loading the van, and perform no function except as holders, or " containers of the goods transported."

In the year 1948 there was a case in the King's Bench Division, *Lowe* v. *Stone*,[3] of which the headnote reads: " To " enable a motor-lorry to carry coal slack without scattering it " on the road, boards were fitted to the sides of the vehicle by " means of slots. The unladen weight of the vehicle was just " under three tons without the boards and just over three tons " with the boards, and the boards were not fitted when the " vehicle was used for other purposes. The vehicle was licensed " as a three-ton vehicle and the appellants were charged, under " the Finance Act, 1922, s. 14 (2), with unlawfully using it in an " altered condition which brought it within a class of vehicle to " which a higher rate of duty was applicable under section 14 (1). " The appellants contended that, under the Road Traffic Act, " 1930, s. 26, the boards should not be included in calculating the " weight of the vehicle as they were ' loose equipment ' within " the meaning of that section. *Held*: since the result of fixing " the boards to the vehicle was that the vehicle was capable of " carrying much larger loads, the boards could not be regarded " merely as ' loose equipment ' within the meaning of the Road " Traffic Act, 1930, s. 26, so as not to be included in the weight " of the vehicle. (*Darling* v. *Burton*[4] distinguished.)"

Lord Goddard said[5]: " In support of his argument that the " boards should be regarded as loose equipment, counsel for the " appellants relied on *Darling* v. *Burton*,[4] a Scottish case, in " which the question was whether the trays with which bakers' " vans are fitted should be regarded as loose equipment or as " part of the van. The court held that those trays, which are " merely put in the van to contain the bread, should be regarded " as loose equipment. I respectfully agree that the judgment of " the Lord Justice-General, Lord Clyde, sitting in Justiciary, " was right." Then this is, in my view, the important part of what Lord Goddard said[6]: " The trays were no part of the van. " They were shelves which were put into the van merely for " holding the bread which was to be carried in the van. Their " presence or absence made no difference to the van as a van, " and they must necessarily be regarded as loose equipment. In " fact, the presence of the shelves would tend to decrease, and

[3] [1948] 2 All E.R. 1076.
[4] 1928 S.C.(J.) 11.
[5] [1948] 2 All E.R. 1076, 1078.
[6] Ibid.

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"not to increase, the load that was carried in the van, because, "if the shelves were not in the van the bread could be packed "much tighter than when it was placed in the ordinary manner "on the shelves. In the present case the boards are affixed by "means of slots to the sides of the van, with the result that the "van is capable of carrying a much larger load. . . I think that "if we held that the justices were wrong in this case and that "the boards must be regarded merely as loose equipment, we "would be opening a very wide door to evasions of the Finance "Act, 1922, s. 14."

It seems to me that, considering this section on the findings at which I have arrived, one has to determine whether this block, fixed and fastened, as it was, on July 18, 1946, was a part of the vehicle. I am satisfied that in the condition in which it was on that day it was a part of the vehicle and was necessary to or ordinarily used with the vehicle when working on the road. In my view it was not "loose equipment" within the meaning of the section, but was a part of the body, and it was proper for it to be included in the unladen weight of that vehicle at that time.

*Judgment for the plaintiffs.*

Solicitors: *J. G. Barr; Mawby, Barrie & Letts.*

J. D. P.

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[WINCHESTER ASSIZES.]

1953
*Mar.* 25.

Slade J.

## *HOOK *v.* CUNARD STEAMSHIP CO.

*False Imprisonment—Ship—Right of master to detain—Necessity for preservation of order or safety of vessel—Belief and reasonable cause to believe.*

The master of a merchant ship on the high seas is justified at common law in arresting and confining in a reasonable manner and for a reasonable time any sailor or other person on board his ship if he has reasonable cause to believe, and does in fact believe, that such arrest or confinement is necessary for the preservation of order and discipline or for the safety of the vessel or the persons or property on board. In an action for false imprisonment by such a sailor or other person the onus is on the defence to prove, by a preponderance of probability: (i) that the master had reasonable cause to believe that the arrest and confinement were necessary for one or more of the purposes above mentioned; and (ii) that the master did, in fact, believe that they were so necessary. It is no defence to prove merely that the master believed or had reason to believe some accusation made against the plaintiff.

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[Reported by NIUL HOGG, Esq., Barrister-at-Law.]

ACTION.

On June 24, 1950, one of the vessels of the defendants' fleet, the *Queen Elizabeth*, left Southampton for New York carrying 1,921 passengers and a crew of 1,287. On June 25, the plaintiff, who had had 41 years of exemplary service with the defendants and was then serving as a steward in the first-class passenger lounge of the vessel, was accused by a Dr. Greenberg, one of the first-class passengers, of indecently assaulting his 10-year old daughter, Linda. The child identified the plaintiff as her assailant and the staff captain, who had been deputed by the master to investigate the complaint, ordered that the plaintiff be put to work in the pantry away from the passengers. However, in view of Dr. Greenberg's insistence that he be put under lock and key, his aggressive attitude towards the plaintiff, and his threat to alarm the other passengers, the staff captain ordered that the plaintiff be confined.

Subsequently Dr. Greenberg told the master that he believed the plaintiff to be unbalanced, but neither of the ship's doctors could find any sign of abnormality. The master, having himself interviewed the plaintiff, who was then for the first time told clearly of the charge against him and given an opportunity to refute it, decided to continue the confinement until the first-class passengers should have disembarked at New York. In fact he was not released until some 12 hours later on June 29. He was not confined during the homeward voyage, but was put to administrative duties away from the passengers.

The defence, as originally pleaded, admitted imprisonment from the time of the interview with the staff captain to the time of the interview with the master but denied that there was any imprisonment thereafter. At the trial this defence was abandoned and, imprisonment throughout the whole period being admitted, it was sought to justify it.

*Norman Skelhorn* for the plaintiff.
*J. T. Molony* for the defendants.

The following cases were referred to: *Christie* v. *Leachinsky* [1]: *Aldworth* v. *Stewart* [2]; *The Lima*, [3] and *Walter* v. *Alltools Ltd.* [4]

SLADE J., having stated the facts: It now being admitted that the plaintiff was imprisoned from June 25 until June 29, it is, of course, conceded by Mr. Molony that the onus lies upon him to justify that imprisonment, and by "justify" I mean satisfy me by the standard of proof which arises in a civil action, namely the preponderance of probability, that there existed sufficient circumstances in law to justify the placing of the plaintiff under restraint for, and for the whole of, that period.

[1] [1947] A.C. 573; 63 T.L.R. 231; [1947] 1 All E.R. 567.
[2] (1866) 4 F. & F. 957.
[3] (1837) 3 Hagg. 346.
[4] (1944) 171 L.T. 371; 61 T.L.R. 39.

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In the first place, therefore, I have to ask myself: in what circumstances does the law recognize the right of a master or anyone deputed by him to imprison someone who is on board the ship which he is commanding when the ship is on the high seas?

There is very little authority on the point. In Halsbury's Laws of England, 2nd ed., vol. 33, p. 43, para. 75, the law is stated in this way (I am, of course, considering only the common law right as opposed to the statutory right, in circumstances which do not arise in this case, under the Merchant Shipping Acts): "The master of a merchant ship is justified at common law in "arresting and confining in a reasonable manner and for a reason- "able time any sailor or other person on board his ship, if he has "reasonable cause to believe that such arrest or confinement is "necessary for the preservation of order and discipline or for the "safety of the vessel or the persons or property on board."

I think there requires to be added to that, not only that the master of the ship must have reasonable cause to believe in the necessity of the confinement for that purpose but that he must in fact believe that the confinement is necessary for that purpose —that is to say, that the confinement must comply not only with the objective but also with the subjective requirements in that respect.

As to the word "necessary" or "necessity," I think that that word is vital. That requirement derives some support from a direction to the jury which was given in *Aldworth* v. *Stewart*,[1] to which Mr. Skelhorn referred me. That was an action for imprisoning a passenger on board a passenger ship for insolence to the captain, the justification being that it was necessary for the due preservation of discipline. Channell B., in summing up to the jury, said that "it was undoubtedly necessary that the "captain of a ship should be entrusted with considerable autho- "rity. And it was true, as a general proposition, that the captain "had some authority over the passengers as over the crew. But "this authority was based upon necessity, and was limited to the "preservation of necessary discipline and the safety of the ship. "It was true that the captain was not bound to wait for actual "mutiny, and he might arrest any movements towards it on the "part of the passengers or the crew. But then there must be "some act calculated in the apprehension of a reasonable man" —that is the objective test—"to interfere with the safety of the "ship or the due prosecution of the voyage."

Mr. Molony was also good enough to refer me to a passage in the judgment of Sir John Nicholl in *The Lima*,[2] in which he said: "The maritime law and the legislature have always considered "this valuable class of persons, the British mariners, as highly "claiming encouragement and protection; but, on the other hand, "the maintenance of order, discipline, and the authority of the

[1] (1866) 4 F. & F. 957, 961; 176 E.R. 865, 867.

[2] (1837) 3 Hagg. 346, 349; 166 E.R. 434, 435.

"commanding officer on board, are essential to the safety of "navigation, and the great commercial interests of the country."

What, therefore, is the authority of the commanding officer on board? In the view which I take of this case it becomes unnecessary for me to decide whether the right, whatever it is, is limited to the master of the ship or commanding officer of the ship or whether he is in any circumstances entitled to delegate it. I will, therefore, apply it to the master of a ship.

To justify an imprisoning of the plaintiff, based on the justification as pleaded in this case, I hold that the defendants must prove, with the burden of proof which I have already indicated, namely that of a civil action, first, that the master, Captain Cove, had reasonable cause to believe that the arrest and confinement of the plaintiff were necessary for either (1) the preservation of order on the ship, or (2) the safety of one or more of its passengers (I say "one or more" so as to include not only Linda but Dr. and Mrs. Greenberg and their little son), and, secondly, that the master in fact believed that the arrest and confinement were so necessary. The parties have agreed in this case that I am to treat the arrest and confinement alleged in the statement of claim as being the single tort of false imprisonment.

Again it is necessary to underline the word "necessary." The question is not: Did Captain Cove believe the accusation against the plaintiff to be true? The answer is that he did, and, of course, Dr. Greenberg did. Nor is the question: Had he reasonable grounds for believing the accusation to be true? I am prepared to accept that he had. The question is: Had he reasonable grounds for believing that the imprisonment of the plaintiff was necessary—necessary for either the preservation of order on the ship or the safety of one or more of its passengers?

That, as I have said, is the objective test. I have no hesitation whatever in arriving at the conclusion that the imprisonment of the plaintiff was in no way necessary and that there were no reasonable grounds for believing it to be necessary for that purpose. It is true that Dr. Greenberg could no longer make the wild threats and the extravagant statements that he made on the return voyage, because he would not be there to make them; but if there were grounds for believing that the plaintiff was really the sort of ogre that he was painted as being, I cannot see why the children should have been any more safe on the return voyage than they were on the outward voyage so long as he remained at large.

That is sufficient to dispose of this defence. But, as this case may go further, I feel it desirable that I should express my view on the second question, and I find as a fact that neither the master nor the staff captain in fact believed that the arrest and confinement of the plaintiff were necessary for either of those purposes or at all. Of course, as I indicated to Mr. Molony, I acquit them entirely of any malice in the sense of ill will or spite towards the plaintiff: on the contrary I am satisfied that they

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felt considerable concern for the plaintiff, a trusted servant of so long standing with their company and under a two-year contract with the company. But in spite of their disclaimers, I am satisfied that they did not order the confinement and the continuation of the confinement of the plaintiff because they in fact believed that it was necessary for any of the purposes which I have mentioned, but that they did it to placate Dr. Greenberg and, by placating Dr. Greenberg, to avoid what Captain Cove described as "unwelcome publicity."

His Lordship further considered the evidence, during the course of which he said that no one in the action had ever ventured to suggest that there was any justification for the accusation made by the child against the plaintiff; it had never been on the pleadings, and it was fortunate for the defendants that he, not sitting with a jury, was able to make it clear that there was no vestige of ground, nor had any vestige of ground been suggested by the defendants, for casting the slightest aspersion upon the plaintiff's character. He was, therefore, able to vindicate the plaintiff in that court, and it was not necessary for him to vindicate him by visiting a heavy sum of damages upon the defendants for their conduct in the matter, as a jury might well have done, being the only way in which they could have made it clear that there was no stain of any kind upon his character. His Lordship then assessed the damages at £250.

*Judgment for the plaintiff.*

Solicitors: *Waller, Chesshire & Co., Southampton; Lamport, Bassitt & Hiscock, Southampton, for Hill, Dickinson & Co., Liverpool.*

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[COURT OF CRIMINAL APPEAL.]

C. C. A.

1953
*Mar.* 30.

Lord Goddard C.J., Byrne and Parker JJ.

## * REGINA *v.* HOLMES.

*Criminal law — Evidence — Murder — Plea of insanity — Questions to medical witness—Admissibility.*

A man pleaded insanity as a defence to a charge of murder. At the trial a doctor who gave evidence for the defence was asked in cross-examination whether in his opinion the conduct of the accused immediately after the murder would indicate that he knew (1) the nature of the act he was committing, or (2) that his act was contrary to law. The doctor answered both questions in the affirmative. On appeal against conviction:—

*Held*, that the questions had been rightly admitted. If such questions were not admissible it would put insuperable difficulties

[Reported by Mrs. E. M. WELLWOOD, Barrister-at-Law.]

in the way of the defence whenever it was endeavouring to establish insanity.

*Reg.* v. *Frances* (1849) 4 Cox C.C. 57, applied.

APPEAL against conviction.

The appellant, Joseph Holmes, committed a homicidal attack on his landlady, Mrs. Harriett Ann Eyles. He then went to a police station, said that he was giving himself up for murder, and gave a full and detailed account of what he had done. He was charged upon indictment for murder before Streatfeild J. at Nottinghamshire Assizes. The only defence was a plea of insanity. It was agreed by doctors for the defence and for the prosecution that at the time of the trial the appellant was suffering from paranoic schizophrenia, a disease of the mind. A doctor who was called to give evidence on behalf of the appellant was asked in cross-examination whether in his opinion the appellant's conduct immediately after the murder would indicate (1) that he knew the nature of the act he was committing, or (2) that the appellant knew that his conduct was contrary to the law of the land. The doctor answered both questions in the affirmative. The appellant was convicted of murder.

The principal ground of his appeal against conviction was that the judge was wrong in allowing the questions put to the doctor and his answers to be admitted in evidence.

*C. N. Shawcross Q.C.* and *P. D. Cotes-Preedy* for the appellant.

*G. Terrell* for the Crown.

The following cases were cited in argument: *Rex* v. *Wright* [1]; *Rex* v. *Searle* [2]; *Reg.* v. *Frances* [3]; *Reg.* v. *Layton* [4]; *Reg.* v. *Burton*.[5]

LORD GODDARD C.J. delivered the judgment of the court.—The appellant was convicted of murder before Streatfeild J. at the Nottinghamshire Assizes. The case was one in which the defence set up the plea of insanity, a plea in which the onus of discharge is on the prisoner. In the course of the case a medical man, Dr. Woddis, was called to give evidence on behalf of the defence. Both the doctor for the defence and the doctor for the prosecution were agreed that at the time of the trial, and probably before that time, the prisoner was suffering from a disease of the mind, a particular form of paranoia.

It is well known that the test of insanity as an excuse for a criminal act according to the answers the judges gave in the *M'Naghten* case,[1] which were adopted by the House of Lords, is whether or not the man knew the nature and quality of the

[1] (1821) 4 R. & R. 456.
[2] (1831) 1 M. & R. 75.
[3] (1849) 4 Cox C.C. 57.
[4] (1849) 4 Cox C.C. 149.
[5] (1863) 3 F. & F. 772, 778.

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act he was doing. If he did not, that establishes insanity. If he did, one must then go further and say: "Did he know at the "time that the act was wrong?" "Wrong," according to the decision of this court, does not mean wrong in the moral sense, but wrong in the sense that it was contrary to law.

[Having stated the facts his Lordship continued:] The doctor called for the defence was asked this question: "Doctor "Woddis, you remember that I asked you the question whether "the accused's conduct immediately after this incident would "indicate to you that he knew the nature of the act that he was "committing, and your reply was 'Yes.' That is so, is it not? "(A) Yes. (Q) Would his conduct immediately after indicate "equally that he knew his conduct was contrary to the law of "the land?" The doctor's answer was "Yes."

Mr. Shawcross has submitted that those questions were inadmissible. Whatever fine distinctions may have been drawn in days before or soon after the *M'Naghten* case,[1] no member of the court has ever heard an objection being taken to such questions as those. Moreover, if the objection prevailed, it would put an insuperable difficulty in the way of the defence whenever they were trying to establish insanity. For instance, if when this question was put to Dr. Woddis: "Would his conduct "immediately after indicate equally that he knew his conduct "was contrary to the law of the land?" he was prepared to answer "No," it would be a very great misfortune and a great hardship to the defendant setting up a plea of insanity if the doctor was not to be allowed to answer that question. It seems to the court that that is essentially a question that may be asked and answered.

Mr. Shawcross referred to a large number of cases in which the court has set out exactly what is the right question and issue, and he relied particularly on the judgment of Alderson B., who evidently had not approved of the decision in the *M'Naghten* case,[1] in *Reg.* v. *Frances*,[2] where he said: "The proper mode is "to ask what are the symptoms of insanity, or to take particular "facts, and, assuming them to be true, to ask whether they "indicate insanity on the part of the prisoner." When the judge is using the word "insanity," he is using it in the sense that it is understood in criminal law as an excuse for crime. In this case the question asked falls exactly within what the judge said was admissible because, when expanded, it is this: "Does "the fact that he went immediately to the police station, gave "himself up for murder and wrote out a full description of the "crime indicate to you insanity on the part of the prisoner, that "is to say, insanity within the M'Naghten rules, depending on "whether or not he knew that what he had done was contrary "to law?"

That is enough to dispose of this case, and this court does

[1] (1843) 10 Cl. & Fin. 200. [2] (1849) 4 Cox C.C. 57, 58.

not propose to give a longer judgment or to deal with all the cases cited because, in the court's opinion, the question is clear, and it would introduce a great deal of confusion and injustice to an insane prisoner if we were to give effect to the argument. This appeal is dismissed.

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*Appeal dismissed.*

Solicitors: *Registrar, Court of Criminal Appeal; Director of Public Prosecutions.*

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[PROBATE, ETC., DIVISION.]

## *PRACTICE DIRECTION (WILLS: SIGNATURE).

1953
*Apr.* 23.

*Will—Signature at foot or end.*

The following direction has been issued by the senior registrar to the staffs of the probate registries:—

An incorrect practice appears to have grown up as regards wills which are signed only at the foot of the first page, but which, for lack of space, are continued upon the next page.

When the continuation is part of an uncompleted sentence, and it has been established that the whole (or part) of the second page was written before the execution of the will on the first page, it has become the practice to admit to proof the continuation on the second page, as being above the signature.

It was decided in *In the Goods of Gee* [1] and *Royle* v. *Harris*,[2] that this is insufficient to justify admission of any of the second page.

Some summaries of decisions, in particular as regards *In the Goods of Kimpton*,[3] *In the Goods of Wotton*,[4] *In the Estate of Long* [5] and *Royle* v. *Harris*.[2] are misleading on this point; and, until there is further legislation or a binding legal decision overruling *In the Goods of Gee*,[1] no such continuation should be admitted as part of the will, unless there is *also* a reference, above the signature on the first page, which effects incorporation.

B. LONG,
Senior Registrar.

[1] (1898) 78 L.T. 843.
[2] [1895] P. 163; 11 T.L.R. 268.
[3] (1864) 3 Sw. & Tr. 427.
[4] (1874) L.R. 3 P. & D. 159.
[5] [1936] P. 166; 52 T.L.R. 323; [1936] 1 All E.R. 435.

[COURT OF APPEAL.]

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*Apr.* 22, 23.

Evershed M.R., Birkett and Romer L.JJ.

## * DORRINGTON *v.* GRIFF FENDER (SWANSEA) LD. AND ANOTHER.

*County Court—Practice—Judge's note—No finding on essential matter—Appeal to Court of Appeal.*

In a running-down action, the county court judge found that one party involved in an accident, the plaintiff, was negligent and that his negligence was the cause of the accident. There was no specific finding in the judge's note of the judgment whether the driver of the other vehicle involved, the second defendant, was also, and if so to what extent, negligent, though evidence had been given which was vital to a consideration of that question. On appeal:—

*Held*, that, having regard to the Law Reform (Contributory Negligence) Act, 1945 (8 & 9 Geo. 6, c. 28), the negligence of the defendant was a vital matter, and as it was not made clear by the note whether it had been considered and taken into account in giving judgment, the case, in the absence of consent by the parties to an apportionment by the Court of Appeal, must be remitted for a fresh trial.

APPEAL from Judge Thomas sitting at Chepstow County Court.

Early in the morning of May 23, 1952, the plaintiff, one Dorrington, was riding a motor bicycle along a side road known as Netherend Road, which runs south to join the main road from Gloucester to South Wales. Dorrington came to the main road and intended to turn on his left near-side into the main road towards Gloucester. At the same time two lorries were coming from the direction of Gloucester. One of these was the defendants' lorry; it was driven by one Fender, the second defendant, and he was following behind the other lorry, which was laden with bricks. Shortly before the two lorries came opposite to the entry to Netherend Road from the main road. Fender drove his lorry to the right side, the off-side, of the road in order to pass the lorry laden with the bricks. He was still on the off-side of the road when the plaintiff on his motor bicycle emerged from Netherend Road and a collision took place.

The plaintiff brought proceedings in the Chepstow County Court, claiming damages for negligence against the first defendants, the owners of the lorry and against Fender, the driver. There was no counterclaim.

At the trial before Judge Thomas, evidence was given first by the plaintiff, and on the defendants' side by the driver, Fender, and by the driver of the lorry laden with bricks, one Powell. There was also evidence of a police constable who was not present at the time of the accident, but went there shortly afterwards. It was the plaintiff's case, according to his evidence, that he had already emerged from the Netherend Road when the defendants' driver began his manœuvre of passing, that the collision took place a few yards on the eastern side of the point of

junction, and that he, the plaintiff, was then carried forcibly back by the lorry to the point of junction of the two roads. The county court judge rejected that explanation, and found that the collision took place just as the plaintiff emerged from Netherend Road. From that finding it followed that at that point the defendants' lorry was on the off-side of the road and was actually passing the brick-laden lorry.

Judge Thomas found against the plaintiff, holding that his own negligence was the cause of the accident.

The plaintiff appealed.

*S. R. Edgedale Q.C.* and *J. F. F. Platts-Mills* for the plaintiff.
*Hugh Griffith* for both defendants.

In addition to the cases cited in the judgments, the following cases were referred to in argument: *Bracegirdle* v. *Oxley*, *Bracegirdle* v. *Cobley* [1]; *Upson* v. *London Passenger Transport Board* [2]; and *British Launderers' Research Association* v. *Hendon Borough Rating Authority*.[3]

EVERSHED M.R. This is a troublesome matter upon which we have taken a little time to consider our judgment. [His Lordship stated the facts substantially as set out above, and continued:] The question was whether the plaintiff could establish that the damage was attributable to the defendant's negligence. Of course, in considering that matter, having regard to the Law Reform (Contributory Negligence) Act, 1945, the judge had also to consider the possibility that both the plaintiff and the defendant were at fault. If he came to that conclusion, then he would have had to consider in what degree each, *vis-à-vis* the other, was at fault.

[His Lordship then considered the evidence as set out above, and continued:] The judge's note of the judgment was as follows: "The plaintiff's claim is based on his evidence that "he emerged from Netherend Road into the major road and "he got, as it were, a few yards round the corner when the "defendants' van, which was following another vehicle, turned "out to pass the other vehicle, and in doing so scraped alongside "the motor cycle, leaving marks on the van and resulting in the "fracture of the plaintiff's right hand and causing damage. The "case for the defendant is that while driving along the main "road he saw nothing emerging from the minor road and the "accident, according to the bang, must have occurred right at "the opening of the road, rather than several yards on as "indicated by the plaintiff. The police constable in his evidence "according to the marks he found on the road was satisfied that

[1] [1947] K.B. 349; 63 T.L.R. 98; [1947] 1 All E.R. 126.
[2] [1947] K.B. 930; 63 T.L.R. 452; [1947] 2 All E.R. 509.
[3] [1949] 1 K.B. 434; 65 T.L.R. 103; [1949] 1 All E.R. 21.

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" the end of the plaintiff's transit "—which, I think, means the end of his own voluntary passage on the motor cycle—" fell " short by several yards from the position marked on the map. " The great difficulty the plaintiff is in is that a much higher " duty of care rests upon any vehicle emerging into the main " road. It is not enough for him to chance getting in between " these vans by emerging from this minor road unless reasonably " satisfied that the main road is clear and perfectly safe to go out. " The facts speak for themselves. There were two vehicles " coming. As he emerged, and allowing for his case but a few " yards, they had no chance to avoid him. I feel bound to find " on the evidence of the defendants' witnesses, and I do find as " a fact, that the collision occurred three feet in the road itself " and not on the grass verge a few yards up. I find it incredible " that after the accident the plaintiff remained mounted on his " motor cycle and was taken back to the spot indicated by the " police constable to the end of his journey; the onus is on the " plaintiff to satisfy the court that the accident was due to the " negligence of the defendant, and for the reasons I have given, " I am by no means satisfied, and feel bound to draw the infer- " ence that the plaintiff's negligence was the cause of the " accident."

Mr. Edgedale has challenged the validity of that judgment on the ground, broadly speaking, that, on the face of the judgment, it is an irresistible inference that the judge applied his mind to the question whether the plaintiff's story was true that the impact occurred not actually at the corner of the road but at some distance along it; that on that matter he found against the plaintiff, whose evidence he did not accept; and that he then put to himself this point and this point only, whether, the plaintiff having run into the defendants' lorry at that point, the defendant Fender could have avoided the accident, for if he could not the plaintiff was solely to blame. According to Mr. Edgedale's argument, the county court judge in effect said that the onus was on the plaintiff to satisfy the court that the accident was due exclusively to the negligence of the defendant, and, because he disbelieved the plaintiff's explanation, he drew the inference that the plaintiff, exclusively, was to blame. It is obvious from that recital (if it is a fair representation of the judgment) that the judge never put to himself the point whether, apart from the plaintiff's careless act in emerging from the side road, the defendants' driver was at fault in any degree in being where he was on the road.

I must emphasize two things, first, that where a judge of the county court has found facts on some admissible evidence, this court cannot and will not disturb the finding; and secondly, this court will not lightly assume, because a judge's note is, necessarily, somewhat brief, that he has failed to bear in mind an essential point which he had to determine. On the other side, it is no less important in the public interest

not only that justice should be done but that it should manifestly appear to be done. This court can only determine the cases presented to it from the county court on the basis of the judge's judgment as it was delivered or recorded. Bearing all those matters in mind, I am unable to avoid the conclusion that the essential point which I have stated, namely, whether the defendants' driver was to blame for being where he was when he was, was never considered by Judge Thomas. There was evidence given which was vital to a consideration of that question. Thus Fender, the defendants' driver, stated that the driver in front gave him the " overtake " signal, and that particular observation is underlined by the judge. It is significant that the driver of the other lorry, Powell, did not (according to the note of his evidence) so state and, according to Mr. Platts-Mills, who was present at the trial, the second driver did not in fact recall giving that signal. It may be that Judge Thomas came to the conclusion, though he does not so find, that the " overtake " signal was given, and if he did intend so to find or so thought, and if because the signal was given he thought that the defendant was wholly exonerated, in my judgment, he misdirected himself. It may or may not be an exoneration from blame that you have been given a signal to overtake, but in my judgment the mere fact that you have been given such a signal is not conclusive.

In the course of cross-examination Fender also said that he knew there was a turning on the right. That particular statement is not underlined by the judge, and again there is no finding on it. It appears and is not in dispute between the parties that the road is obscured by high hedges and, since the accident occurred in the month of May, the hedges would be covered with leaves. It follows that a person proceeding on the main road would not see at any rate a small vehicle come out of Netherend Road. Equally, a person proceeding along Netherend Road would not see what might be passing on the main road to his left. In all the circumstances of the case, I am not satisfied that the judge put to himself the essential point which I have already stated, namely, whether the defendants' driver was to some extent at fault in passing where he did.

It is not here a question of departing from a judges' finding of fact, as in *Foster* v. *Bush House*,[1] to which Mr. Griffith referred or, indeed, of saying that the finding of the judge was perverse. It is a case in which it seems to me, on the face of the judgment, that this court cannot be satisfied that the essential matter was ever put to himself and considered by the judge at all. I think that it must be plain from the evidence that if a driver knows of a blind intersecting road, and by blind intersecting road I mean a road the mouth of which is wholly or partially obscured by hedges, he must owe a duty of care if he is

[1] The Times, Oct. 21, 1952; 96 S.J. 763.

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considering passing other vehicles. He is not bound to take account of extravagant and reckless behaviour, but he would (I should have thought) be bound to take account of the ordinary chances of mankind, for example, that a child might come out of Netherend Road. If, therefore, the matter rested there alone, I should feel compelled to say that this appeal must succeed and that the right answer would be to remit the case for retrial in accordance with the practice of this court, which involves no reflection on the county court judge, to another judge on the same circuit. In default of some agreement between the parties which would render it unnecessary, that should be the order made.

But I understand in this case that the parties may desire to avoid costs and concede that we should, doing the best we can on the recorded note of the evidence, decide whether the defendants' driver was himself negligent, and if so that we should apportion the blame between him and the plaintiff—for that I am not suggesting that this court could interfere with the judge's finding of fact that the plaintiff was to blame, and substantially to blame, for emerging as he did from Netherend Road. We have considered between ourselves (if the parties should be willing) how we should, doing the best we can, deal with these matters; but before it is further debated, my brethren will deliver their judgments. As I have already said, in the absence of the parties' consent, I propose that this appeal be allowed and that the matter be remitted for a rehearing.

BIRKETT L.J. I agree. I had great sympathy with and agreed with most of the argument addressed to this court by Mr. Griffith. It is important that what I call the sanctity of the findings of county court judges should be maintained. They see and hear the witnesses, they get what Mr. Griffith called the atmosphere, which is not possible in the Court of Appeal, and speaking generally, as my Lord said, it is highly important that that doctrine should be firmly upheld. The distinction between *Foster* v. *Bush House* [2] and this case is that in that case there was no doubt that the judge had considered all the relevant facts. In this case it is said that a most material and relevant fact has never been considered at all. Speaking generally, I agree with the propositions put forward by Mr. Griffith as to the findings of fact by the county court judge. Merely because a judge does not mention a thing, it does not follow that he has not had it in mind. With all that, which was part of the argument of Mr. Griffith, I agree, but the important matter in which I disagree with him is this: the ground of the decision in the present case was plainly that the accident was caused solely by the negligence of the plaintiff. The wording of the judgment is

[2] Ibid.

not free from some ambiguity: "The onus is on the plaintiff "to satisfy the court that the accident was due to the negligence "of the defendant, and for the reasons which I have given I am "by no means satisfied and feel bound to draw the inference that "the plaintiff's negligence was the cause of the accident."

That is negativing the negligence of the defendant, and it would appear from the judgment that, if I may put it in my own way, the judge was saying: "I have considered this "case and, in my judgment, the accident was caused in "this way: it was entirely due to the plaintiff, because he "emerged from this road into the main road and the defen-"dant had no chance to avoid him." That, in my view, is only a partial view of the situation. I think that the important matter was how the defendants' lorry driver came to be there. He was, admittedly, on the wrong side of the road and, in the ordinary way, people emerging from a side road do not expect to find people on the wrong side of the road. As these things happen in the twinkling of an eye; it may well be that a child emerging from the side road might have been taken very much by surprise by the lorry being on the wrong side of the road. I think that a vital question for the county court judge was, not whether there was any chance to avoid the plaintiff, but whether it was negligent of the driver for the lorry to be there at all. Reading Judge Thomas' judgment, I am bound to say that the conclusion seems irresistible that he did not consider that matter at all. I quite agree with Mr. Griffith that it was raised in cross-examination, but when the judge came to give his judgment he had this one point, it would appear, in mind: when the plaintiff emerged, the defendants' lorry driver had no chance to avoid him. I think there was the prior question to which he ought to have addressed his mind.

I have great sympathy with county court judges, who have busy days and many cases and are not able always in an extempore judgment to clothe their ideas in words which will stand up to a minute and careful cross-examination. But I think that the effect of this judgment is that the judge omitted to give consideration and attention to what, I think, was a vital part of the case.

I agree fully with my Lord that not only must justice be done, but it must manifestly appear to be done. With regard to the atmosphere of which Mr. Griffith spoke, when I read these papers, the evidence and the judgment, and listened to the speeches of counsel in this court, I could not escape from the feeling that to make the plaintiff solely liable was not really in accordance with the justice of the case. For these reasons, I agree with the judgment announced by my Lord.

ROMER L.J. I also agree. The sanctity in this court of the findings of fact of county court judges was well exemplified in

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*Foster* v. *Bush House*.[3] But for the reasons which my Lords have given, the view at which we have arrived today does not in any way infringe the principle on which that case laid emphasis.

As to the rest of the case, I so entirely agree with the conclusions that my Lords have expressed that there is nothing that I can usefully add.

[By agreement between the parties the court then apportioned the damage, the quantum of which was agreed at £120.]

EVERSHED M.R. The parties having desired us to do the best we could with the apportionment, I proceed on the view that the defendants' driver, Fender, was treated as a truthful witness. He had in front of him, according to the evidence, a clear road and a signal to pass. He admitted that he knew there was this turning. Without saying more, it seems to me that a fair apportionment would be to say that the plaintiff, whom Judge Thomas considered to have been extremely careless, was three-fourths to blame, and the defendants' driver one-fourth, which will mean that there should be judgment for the plaintiff for £30.

BIRKETT and ROMER L.JJ. agreed.

*Appeal allowed with costs. No costs of the trial below.*

Solicitors: *O. H. Parsons; R. I. Lewis & Co.*

E. D.

[3] The Times, Oct. 21, 1952; 96 S.J. 763.

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[COURT OF APPEAL.]

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*Apr.* 16, 21.
Singleton, Jenkins and Morris L.JJ.

* GRINSTED *v.* HADRILL AND OTHERS.

[1950 G. No. 1923.]

*Practice and Procedure—Jury action—Submission of no evidence—Time for making—Issue left by judge to jury—Verdict for plaintiff—Submission thereafter of no evidence to support jury's finding—Agent—Secret profit.*

In an action in which the plaintiff claimed (inter alia) to recover from the managing director of the defendant company, and the company, a sum of money, said to be secret profit which it was alleged that the defendants had retained when acting as agents for the plaintiff in the purchase of shares, the trial judge left the

issue to the jury, who returned a verdict in favour of the plaintiff. It was then submitted by counsel for the defendants that there was no evidence on which the jury could have come to their conclusion, and after hearing arguments the judge entered judgment for the defendants. On appeal, it was contended that there having been no submission of no evidence before the issue had been left to the jury and they had given their verdict, the judge should have accepted their finding:—

*Held*, that there was evidence on which the jury could find as they did, and, it being a matter for their decision, the appeal should be allowed on that issue.

A submission that there is no evidence to go before the jury should be made by counsel either at the end of the plaintiff's case or after all the evidence is concluded, and, speaking generally, it should not be allowed to succeed if made subsequent to the jury's verdict. By Ord. 36, r. 39, of the R.S.C. the judge is empowered, at or after trial, to direct judgment to be entered as he shall think right, but if he thinks that a case, however weak, has been made which, if unanswered, would justify a verdict for the plaintiff, and therefore submits the case to the jury and obtains their verdict, he should take their decision and not usurp their province.

Dictum of Lord Reading C.J. in *Skeate* v. *Slaters Ltd.* [1914] 2 K.B. 429; 30 T.L.R. 290, applied.

APPEAL from Barry J.

The plaintiff, P. F. Grinsted, in 1948 entered into an agreement with R. A. Hadrill, the managing director of London Commercial Investment Co. Ltd., to purchase 1,500 shares in the company at a price of £2 per share, in consideration of which he was to be appointed secretary of the company. Towards the end of 1949 he gave up his appointment and in 1950 commenced the present action against both Hadrill and the company, claiming damages for fraudulent misrepresentation, in consequence of which, he alleged, he had suffered loss, and also claiming the return of a sum of money which he alleged Hadrill had made as a secret profit when acting as his (the plaintiff's) agent in the purchase of shares. He alleged that 500 of the shares had been purchased for £550, and Hadrill and/or the company had retained £450, the balance of £1,000 paid by the plaintiff, and had not disclosed the fact.

At the trial before judge and jury Barry J. left both issues to the jury, after a full summing-up, and the jury found for the defendants on the issue of fraudulent misrepresentation, and for the plaintiff on the issue of secret profit. Counsel for the defendants then submitted that there was no evidence on which the jury could find for the plaintiff on the issue of secret profit, and after hearing arguments the judge entered judgment for the defendants on that issue also.

The plaintiff appealed on both issues, but early in the hearing the court intimated that it could not disturb the finding of the jury on the question of fraud, and this report is confined to the point of procedure in regard to the second issue.

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*Gerald Gardiner Q.C.* and *Harold Brown* for the plaintiff.
*H. J. Phillimore Q.C.* and *Lewis Hawser* for the defendants.

The following cases were referred to in argument:—*Thompson* v. *Meade* [1]; *Skeate* v. *Slaters Ld.*[2]

SINGLETON L.J., having stated the facts and the reasons why the court did not think there was any ground for allowing the appeal on the issue of fraudulent misrepresentation, continued: The issue on the second part of the case appears from para. 9 of the statement of claim: "Further or alternatively at or about "the end of September, 1948, the plaintiff, at the first defendant's "request, paid to the first defendant as the agent of the plaintiff "£1,000 for 500 shares which the first defendant informed the "plaintiff was the purchase price to be paid to one Bisiker for "such shares. In fact the first defendant paid to the said Bisiker "for the purchase of the said shares the sum of £550 and the "first defendant or the second defendants or the directors of the "second defendants as their agents made an illegal profit of £450 "on such transaction," and the plaintiff claimed the sum of £450 as money had and received by the defendants, or one of them, for the use of the plaintiff.

There was some evidence upon this, and there are documents. It is not an easy case to determine. It is not wholly a question of law. The point raised by Mr. Phillimore on behalf of the defendants is really this, and no more than this: was Hadrill the agent of the plaintiff? That issue was left by the judge to the jury; it was put clearly to them, and the jury at the conclusion of the case found for the plaintiff. They said that the plaintiff should have from the defendants the sum of £500, representing £450 secret profit less £20 stamp duty, with something added for interest. The judge thereafter heard argument, and he reached a conclusion that, notwithstanding the verdict of the jury, the defendants ought to have judgment on that issue. Mr. Gardiner submits that that is wrong, and that the plaintiff is entitled to judgment on that issue. He raised before this court a question of procedure of some nicety. He said that there had been no submission on this part of the case that there was no evidence to go to the jury, the jury had given their verdict and, there having been no submission, it was then the duty of the judge to enter judgment for the plaintiff according to the jury's verdict. He submitted further that as Mr. Phillimore, on behalf of the defendants, had not submitted that there was no evidence to go to the jury before the case went to them, he ought not to be allowed to succeed on a submission made subsequently.

Speaking generally, that expresses the view which I hold on this matter. If it is to be said that there is no evidence to go

[1] (1891) 7 T.L.R. 698.
[2] [1914] 2 K.B. 429; 30 T.L.R. 290.

before the jury, counsel who proposes to submit that should do so either at the end of the plaintiff's case or when all the evidence is concluded. If he takes that course, the presiding judge has the matter before him. He knows that counsel has asked him to rule on it, and even if he thinks that it is better to leave the case to the jury he has all the elements before him when he is directing the jury. The judge is entitled to the help of counsel on those matters.

Mr. Phillimore told us that he would have submitted that there was no evidence on this part of the case but for the fact that the judge had told him that the case would have to go to the jury in any event on the issue of fraud; but, apart from that, I rather gained the impression from what I have read and heard that Mr. Phillimore was encouraged by the summing-up of the judge, who indicated that he did not think that there was much evidence on this part of the case.

I do not think that any question of procedure arises now, but as we have been referred to one or two authorities I think that I should state what I believe to be the correct position, as shown by *Skeate* v. *Slaters Ltd.*[1] No question as to the failure of counsel to submit is raised there, but the duty of the judge is stated clearly. If the judge himself, at the conclusion of a case, thinks that there is no case to go to a jury, it is his duty to say so; and if at the end of everything, after a jury's verdict, the judge deems it to be his duty to give judgment for the defendant, though the jury have returned a verdict for the plaintiff, it is the judge's duty to do so if in his view the evidence compels him to take that course.

In *Skeate* v. *Slaters Ltd.*[1] the position is stated thus in the headnote: "In an action tried with a jury the judge was asked "at the conclusion of the plaintiff's case to withdraw the case "from the jury on the ground that the plaintiff had failed to "make any case against the defendants. The judge refused to "do so. Witnesses were then called for the defence. The jury "disagreed. Subsequently an application was made to the judge "to enter judgment for the defendants upon the above ground "and also upon the ground that upon all the evidence in the "case the jury could not reasonably have found a verdict for "the plaintiff. The judge refused to enter judgment for the "defendants." On appeal to this court on the refusal of the judge to enter judgment for the defendants, it was held by Lord Reading C.J. and Buckley L.J. "that the Court of Appeal has "power under Ord. 58, r. 4," and by Buckley L.J. that "a judge "at the trial also has power under Ord. 36, r. 39, to enter judg-"ment for a defendant if upon the case as a whole the evidence "for the plaintiff was so weak that a verdict in his favour would "have been set aside as unreasonable." It was held further that on the facts in that case judgment ought not to be entered for the defendants.

[1] [1914] 2 K.B. 429; 30 T.L.R. 290.

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I refer to that decision because of the words of Lord Reading in his judgment [2]: "It was argued for the plaintiff that the learned "judge, having left the case to the jury, could not subsequently "alter his decision and enter judgment for the defendants. I "do not agree with this contention. It is always open to a "judge, if he thinks fit, to reconsider his decision that there "was no case to go to the jury and to enter the judgment for "the defendants if he is then of opinion that the plaintiff has "failed to make a case against the defendants. Frequently at "trials with a jury, the judge, although he thinks the plaintiff "has not made a case, submits it to the jury in order that their "views may be ascertained. This practice very often has the "advantage of making an end of the contest as to the facts and "in the event of a successful appeal against the judge's ruling "enables this Court to dispose of the action without sending it for "retrial. If the judge thinks a case, however weak, has been made "by the plaintiff which, unanswered, would justify a verdict for "the plaintiff, and, therefore, submits the case to a jury, the "judge ought not thereafter to enter judgment for the defen-"dants, however strong may be his opinion that, upon all the "evidence, including that of the defendants, they should succeed, "unless he would have been justified in directing the jury to "find a verdict for the defendants. If he could not have so "directed the jury he should leave the facts to their decision "and should not usurp their province." Similar expressions of view are to be found in the judgment of Buckley L.J.[3] and of Phillimore L.J.[4]

In the present case the judge directed the jury in this way: "If you or I employ a stockbroker to buy some shares for us, he "goes into the market and buys some shares at 25s. per share, "then comes back and charges us 30s. a share, making a profit "of 5s. on each share, which we know nothing about, he is not "entitled to keep it. He is acting for us as our agent to purchase "shares as cheaply as he can, and he is not entitled to make any "illicit or hidden profit of that kind. If the client finds out, the "stockbroker is made to hand over that secret profit to him. If "you thought that Mr. Hadrill was somewhat in the position of "a stockbroker, that he was an agent employed by Mr. Grinsted "to purchase shares for him in this company, and that in that "position he had made a secret profit, then Mr. Grinsted would "be able to recover that secret profit from him."

That was the question put to the jury, and Mr. Phillimore does not criticize it. He agrees with it. Indeed, he accepts the statement of the law in two paragraphs in the well-known text-book, Bowstead on Agency, at the commencement of article 55, in these terms: "No agent is permitted to acquire any personal "benefit in the course of, or by means of, his agency without "the knowledge and consent of his principal. Every agent must

[2] Ibid. 434.
[3] Ibid. 438–9.
[4] Ibid. 443.

" account to his principal for every benefit, and pay over to the " principal every profit, acquired by him in the course of, or by " means of, the agency without such knowledge and consent " even if in acquiring the benefit or profit, he incurred risk of " loss and the principal suffered no injury thereby."

The point raised by Mr. Phillimore on behalf of the defendants is that Hadrill was not agent for the plaintiff. The next line in the judge's direction to the jury is this: " Members " of the jury, can you find any evidence that that is the position " here? " That the judge did not think that it was a strong case on the part of the plaintiff is clear. He then proceeded to set out the case on each side upon this, without referring to all the letters, but he put the case fairly and properly to the jury. At one time, when he was considering the question of damages and how far a verdict for the plaintiff for a nominal sum on the first part of the case would affect damages on the secret profit issue, he put this question to Mr. Phillimore: " Assuming that the " jury found against your client on the question of fraud, but " came to the conclusion that the damages were purely nominal, " namely, that the shares were worth about half what Mr. " Grinsted had given for them, that would not preclude them " from considering this other branch of the case, would it? You " do not submit that it should, do you? " Mr. Phillimore replied: " No, my Lord. I think they clearly could, because " the position would be that if they thought the plaintiff bought " the shares, and the shares were worth what he paid, neverthe " less it would be open to the plaintiff to say: ' This gentleman " ' was my agent and was not entitled to make a secret profit.' "

An answer of that kind clearly ought not to bind counsel beyond the question to which it is an answer, but it shows the nature of the discussion between the judge and counsel. The judge told the jury: " Members of the jury, on the question of " secret profit, as I pointed out to you, when we say ' secret " ' profit,' the fact that a secret profit was made does not " conclude the matter by any means, but only if you came to " the conclusion that Mr. Hadrill was acting as the plaintiff's " agent for the purchase of these shares, and that as such agent " he made a profit to which he was not entitled."

[His Lordship read the correspondence between the plaintiff and Hadrill, and referred to oral evidence given by Hadrill, which he said the jury did not believe, and continued:] The first question to be decided is, was Hadrill the plaintiff's agent to acquire shares? That was put before the jury very clearly by the judge, and the jury's conclusion was that Hadrill was agent for the plaintiff to acquire those shares. Thus it is submitted on behalf of the plaintiff that the verdict of the jury was right, and that that judgment should be given accordingly. The jury found that the sum of £500 in respect of that secret profit should be repaid.

I have omitted to refer to something which, I think, is of

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significance; when the dispute arose the plaintiff put the matter in the hands of solicitors, and they wrote a letter on June 5, 1950, to Hadrill setting out some part of the plaintiff's case, including this paragraph: "There are one or two further matters "for consideration. In regard to the purchase of 500 shares "from Mr. Bisiker, our client paid £2 per share by cheque pay- "able to you personally. It now appears that the consideration "was £1 per share, and someone has made a profit of £500. "This must be accounted for to our client. As our client's "cheque was made payable to you (at your request) we should "like your explanation of the transaction."

The reply to that part of the letter from Hadrill himself, addressed to the plaintiff's solicitors, is this: "The transfer of "500 shares from Mr. Bisiker was for the sum of £1,000. It "was signed by Mr. Grinsted for that figure and subsequently "entered by him, as secretary to the company, in the registers. "The only explanation we can find for your suggestion is that "his memory must be at fault. During Mr. Grinsted's trial "period it is quite likely that he was told if the company con- "tinued to prosper to the same extent that it had done up to "that time, there would be no difficulty in finding someone "willing to pay him £2 or more a share should he wish to leave "the company. If this was said, it was true."

That answer about Bisiker's shares is not an answer at all, and a further letter was written to the defendant Hadrill on July 6, 1950, by the plaintiff's solicitors which contained this passage: "We also note that you side-step the statement about "Mr. Bisiker's shares. It may well be true that the transfer "showed the consideration as £2 per share. What we want to "know is whether he got £2 per share, and if not where did the "balance of the money go to?"

At that time Hadrill and the defendant company had instructed solicitors, and the solicitors replied to that paragraph on July 20: "We do not understand your complaints that our "client's letter of the 6th ultimo 'side steps' any statement "about Mr. Bisiker's shares. The consideration for the sale, as "for the sale of the other shares, was £2 per share, and this is "the amount received and expressed to be received by the "vendor. What precisely is your point on this transaction?" No firm of solicitors could have written that if they had been instructed what the true position was, or what Hadrill's case before the court would be. It seems to me to make it clear that he had kept back the true facts from his own solicitors. When he answered the earlier of those letters, Hadrill did not give the plaintiff's solicitors the true facts, nor did his solicitors in reply to the second letter. It would make most people the more ready to believe that this was a secret profit; and the fact that he had declined to give an explanation of it even to his own solicitors might well influence a jury in thinking: "This man

"knew that he was an agent. That is why he would not disclose "it and would not disclose the true position. He knew it."

All those matters were before the jury, but though the jury returned a verdict on this part of the case in favour of the plaintiff, the submission was made to the judge later that there was no case. That was argued before the judge, he considered it, and in the course of his judgment he said: "I have to "consider now whether on the whole of the facts in this case "there was evidence on which a jury could come to the con- "clusion that Mr. Hadrill was acting as agent for the plaintiff "in acquiring the further 500 shares which the plaintiff had "undertaken to acquire in this company, or that the profit "undoubtedly made by Mr. Hadrill in connexion with this "transaction was an illicit profit made as agent, for the amount "of which he is accountable to his principal."

The judge said that very little argument was addressed to the court on this alternative claim, and there is no doubt that that is right. Counsel were both full of fight on the other part of the case, and in consequence this part did not receive from them the attention which they would have given to it if it had been the only part of the case. But the judge considered it, as his direction to the jury shows; and when Mr. Phillimore suggests in this court that the position was rather unsatisfactory, because the matter was not very fully investigated, it was at least investigated, it seems to me, sufficiently for the judge to direct the jury upon it. The judge referred to the evidence. It is true that he did not refer to all the letters, but the jury had had them read to them, and we are told that they took the correspondence away with them when they retired to consider their verdict. At the conclusion the judge said that he was still unable to see that there was any real evidence on which the jury could reach the conclusion which they did.

I think that this was a matter for the jury and one on which they had to make up their minds. This case is of some importance in the commercial world, and if there be *any* evidence, it is better that the jury's verdict should be taken than otherwise. I do not think it is right to say that there was no evidence for them to consider. I think that there was evidence, and that it was for the jury to say what the result of this part of the plaintiff's claim should be. They determined it; and though I recognize the great care and attention which Barry J. gave to this case, I believe it to be the duty of this court to say that the jury's verdict on the facts on this part of the case should be maintained, and that judgment should be given accordingly. To that extent, I am in favour of allowing the appeal.

JENKINS L.J. For the reasons given by my Lord, to which I cannot usefully add anything, I agree that this appeal should

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fail on the question of fraudulent misrepresentation, but should succeed on the question of secret profit.

MORRIS L.J. I also entirely concur.

*Appeal allowed on the issue of secret profit only. Judgment entered for the plaintiff for £500, the amount found by the jury.*

Solicitors: *Lee, Ockerby & Co.; Manches & Co.*

A. W. G.

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[QUEEN'S BENCH DIVISION.]

1953 *Apr.* 21, 22, 23.

Ormerod J.

## * BRIDGMAN *v.* STOCKDALE AND OTHERS.

[1951 B. No. 2976.]

*Defamation — Slander — Privilege — Common interest — Moral duty or right to publish—Invigilator's remark to class that examinee had cheated—Special damage—Whether words spoken against plaintiff in way of his profession—Allegation of dishonesty a defamation of his general character.*

At an examination on a trade course an invigilator remarked to the class that one of the trainees had "cribbed."

*Held*, (1) that the occasion was privileged, it being the common interest of the invigilator and all the class that the examination should manifestly be conducted in a fair and proper manner; and (2) that, in any event, the remark was not something said of him in the way of his business or profession but was simply a remark as to his character, so that in the absence of special damage the action failed.

ACTION.

The plaintiff, a qualified electrical engineer, was a trainee with a firm of diesel engine manufacturers, who sent him, as part of his training, to a course held by the second defendants. At the end of the course, on Friday, April 27, 1951, an examination was held at the second defendants' premises for those taking part in the course. During the examination the plaintiff asked the first defendant, a servant of the second defendants who was invigilating the examination, for permission to leave the room to relieve himself. That was granted and the plaintiff left the room and returned about five minutes later, made one or two additions to his answer paper, handed it in, and left for good. The first

[Reported by NIUL HOGG, Esq., Barrister-at-Law.]

defendant, observing that one of the additions was vital and that it was couched in the words of some notes he had dictated during the course, jumped to the conclusion that the plaintiff had cheated and said to the rest of the class: "This fellow Bridgman "has cribbed and he will get no marks in consequence." When he reported to his employers on the Monday morning the plaintiff was given a fortnight's wages and summarily dismissed.

The plaintiff alleged that the second defendants had, by their servant, repeated the accusation in a telephone conversation with his employers and that that was the cause of his dismissal. He claimed damages for slander against both defendants, complaining of the original remark and of the alleged repetition of it as each a separate slander of him in the way of his profession, and he pleaded his dismissal by his employers as special damage.

The defendants pleaded, inter alia, that the words were spoken by the invigilator on a privileged occasion and without malice, and that no action lay. Malice was not pleaded in reply.

*C. Lloyd-Davies* for the plaintiff.
*H. J. Phillimore Q.C.* and *R. Dunn* for both defendants.

The following cases were among those cited in argument: *Stuart* v. *Bell* [1]; *Watt* v. *Longsdon* [2]; *Hopwood* v. *Muirson*.[3]

ORMEROD J. stated the facts, considering first the alleged repetition of the slander to the plaintiff's employers. He said that he was quite satisfied on the evidence before him that there was no telephone or other communication of this matter to the employers and that the plaintiff was dismissed from his employment for some reason which had not been put before the court. It followed, therefore, that as far as that part of the case was concerned, it failed. It followed, too, that the special damage which had been pleaded by the plaintiff, namely, the loss of his employment, failed also, because he (his Lordship) was satisfied that that was in no way connected with the slander.

His Lordship then considered the facts relating to the making of the original remark, and continued:—On those facts I am asked by the defendants to say that this was a privileged occasion and that there was no evidence of malice, and, indeed, malice is not pleaded. It is said, therefore, that no action can lie. After some rather anxious consideration I have come to the conclusion that I ought to find that this was a privileged occasion. I have come to the conclusion that there was a common interest of the invigilator and the whole of the class; it was the common interest of all of them to ensure that the examination was carried out properly and fairly and to ensure that one person did not have an advantage over the others. I think also that it was the

[1] [1891] 2 Q.B. 341; 7 T.L.R. 502.
[2] [1930] 1 K.B. 130.
[3] [1945] K.B. 313; 61 T.L.R. 312; [1945] 1 All E.R. 453; 89 S.J. 224.

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common interest of the first defendant with each and all of the members of the class to ensure that they should know that the examination was being conducted fairly and properly and that, if in fact one member of the class was taking advantage or if the first defendant thought that one member of the class was taking advantage, the rest of the class should be informed that that had been discovered and that certain consequences might well follow.

In those circumstances, although clearly there was no legal duty on the first defendant to inform the class, I think it is proper to say that he had this common interest and therefore had a moral duty or right to pass what he bona fide thought was a proper remark on the conduct of the plaintiff. It is an extremely unfortunate thing that he did so, but I do not think that that in itself prevents the occasion being a privileged one. I am satisfied here that this was a privileged occasion, that there was no malice, and that in those circumstances the action must fail.

Even if I had thought that this was not a privileged occasion, the plaintiff still has another difficulty, in view of my finding that his dismissal was not due to this slander or, in fact, any slander on the part of either of the defendants, and that is that in the absence of any evidence of special damage I have to be satisfied that this was a slander of him in the way of his profession or business. To get over that difficulty, I suppose, this innuendo has been pleaded in two ways. First, the innuendo is that the plaintiff, who is a competent and qualified engineer, was in fact so incompetent in his business as an engineer that he had to resort to cheating to pass his examination. The alternative way in which it is put is that he was such an idle fellow that he did not take the trouble to learn any of the matters which were told him on the course of instruction and, therefore, had to have recourse to cheating to pass the examination.

I am far from satisfied that the words used can bear either of those innuendoes. The suggestion is that he cheated. A man may cheat because he suffers from temporary loss of memory so far as one question is concerned. It does not mean that he is incompetent or idle. To suggest that either of those innuendoes is the proper one is, I think, straining the ordinary meaning of words very much more than these words can stand. I think that the innuendo here is that the plaintiff was dishonest and a fraud, and that that is not something said of him in the way of his business. It is simply a remark as to his general character.

I think, even if I found that this was not a privileged occasion, I should find it extremely difficult to come to the conclusion that the words were spoken of the plaintiff in the way of his trade or business, that of a trainee qualifying for a particular appointment. It is said of him that in the course of that qualifying he behaved in a dishonest and fraudulent manner.

I think that that is a reference to his personal, general character. Serious enough it may well be, but it is not something spoken of him in the way of his trade.

It follows from that, although no one here makes any suggestion in this case that the plaintiff in fact behaved in any way dishonestly, that the action fails and that there must be judgment for the defendants.

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*Judgment for the defendants.*

Solicitors: *Beckinsales; Lovell, White & King.*

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[PROBATE, ETC., DIVISION.]

## * PRACTICE DIRECTION (CUSTODY ORDER).

1953 *May* 8.

*Infant—Custody—Removal from jurisdiction—Order against—Form.*

The President has approved the following new wording for the restriction against taking out of the jurisdiction a child the subject of a custody order:—

"... And it is directed that the said child be not removed "from the jurisdiction until he or she attains the age of 18 years "without leave but provided that if the (Petitioner) do give a "general written undertaking to the Court to return the said "child to the jurisdiction when called upon to do so, the "(Petitioner) may with the written consent of the (Respondent) "remove the said child from the jurisdiction during the school "holidays for any period specified in such written consent."

This wording should be in future used in all decrees and orders unless the judge otherwise directs.

Since many years must elapse before orders made in the old form cease to operate, the President has authorized registrars to vary the terms of the existing custody orders by order on summons, in unopposed cases, to the new form.

B. LONG,
Senior Registrar.

[COURT OF APPEAL.]

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*Apr.* 29.

Denning and Hodson L.JJ.

## *CRABTREE *v.* CRABTREE.

*Husband and Wife—Divorce—Desertion—Agreement by husband, after desertion, to maintain wife during joint lives "if they shall so "long live separate"—No agreement to live separate—Agreement not a bar to petition for dissolution on ground of desertion.*

A husband deserted his wife in 1947 and refused to return to her. On January 3, 1948, the parties entered into a written agreement which recited that having for some time lived separate and apart and the wife having the custody of the child of the marriage, the husband agreed that he would during the joint lives of himself and his wife "if they shall so long live separate and apart from "each other" pay to her weekly sums for the support and maintenance of herself and of the child until it attained the age of 16. Later the wife sought a decree of dissolution of the marriage on the ground of the husband's desertion. The commissioner held that the agreement of 1948 was by implication a separation agreement which put an end to the desertion, and was a bar to a petition on that ground. On appeal by the wife:—

*Held*, that the agreement was not a bar to a petition on the ground of desertion, since the material clause was conditional only, defining the duration of the payment of maintenance by the husband, and did not contain a stipulation, express or implied, that the wife agreed to the husband living apart from her.

*Long* v. *Long*, 57 T.L.R. 165; [1940] 4 All E.R. 230, 233 referred to.

APPEAL from Judge Rewcastle sitting as a special commissioner.

The parties were married in September, 1944, and there was one child of the marriage. In 1947 the husband deserted the wife by leaving the home, and refused to return to her. On January 3, 1948, the parties entered into an agreement, clause 1 of which provided: "The husband and the wife having for some "time past lived separate and apart from each other and the wife "having the custody of and control of the child of the marriage, "the husband agrees with the wife that he will during the joint "lives of himself and the wife, if they shall so long live separate "and apart from each other, pay to her for the support and main-"tenance of herself the weekly sum of one pound and for the "maintenance of the said child the weekly sum of one pound "until the said child attains the age of 16 years."

The wife agreed to maintain herself out of that allowance, and there was a clause by which, if at any time they came together again or if the marriage were dissolved, the sum should cease to be payable.

In 1952 the wife filed a petition for the dissolution of the marriage on the ground of the husband's desertion of her without just cause for a period of three years immediately preceding the date of the petition. The husband did not defend the petition. On November 24, 1952, Judge Rewcastle, sitting as commissioner in divorce, held that the agreement of January 3, 1948, was

impliedly a separation agreement by consent, which put an end to the desertion by the husband, and he dismissed the petition.

The wife appealed. The husband appeared by counsel on the appeal only on the issue as to the costs of the appeal.

*Laurence A. Pratt* for the wife.
*J. A. Petrie* for the husband.

The following cases were cited in the argument: *Long* v. *Long* *; *Smith* v. *Smith*.†

DENNING L.J. stated the facts, read the material clause of the agreement, and continued: The question is whether, as a result of that agreement, the desertion ceased to run. That is a question of interpretation. If it was an agreement binding the parties to live separate and apart, it would stop the desertion running; but if it was only an agreement to pay maintenance it would not. In *Long* v. *Long* [1] there was an agreement to live separate and apart which brought the desertion to an end. Lord Greene M.R. said [2]: "It appeared from the evidence of the appellant that the real "purpose of the separation deed was, in the minds of both parties, "to regulate the financial position and to make provision with "regard to the child. If the deed had been confined to these "matters, no difficulty would have arisen." Lord Greene there recognized that on or after separation the parties could regulate the financial position between them without bringing the desertion to an end.

On the true interpretation of this agreement, I think that it was such an agreement as Lord Greene had in mind. It is confined to maintenance. The words "if they shall so long live "separate and apart" simply define the duration of the payment and do not amount to a bargain binding them to live separate and apart. The agreement does not stop the desertion from running. The petition should be granted and a decree nisi pronounced on the ground of the husband's desertion.

HODSON L.J. I agree. The desertion began to run in November, 1947, and the only question which arises on this appeal is whether it was terminated on the execution of the agreement of January 3, 1948. The commissioner thought that this agreement was, on its true construction, a separation agreement, and, accordingly, that desertion ceased to run from the moment when the parties put their hands to it. I think that the position is correctly set out in Rayden on Divorce, 5th ed., p. 113: "A deed which contains no express or implied stipulation "that the petitioner agrees to the respondent living apart will

* 57 T.L.R. 165; [1940] 4 All E.R. 230.
† 61 T.L.R. 568; [1945] 2 All E.R. 452.
[1] 57 T.L.R. 165; [1940] 4 All E.R. 230.
[2] [1940] 4 All E.R. 230, 233.

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"not prevent desertion from running." That there may be deeds of a kind which will not prevent desertion from running is plain from the passage from the judgment in *Long* v. *Long* [2] which my Lord has read. The words which were thought to stand in the way of the petitioner here were the words following the agreement by the husband to pay, "if they shall so long live "separate and apart." If those words imply a stipulation that the petitioner agrees to the respondent living apart from her, they prevent desertion from running; otherwise not. In my judgment, these words, on their true construction, are merely a conditional clause defining the duration of the payment and do not imply such a stipulation, and they come within the exception which appears to have been contemplated by Lord Greene M.R. in *Long* v. *Long*.[2]

*Appeal allowed; decree nisi pronounced.*

Solicitors: *Wood, Nash & Co., for Wilkinson, Woodward & Ludlam, Halifax; Williamson, Hill & Co., for Clarkson, Thomas & Hanson, Halifax.*

M. M. H.

[2] [1940] 4 All E.R. 230, 233.

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[CHANCERY DIVISION.]

1953 *Apr.* 20, 21.

Upjohn J.

## * HOUSEHOLD *v.* GRIMSHAW.

*Revenue—Income tax—Author—Film contract—Periods of employment and option to purchase literary work—Contract of service or for services—Cancellation of contract—Compensation—Whether assessable to tax—Income Tax Act*, 1918 (8 & 9 *Geo.* 5, *c.* 40), *Sch. D, Case II, Sch. E.*

The appellant by a contract made in 1943 agreed with a film company that, on his leaving the army, he would work for the company as a script writer for 12 consecutive weeks in three successive years, and that the company should have an option to purchase all novels written by him during the currency of the agreement. He received £10 a week from a date anterior by some five months to the agreement until his "employment" with the company began, and £200 a week during the "employment."

The appellant worked for the company from October, 1945 for one period of 12 weeks, after which time the contract was terminated by an agreement between the parties dated September 11, 1946, the parties releasing each other from their obligations. Under that agreement the appellant received £3,000 in consideration of all his claims against the company under the agreement of 1943. He also received 5s. in consideration of his granting the company an option to purchase the photoplay rights of the next three novels written by him.

The appellant was assessed to tax under Case II of Sch. D in respect of the £3,000 (less agent's fees of £300), on the ground that

that sum arose from his vocation as an author. The appellant disputed the assessment, contending that the contract was a contract of employment assessable under Sch. E; alternatively that if it arose from his earnings as an author it was a capital payment.

*Held*, (1) that the contract of 1943 could not be construed as a contract of employment, but was a contract by which the appellant gave partly an option and partly services, and that the contract was not severable into two parts so as to be partly a contract of employment; so that the remuneration was properly assessable under Case II of Sch. D. (2) That the compensation for the termination of the contract was not compensation for the loss of a capital asset. (3) That, therefore, the sum in question was properly assessed under Case II of Sch. D.

*Bush Beach & Gent Ltd.* v. *Road* [1939] 2 K.B. 524; 55 T.L.R. 862; [1939] 2 All E.R. 302, applied.

*Barr Crombie & Co. Ltd.* v. *Inland Revenue Commissioners* (1945) 26 T.C. 406, distinguished.

CASE STATED by Special Commissioners.

The appellant, Geoffrey Household, an author, appealed by way of case stated from a decision of the Commissioners for the Special Purposes of the Income Tax Acts, affirming an assessment under Case II of Sch. D for the year 1947/48, which included, as part of his income for that year, a sum of £2,700 net received by the appellant in 1946 as consideration for the cancellation of a film contract. The question on that appeal was whether that sum was rightly included as part of the appellant's income under Case II of Sch. D, or whether it should be treated as a capital receipt.

The case stated set out (inter alia) the following facts: The appellant had been engaged in the profession of author continuously since 1936, save for the time when he was serving with His Majesty's Forces; but until the war he had had no contact with any film company and had not sold the film rights in any of his novels or short stories. The appellant joined the army on the outbreak of war, and in 1943 he was serving in the Middle East. While there, an agent on his behalf entered into an agreement dated December 31, 1943, with Metro-Goldwyn-Mayer British Studios Ltd. The appellant entered into this agreement with some reluctance, but he realized that after the war he would have to re-establish himself in his profession, and that this agreement afforded a valuable means of securing his financial position during that time.

The agreement provided so far as relevant: "Metro hereby "employs the writer" [the appellant] "to render and the writer "hereby agrees to render to Metro his exclusive services in the "United Kingdom of Great Britain and Northern Ireland Eire "and in Europe only in accordance with Metro's directions and "instructions and either alone or in conjunction or collaboration "with any other person appointed by Metro in writing and com- "posing stories treatments adaptations continuities scenarios." Subclause (3) of clause 3 provided: "Metro will pay to the "writer the sum of ten pounds per week as from July 20, 1943

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" until the commencement of the employment." It was provided that the writer should not be bound to account for or repay that sum of £10 a week unless he broke the agreement, when it should become repayable, or, if Metro exercised certain options, the sum of £10 a week " shall be taken into account in ascertain- " ing what is due to the writer upon the exercise of such options."

Subclause (6) provided: " The term of the employment shall " be a minimum period of 12 consecutive weeks in each of the " three consecutive years commencing from the commencement " of the employment." The employment was to begin as soon as the writer could obtain his discharge from the army on the cessation of hostilities, or, at the latest, three months after such discharge. It was further provided that the period of 12 consecutive weeks in each year might be extended by Metro for a further four weeks following consecutively upon the 12 weeks in any year if they desired so to do. Clause 4 was in these terms: " All products of the writer's services to Metro and all copyright " performing right and all other rights therein throughout the " world during the full term of copyright and all renewals and " extensions thereof shall be the sole property of Metro who " shall be deemed in law to be the sole author thereof (the " writer acting entirely as Metro's employee) and the writer " shall at the request and cost of Metro make execute and do all " acts deeds and things necessary or proper for the purpose of " vesting and warranting all such rights in and to Metro." Clause 6 provided: " Metro shall have the right to add to take " from change adapt translate into and use and treat in every " way and in all or any languages the products of the writer's " services . . . in all respects as Metro in its sole discretion shall " think fit but shall not be bound to make any use of the products " of the writer's services." Clause 8 provided that during the time of employment the writer was to devote the whole of his time and attention to rendering services to Metro, but that he was to be entitled to work at home provided that he attended Metro for conferences and discussions as and when required by Metro during normal business hours. During the three years of the currency of the agreement, the appellant agreed not to write for films other than for Metro without their previous consent in writing. The appellant's remuneration under the agreement for all the services which he rendered and the rights possessed by Metro under it was £200 a week during his employment.

By clause 13 the appellant granted to Metro the option to acquire the " motionpicture television broadcasting and ancillary " rights " of each novel written by him which was published after the date of the agreement and before the expiration of the three consecutive years.

It was provided that the price for the rights was to be £6,000 in respect of the first novel, £7,000 for the second, £8,000 for the third, and so on. Metro was given the option of continuing

the whole agreement for a further period of two years consecutive upon the expiration of the first three years upon the same terms. Finally, it was provided that the agreement was to be construed according to the law of England.

The appellant secured his release from the army in 1945, and, as required by the agreement, he duly notified Metro of that fact. They gave him employment which started in 1945 and lasted for the minimum period of 12 weeks.

In March, 1946, Metro informed the appellant that, owing to a change in their plans and a substantial reorganization, they would have no work for him; and, although they were willing to continue to employ him in accordance with the contract if he insisted upon it, they were anxious to be released from their bargain and asked him what sum he wanted to be paid for such a release. The appellant had no wish to be released. It was stated in the case stated that: "The appellant was disappointed "and angry at Metro's suggestion, but realized that Metro could "make his life miserable if he refused to agree to a cancellation." He therefore agreed to a cancellation on terms.

Those terms were contained in an agreement made on September 11, 1946, which recited that he had received the sum of £1,168 6s. 8d. on account of the £10 a week and that he was to keep that sum unless Metro exercised the option contained in the agreement to purchase the film rights of any novel, in which case, as in the earlier agreement, he had to bring that sum into account as part of the purchasing price.

Clause 1 provided that in consideration of the sum of £3,000 Metro and the appellant released each other from all their obligations under the agreement of 1943. Clause 2 was in these terms: "In consideration of the sum of five shillings now paid by the "company to Mr. Household" [the appellant] "Mr. Household "hereby grants . . . unto the company the exclusive option to "acquire by way of partial assignment of the copyright all photo-"play rights in and throughout the world . . . of his next three "novels of not less than seventy thousand words or dramatic "works or either of them." The purchase price under the option "was to be the same as in the earlier agreement.

Under that agreement, £3,000 was paid to the appellant, of which £300 was paid to an agent, and the question arose whether the sum of £2,700 should be included as part of the income of the appellant, and assessable under Case II of Sch. D.

The case stated provided further that "since the date of the "deed of release the appellant had never entered into any similar "agreement with Metro or any other film company; and he had "not sold any rights in any of his books to Metro or to any other "film company."

*H. M. Allen* for the appellant.

*Geoffrey Cross Q.C.* and *Sir Reginald Hills* for the Crown.

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Cases cited in argument are set out in the judgment.

UPJOHN J., having stated the facts, continued:—Two main arguments have been presented to me. The first depended upon the answer to this question: ought the remuneration of £200 a week for the minimum period of 12 weeks in each of the three years to be assessed for income tax purposes under Sch. E, on the footing that the contract was a contract of employment, or ought it to be assessed under Case II of Sch. D on the ground that it was a profit of the profession or vocation carried on by the appellant as author at the material time? It was conceded in this court that, if the appellant established that the remuneration was assessable under Sch. E, having regard to *Henley* v. *Murray*,[1] the case must be concluded in favour of the appellant. But the Crown reserved the right to challenge that authority should this case go higher. That is the first main question. If, however, the decision is against the appellant, and the remuneration ought to be assessed under Case II of Sch. D, a question still arises whether in the particular circumstances of this case the payment he received in 1946 ought to be subject to tax, or whether it ought to be regarded as a capital payment.

On the first point, whether this contract is to be regarded as a contract of employment and assessable under Sch. E, the appellant argued that certain of the clauses of this agreement showed that this was something entirely outside the scope of the profession or vocation of an author, because it bound him for a minimum period of 12 weeks in each year hand and foot to Metro. He was not merely to produce novels. He had to produce, either alone or in collaboration, as he might be directed, such stories, treatments, adaptations, continuities and scenarios as he might be directed. Having done that, Metro could make such use of his work as they pleased. They might make no use of it at all; they might alter it, adapt it and treat it in any way they pleased. It was argued that that fell entirely outside the conception of the work, profession or vocation of an author.

This point is not, in my judgment, open to the appellant. It is not for this court in a case such as this to decide in the absence of evidence what is or is not within the scope of the vocation of an author. There may, indeed, be some cases so plain and obvious that no evidence is required. Such a case is *Bury and Walkers* v. *Phillips*,[2] where it was held that it was no part of the business of a solicitor as such to lend money to his clients. That was a simple and obvious case. But here I am left completely in the dark as to what is the true ambit of an author's vocation or profession. No evidence was called on that matter before the Special Commissioners, and there was no finding on it.

The appellant, however, contended that, even if that be so, nevertheless this was a contract of employment. Mr. Allen

[1] [1950] 1 All E.R. 908. [2] (1951) 32 Tax Cas. 198.

rightly pointed out that one may carry on a profession, and at the same time an employment which is assessable under Sch. E, and that may be so, although the profession is of precisely the same character as the employment. That that may be so in proper circumstances cannot be doubted, and is well illustrated in *Davies* v. *Braithwaite*.[3] I need only quote one sentence from the judgment of Rowlatt J.: "For instance, a musician who "holds an office or employment under a permanent engagement "can at the same time follow his profession privately."

The Crown, however, said that, properly regarded, this contract was not a contract of employment, and they put their case in two ways. First, it was said that the agreement of 1943 was an agreement by which the appellant was to give his personal services for a minimum period of 12 weeks in each year for three years. He was also to give an option for the same period to Metro to acquire the film rights in any novel or other work which he might produce in his own time. He was also under certain restrictions about not giving any works to any other film companies, and he was under certain restrictions as to secrecy. The consideration for those obligations on the part of the appellant was one entire consideration, namely, he was to be paid £200 a week for 12 weeks in each year. It was said that this figure could not be split or apportioned, and, when the matter was looked at closely, it appeared that this was not a contract of employment at all, but a contract by which the appellant exercised his vocation as author partly by services and partly by an option over his literary products. It was argued that the fact that Metro's consideration could not be split into two parts showed conclusively that it could not be an employment under Sch. E.

On the other hand, the appellant submitted that, on the true construction of the agreement, it was severable into two completely distinct parts: £200 a week being consideration for performing the services for the 12 weeks in each year, and the payment of £10 a week from July, 1943, onwards, and the other provisions, if the option were exercised, being the consideration if Metro exercised the option.

Not unnaturally he referred me to a letter of March 1, 1946, which, he contended, showed where the agreement was severable. On the whole, however, I cannot accept the appellant's submission upon that matter. From clause 9 and clause 13 it seems clear to me that the consideration of £200 a week given by Metro was one consideration in respect of the appellant's services and option grant. In my judgment, upon its true construction, this was not a contract of employment. It was a contract entered into by the appellant partly to give an option on his activities as an author, and partly to give services for some 12 to 16 weeks in any year.

[3] [1931] 2 K.B. 628, 635; 47 T.L.R. 479.

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But the Crown's case does not stop there, because the Crown submitted that, even if the contract be regarded as severable, it ought, nevertheless, to be regarded not as a contract of employment but as a mere engagement entered into by the appellant in the course of carrying on his professional activity as an author. Counsel for the Crown referred to *Higgs* v. *Olivier*,[4] in which Evershed M.R. said[5]: "In this case the "Special Commissioners concluded that the £15,000 was not "within the taxing provisions I have quoted. 'We found it "'impossible to say that the sum of £15,000 under the deed "'came to the taxpayer as part of the income from his vocation. "'On the contrary, it came to him for refraining from carrying "'on his vocation, and in our opinion was a capital receipt.' I "agree that in questions of this kind which involve a considera- "tion of true import and scope of the trading provisions, it is "not possible to say that the whole matter is one of fact. It "is, I think, a question of mixed law and fact. But I think "that, if I am right in saying that in such a case as this it may "well be a matter of degree, then so long as it does not appear "that the Special Commissioners have misapprehended the effect "of the taxing provisions their decision should not be disturbed. "That was Harman J.'s first approach to this case, and I am "of the same opinion." The Crown submitted that on looking at the conclusions, admittedly of mixed law and fact here, one finds that the Special Commissioners came to the conclusion that this was not a contract of employment, but an engagement entered into in the course of carrying on the activities of an author. It was said, relying on the passage I have just quoted from the judgment of the Master of the Rolls, that the finding ought not to be disturbed unless I am clearly of opinion that it was wrong.

The relevant passage in the stated case is in these terms: "We also hold that the said agreement"—that was the agreement of 1943—"though it did involve an engagement, and in "one sense of the word an employment was a mere engagement "in the course of the appellant's profession of author. (Compare "Rowlatt J. in *Davies* v. *Braithwaite*.[6])" Then: "Indeed, we "think that in one important respect the appellant's case is "weaker than was the case of Miss Lilian Braithwaite, in that "while each of her 'posts' was full time, while it lasted, the "appellant was free for a minimum of 36 weeks in each of the "three years covered by his agreement with Metro to pursue "his profession as author as he pleased, saving only Metro's "option in the film rights of his writings." I do not think that the example given by the Special Commissioners is a very happy one. If they were going to point out that, it would at least have been right in my judgment to have pointed out that, in some

[4] [1952] Ch. 311; [1952] 1 T.L.R. 441.

[5] [1952] Ch. 318.

[6] [1931] 2 K.B. 628.

respects, the appellant's case was much stronger, for during the period of employment of 12 weeks, as I have already pointed out, he was bound hand and foot as a mere servant or tool of Metro and had to carry out every literary duty laid upon him as Metro pleased. Nevertheless, on the whole, I think that the Special Commissioners came to a correct conclusion upon this matter, and I am not prepared to disturb their decision. It follows that, upon the first main question, the remuneration under the agreement of 1943 is assessable not under Sch. E, but as part of the earnings of the author in the course of his profession or vocation under Case II of Sch. D.

The second main question in this case is this: notwithstanding that the appellant was carrying on in essence his vocation or profession of an author, does that fact preclude him from treating the sum of £2,700, which he received in the course of carrying on that profession as consideration for the termination of the agreement of 1943, as capital? The general rule, as I have pointed out, under Sch. E is, so far as this court is concerned, clear. The sum received as consideration for the termination of an agreement, at all events where the termination is one-sided in its inception, is a capital receipt. No clear rule appears to be laid down where a contract is terminated in the course of carrying on a trade or profession assessable under Case II of Sch. D. No doubt where a trading company is carrying on a trade, for instance, such as building ships, and one or two of the persons for whom the ships are being built desire to be relieved of their bargains, money received as damages for breach of contract for failure to take delivery of the ship must be treated as a trade receipt for the purposes of income tax. That is plain from *Short Brothers Ltd.* v. *Inland Revenue Commissioners*,[7] and *The Sunderland Shipping Co. Ltd.* v. *Inland Revenue Commissioners*,[7] which is a decision of the Court of Appeal.

On the other hand, there are other cases where a different result has been reached. In particular, I refer to *Barr, Crombie & Co. Ltd.* v. *Inland Revenue Commissioners*,[8] a case before the First Division of the Court of Session. That each case must depend on its own facts is clearly shown by the judgment of the Lord President, Lord Normand, who said[9]: "It has been truly "said that every case must be considered on its own facts, and "that no legal criterion for distinguishing between capital pay-"ments and income payments is readily applicable. Therefore, "though we have had a considerable citation of cases, I do not "propose to refer to more than a few of them. Lord Cave L.C., "in the case of *British Insulated and Helsby Cables Ltd.* v. "*Atherton*,[10] said: 'But when an expenditure is made, not only "'once and for all, but with a view to bringing into existence "'an asset or an advantage for the enduring benefit of a trade,

[7] (1927) 12 Tax Cas. 955.
[8] (1945) 26 Tax Cas. 406.
[9] Ibid. 411.
[10] [1926] A.C. 205; 42 T.L.R. 187.

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"'I think that there is very good reason (in the absence of "'special circumstances leading to an opposite conclusion) for "'treating such an expenditure as properly attributable not to "'revenue but to capital.' And, of course, one may equally say "that an expenditure made once and for all as payment for "abandoning or surrendering an asset is received by the recipient "as a capital and not as a revenue payment, in the absence of "any indication to the contrary. In the present case virtually "the whole assets of the appellant company consisted in this "agreement. When the agreement was surrendered or aban-"doned practically nothing remained of the company's business. "It was forced to reduce its staff and to transfer into other "premises, and it really started a new trading life. Its trading "existence as practised up to that time had ceased with the "liquidation of the shipping company. The proportions of its "profits, to which I have referred, demonstrate that. It is, "therefore, an entirely different case from *Kelsall, Parsons & "Co.* v. *Inland Revenue Commissioners*.[11] I regard the payment "here as a payment made, in the sense of Lord Cave's observa-"tions 'once and for all,' and received by the appellant company "as the price of the surrender of its only important capital asset. "In *Kelsall, Parsons & Co.*,[11] on the other hand, the payment "was in return for the loss of a single agency out of about a "dozen agencies carried on by the company, and the fact that "the payment in that case did not represent the whole capital "assets of the company is easily shown by the fact that in the "year after the surrender of the single agency profits were no "less than they had been the year before the surrender. There "is another distinction between the *Kelsall Parsons & Co.*[11] case "and the present which is not conclusive, but is, I think some-"times helpful. Here we are not dealing with a single payment "in return for the surrender of the prospect of making profits in "the final year of the agreement, but with a payment for the "surrender of an agreement while there was still a substantial "period—indeed, more than half of the period of the agreement—"to run, and a period which extended to many years of "accountancy for the purposes of this company's business." Pausing there for a moment, it is of course plain here that the agreement had only run one-third of its minimum course. "Then, again, to apply what was said by Lord Macmillan in "the case of *Van den Berghs Ld.* v. *Clark*,[12] it is manifest that, "after the liquidation of the shipping company and the payment "to the appellant company of this sum of money, the structure "of the company was radically affected and its whole character "as a business was decisively altered. Though each one of the "distinctions may be in itself indecisive, and though each is "open to criticism, yet *juncta juvant*. And where you have a "payment for the loss of the contract upon which the whole

[11] (1938) 21 Tax Cas. 608. [12] [1935] A.C. 431; 51 T.L.R. 393.

"trade of the company has been built, where the expected "profits of the contract are used to measure the loss of them for "a period of future years, and where in consequence of the loss "the company's structure and character are greatly affected, the "payment seems to me to be beyond doubt a capital payment. "For these reasons, therefore, I think that the question of law "ought to be answered in the negative. So much for the income "tax aspect of the case."

Lord Moncrieff said [13]: "I am of the same opinion and have "little to add. In cases such as this, which are so dependent "each upon its own complicated circumstances, it is not possible "to get much guidance by way of comparison from the decisions "in other related cases. I think, however, that a general guide for "application in all such cases is to be found in the passage from "Lord Cave's speech in the case of *British Insulated and Helsby "Cables Ltd.* v. *Atherton* [14] (as approved in the subsequent case "of *Van den Berghs Ltd.* v. *Clark* [15] by Lord Macmillan), in "which he indicated that, when the transaction takes the form "of a transfer from one party to another of something that has "formed part of the enduring trading assets of one of them, "any such transfer for a price points rather to a transaction on "capital than on revenue account. That that was the nature of "the present case is amply demonstrated by the few findings of "fact which are contained in the case itself. This particular "agency contract was the real stock-in-trade of the appellant "company. The percentages show how little else of value would "have been available to them for transfer as part of their good-"will; and it seems to me, accordingly, that it is manifest on "the findings of the case that, had they desired to bring their "business to a sale, the asset which would have earned a price "would have been this agency contract and practically nothing "else." I have read those judgments at length because, while showing how each case must depend on its own facts, they provide a very useful guide to the relevant matters to be considered in coming to a conclusion upon the matter.

There is, I think, only one other authority to which I ought to refer, namely, *Bush Beach & Gent Ltd.* v. *Road*,[16] which was cited by Mr. Cross in support of his submission that the mere fact that, as found in the stated case, the contract with Metro was in a sense unique and special of its own kind, is not in any way conclusive upon the matter. I need only refer very briefly to the facts which show that, before the contract in respect of which a payment for termination of it was made, the business of the appellant company was that of merchants of industrial chemicals. The contract with Chemicmetals Ltd. introduced it to quite a new field of business activity—namely, that of

[13] (1945) 26 Tax Cas. 412.
[14] [1926] A.C. 205.
[15] [1935] A.C. 431.
[16] [1939] 2 K.B. 524; 55 T.L.R. 862; [1939] 3 All E.R. 302.

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merchants of agricultural chemicals. It was said that the agreement was terminated by a payment from Chemiemetals Ld. of a sum of £4,750, and the question was whether that sum fell to be brought into tax by the appellant company. Lawrence J. said this [17]: "The appellant company contended before the "Commissioners and now contends, first, that the selling of "industrial and agricultural chemicals were two separate and "distinct branches of the appellant company's business; secondly, "that the cancellation of the contract destroyed the whole of "their business in agricultural chemicals and that the sum of "£4,500 was made by way of agreed compensation for the loss "of that business; and, thirdly, that the sum of £4,500 was "paid by way of compensation for sterilization of a capital asset. "It was further argued that the appellant company had, by the "contract, established for itself not only a source of supply but "also a market: that the sale of agricultural chemicals was a "new and profitable field and that, in view of the agreement "not to supply competitors, the contract was a capital asset and "the payment for its cancellation was therefore capital. In my "opinion the present case is more closely analogous to cases "such as *Short Brothers Ld.* v. *Inland Revenue Commissioners* [18] "and *Inland Revenue Commissioners* v. *Northfleet Coal and* "*Ballast Co. Ld.*[19] than to such cases as *Van den Berghs Ld.* "v. *Clark* (*Inspector of Taxes*).[20] The sum paid, in my view, "represented profits which the appellant company would or "might have made under the contract, not the purchase price "of the contract itself. . . ." That certainly is an observation which is applicable to this case. "Nor do I accept the argument "that the structure of the appellant company was affected by "the contract or its cancellation as in *Van den Bergh's* case.[20] "The appellant company could always have sold agricultural "chemicals and it can still do so. The contract was made in "the ordinary course of the company's business, although in "a new field, and the exclusion of competition is an ordinary "incident of such contracts and not, as it seems to me, analogous "to a pooling agreement." I do not think I need read the next few words; then he said a little later on [21]: "Here no money "was paid to secure the contract in question and the money paid "for its cancellation was not a repayment of any such money but "must have been a payment in respect of the profits to have "been earned under the contract. I am, therefore, of opinion "that the Commissioners' decision was right and the appeal is "dismissed with costs."

This matter is not free from difficulty. It was naturally submitted by Mr. Allen that this contract was of outstanding and, indeed, unique importance to the appellant. The sole reason

[17] [1939] K.B. 532.
[18] (1927) 12 Tax Cas. 955.
[19] (1927) 12 Tax Cas. 1102.
[20] [1935] A.C. 431.
[21] [1939] 2 K.B. 533.

for his reluctant entry into the agreement was to give him financial security while he was re-establishing himself as an author. This it was said was in the nature of a capital asset which he agreed to surrender for the sum of £2,700. On the whole, I do not think that this is the correct way of looking at this matter. It seems to me that the appellant as an author coming back from the war was seeking to re-establish himself in his vocation as an author; for nine months of every year he was at perfect liberty to carry on his vocation as an author without any restriction whatever, except that in respect of any novels that he might produce he had to offer the film rights during the currency of the agreement to Metro. True, for three months of that time he secured a valuable and, indeed, very lucrative employment with Metro. But I cannot regard this contract as being in any sense a capital asset such as was the case in *Barr, Crombie & Co.* v. *Inland Revenue Commissioners*.[22] The capital asset which the appellant has in this case is his own brain, talents and flair as an author and not this agreement, although it provided him with a very convenient remuneration to tide him over the early period of reconversion to civilian life. Accordingly, in my judgment, this appeal fails.

It was also submitted to me by Mr. Cross that the payment of the sum of £3,000 for the release of the parties' rights under the agreement of 1943 was paid partly for the rights granted under clause 2 of the agreement of 1946, that is to say, part of the consideration was for the re-granting of the options. That point is not open to the Crown in this case. I think that the Special Commissioners misdirected themselves when they said: "Although, as is admitted on behalf of the Crown, the appellant "did enter into a contract of service with Metro, we hold that "on a proper construction of the agreement the option given to "Metro to purchase during the term of the agreement the film "rights of the appellant's novels was an essential part of the "bargain between them." I do not quarrel with that, but it is with what follows that I disagree: "and it follows that the "sum paid under the deed of release was not by any means "wholly paid for the abrogation of the service agreement." That is a complete non sequitur.

Clause 2 of the 1946 agreement provides for what is virtually a re-granting of the options for the sum of 5s. There was no cross-examination of the appellant, who gave evidence before the Special Commissioners, to disturb the accuracy of that statement to be found in the agreement of 1946. Therefore, in the absence of any evidence that the consideration in clause 2 of the agreement of 1946 was wrongly stated, in my judgment, it was not open to the Special Commissioners to make a finding of fact to that effect. In truth, the consideration may well have been correctly stated. The appellant had received the sum of

[22] 26 Tax Cas. 406.

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£1,168 under the agreement of 1943, and he might well have thought it only fair and have been willing to give an option to the company to buy the film rights for the substantial sums contained in the new agreement for a nominal consideration.

I only mention this in case this appeal should go further and it should be thought material, but in the circumstances, it does not affect my decision. Accordingly, the appeal must be dismissed with costs.

*Appeal dismissed.*

Solicitors: *Lovell, White & King; Solicitor of Inland Revenue.*

I. G. R. M.

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[QUEEN'S BENCH DIVISION.]

1953
*Apr.* 23.

Lord Goddard C.J., Lynskey and Parker JJ.

## * REGINA *v.* AGRICULTURAL LAND TRIBUNAL FOR THE WALES AND MONMOUTH AREA, *Ex parte* DAVIES.

*Agricultural Holding—Notice to quit—Interests of efficient farming—Discretion of land tribunal—Agricultural Holdings Act*, 1948 (11 & 12 *Geo.* 6, *c.* 63), *s.* 25 (1) (*a*).

The discretion given to the Minister under section 25 (1) of the Agricultural Holdings Act, 1948, applies equally to a land tribunal on appeal from the Minister's decision, and empowers the tribunal to withhold consent to the operation of a notice to quit an agricultural holding notwithstanding that the case is one falling within paras. (*a*) to (*e*) of that subsection; in considering whether or not consent should be given in the interests of efficient farming under para. (*a*), the tribunal must only have regard to the farming of the holding to which the notice relates and not to a holding farmed by the landlord.

APPLICATION for an order of certiorari.

The applicant, Daniel Davies, was the tenant of a farm known as Blaenllyn Farm, Llandyssul, Cardiganshire. In 1951 he received a notice dated September 19, 1951, signed by Thomas Evans and his son, D. R. Evans, requiring him to quit the farm on September 29, 1952. The applicant served a counter-notice under section 24 (1) of the Agricultural Holdings Act, 1948, and the father and son applied to the Minister of Agriculture for his consent to the operation of the notice to quit. On June 12, 1952, the parties appeared before the Cardiganshire Agricultural Committee, who heard the application for consent on behalf of the Minister. At the hearing no issue as to efficient farming under section 25 (1) (*a*) [1] of the Act of 1948 was raised, the consent

[1] Agricultural Holdings Act, 1948, s. 25 (1): "Without prejudice to the discretion of the Minister in a case falling within paragraphs (*a*) to (*e*) of this subsection, the Minister shall withhold his consent under the last

being sought under section 25 (1) (*a*) [1] on the ground of hardship. Following the hearing the Minister decided to withold his consent.

On November 3, 1952, the father and son appealed to the Agricultural Land Tribunal. During the course of the hearing it was disclosed that until 1948 Thomas Evans had been the sole owner of the farm let to the applicant, but that in that year he had conveyed the whole of his interest in the farm to his son. It was agreed that in those circumstances consent could not be sought on the ground of hardship; at the same time it was not disputed that the applicant was an efficient farmer. The tribunal were informed, however, that a farm rented by Thomas Evans and his son was not being run as efficiently as it might be on account of lack of labour and the age of the father. Evidence was given of an alleged agreement between the father and son and the applicant for the relinquishment of the tenancy on the payment of £500 compensation by the Evanses.

At the conclusion of the hearing the tribunal decided "that "the appellants' version regarding the tenants' decision or agree- "ment to relinquish the tenancy in consideration of the sum of "£500 by way of compensation is accepted. Despite the fact "that the method of farming of the said holding of Blaenllyn was "not in dispute, and that the question of hardship could not "arise under the provision of section 25 (1) (*a*) of the Agricultural "Holdings Act, 1948, because the same landlord was not in "existence at the material times, possession, having regard to "all the circumstances, ought to be given to the present owner. "Discretion is exercised in favour of the present owner under "section 25 (1) (*a*) of the said Act, and the appeal is allowed."

*H. V. Lloyd-Jones Q.C.* and *J. T. Plume* for the applicant.
*H. Edmund Davies Q.C.* and *J. Cook Rogers* for the tribunal.
*B. S. Wingate-Saul* for the Minister.

No cases were cited in argument.

LORD GODDARD C.J. [having stated the facts:] I need only read the section which is material in this case to show that the decision of the tribunal cannot stand. Section 25 (1) of the Agricultural Holdings Act, 1948, sets out the grounds on which the Minister

"foregoing section to the operation of "a notice to quit an agricultural "holding or part of an agricultural "holding unless he is satisfied— "(*a*) that the carrying out of the pur- "pose for which the landlord pro- "poses to terminate the tenancy is "desirable in the interests of efficient "farming, whether as respects good "estate management or good hus- "bandry or otherwise; . . . (*d*) where "the tenancy was created before the "sixth day of August, and the same "person was landlord at the beginning "of that day as at the time when the "notice to quit was given, or, if the "application for the Minister's con- "sent is made before giving the "notice to quit, at the time of the "application, that greater hardship "would be caused by the Minister's "withholding than by his granting "his consent to the operation of the "notice."

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may withhold his consent to the operation of a notice to quit, and those grounds are equally available to the Land Tribunal. [His Lordship read section 25 (1) (*a*) and (*d*) and continued:] It emerged at the hearing before the tribunal that there had been a change of landlord, and, therefore, the question of hardship, which had been argued before the agricultural committee could no longer apply. The tribunal apparently thought that the words "the interests of efficient farming" in section 25 (1) (*a*) entitled them to consider, not the efficient farming of the holding to which the notice to quit related, but the farming of the property which the landlord himself was occupying at the time when he gave the notice to quit, and if the landlord could not farm his own property efficiently, that was a ground for giving notice to his tenant, who was farming efficiently, to vacate his (the tenant's) farm. That interpretation is contrary to the intention of section 25 (1). The words "the carrying out of the purpose for which "the landlord proposes to terminate the tenancy is desirable in "the interests of efficient farming," must mean the efficient farming of the holding to which the notice to quit applies, and it seems very extraordinary that anybody should have thought the contrary.

As to the words "without prejudice to the discretion of the "Minister in a case falling within paragraphs (*a*) to (*e*)," under those paragraphs the Minister can only give his consent to the operation of the notice to quit if he finds that certain things exist, for instance, bad farming, but even then he is given a discretion to withhold his consent. The discretion is not to give his consent although the case does not fall within paras. (*a*) to (*e*), but that if he finds circumstances which would entitle him to give consent yet he has a discretion to withhold it.

In the present case the terms of the tribunal's order were: "That the appellants' version regarding the tenant's decision or "agreement to relinquish the tenancy in consideration of the sum "of £500 by way of compensation is accepted. Despite the fact "that the method of farming of the said holding of Blaenllyn was "not in dispute, and that the question of hardship could not "arise under the provisions of section 25 (1) (*d*) of the Agricul-"tural Holdings Act, 1948, because the same landlord was not "in existence at the material times, possession having regard "to all the circumstances ought to be given to the present owner. "Discretion is exercised in favour of the present owner under "section 25 (1) (*a*) of the said Act, and the appeal is allowed." But there was no ground on which discretion could be exercised in favour of the owner. The discretion could only be exercised in respect of the tenant. Therefore, this order is hopeless from beginning to end.

Another ground on which this court could grant certiorari is that on the face of this order it is clear that the tribunal took into account a fact which is entirely irrelevant. It appears from the affidavits that there had been negotiations for the applicant to

quit the holding in return for the sum of £500, and the landlords said that the applicant had agreed to go out for this sum. If the applicant had made some independent agreement it may be possible that some action might be brought to enforce that agreement. I do not express any opinion about that, and it is not a matter which was relevant. The only relevant question was whether or not the Minister or the tribunal should give their consent to the notice to quit, and that they can only do by applying section 25 (1). There is nothing in section 25 about a monetary bargain being entered into between the landlord and the tenant, so on all these grounds it is obvious that this award cannot possibly stand and must be quashed.

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REGINA v. AGRICULTURAL LAND TRIBUNAL FOR THE WALES AND MONMOUTH AREA. *Ex parte* DAVIES.

Lord Goddard C.J.

LYNSKEY J. I agree.

PARKER J. I agree.

*Application granted.*

Solicitors—*Ellis & Fairbairn, for James Jones, Son & Francis, Llandyssul; T. D. Jones & Co., for J. C. Williams & Roberts, Carmarthen; Solicitor, Ministry of Agriculture and Fisheries.*

J. D. P.

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[CHANCERY DIVISION.]

* *In re* WARRE'S WILL TRUSTS. WORT *v.* SALISBURY DIOCESAN BOARD OF FINANCE AND OTHERS.

1953 *Apr.* 28.

Harman J.

[1952 W. No. 2776.]

*Will — Charity — Trustees' absolute discretion — "Retreat house" — Benefit to individuals but not to public—Not valid charitable trust —Uncertainty.*

A testatrix gave the residue of her estate to the Salisbury Diocesan Board of Finance, as the holding trustee on trust to establish a scheme for the future use of her residence. After providing what persons should be the administrative trustees she continued: "the precise form of the scheme and therefore the "final trusts of this my will shall be settled in their absolute "discretion but for the guidance of such administrative trustees "in settling such scheme I now set out a rough outline which sets "out my wishes:—'The property and income to be derived there-"'from to be applied to the provision and upkeep of [so far as "'now relevant] . . . a retreat house. . . .'"

She further provided that any surplus income could be used by the trustees for either training ordination candidates or a certain ecclesiastical charity. She gave the trustees a further discretion that if the scheme "not be found to be of the best "service in furthering the spread of Christianity . . ." to adopt certain alternatives which appeared charitable.

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A "retreat house" was a house devoted to a form of religious exercise known as a retreat, by which persons retired for a time from the activities of the world for religious contemplation and cleansing of the soul.

On a summons to determine whether the trusts of the residue constituted valid charitable trusts:—

*Held*, (i) that if, as appeared to be the case, the wishes of the testatrix were merely precatory and not mandatory, the trustees would have an absolute and unlimited discretion and the trusts would be void for uncertainty; (ii) that if, alternatively, the wishes of the testatrix were mandatory, these were not valid charitable trusts, because although a retreat house might be highly beneficial to the individuals who frequented it, it lacked the element of benefit to the public, which, as laid down in *Cocks* v. *Manners* (1871) L.R. 12 Eq. 574, was essential to render a purpose charitable in the legal sense; (iii) that, even if the final clause disposing of the residue contained valid charitable objects, that would not preserve the trusts if the preceding objects were invalid; and accordingly the trusts of the residue were void.

*Cocks* v. *Manners* (1871) L.R. 12 Eq. 574, and *Gilmour* v. *Coats* [1949] A.C. 426; 65 T.L.R. 234; [1949] 1 All E.R. 848 followed.

ADJOURNED SUMMONS.

Agnes Margaret Warre made her will on June 10, 1937, and appointed the plaintiffs to be the executors and trustees of her will. She gave the residue of her estate to her trustees on trust for the Salisbury Diocesan Board of Finance, and after setting out a number of bequests, not here relevant, she continued: "And ultimately to establish a scheme for the future of my "present residence and its use and in such scheme it shall be "provided that the holding trustee shall be the board and the "administrative trustees shall be the Bishop of Salisbury for the "time being the said Gerald Burton Allen Francis Herbert Wort "and Percy John Dale [trustees under the will] two persons "either clergymen of the Church of England or laymen nomina-"ted by the Bishop of Salisbury and three laymen nominated "by the board my idea being that so far as may be the administra-"tive trustees shall consist as to half of clergymen and half of "laymen. The precise form of the scheme and therefore the final "trusts of this my will shall be settled by the administrative "trustees in their absolute discretion but for the guidance of such "administrative trustees in settling such scheme I now set out "a rough outline which sets out my wishes:—'The property "'and income to be derived therefrom to be applied to the pro-"'vision and upkeep of (i) a house of residence for the Saint "'Andrew's Missioners either as at present constituted or in "'any reconstituted form and/or (ii) a retreat house. . . . So "'much of the income as shall not in the judgment of the "'trustees be required for the upkeep of the house church and "'other buildings and for the diocesan use of the premises as "'a house for Saint Andrew's Missioners or a retreat house and "'the expenses thereof with a suitable reserve for future needs

" ' shall be applied to making grants for (i) training of ordination " ' candidates including those intending to offer themselves for " ' missionary dioceses and (ii) to the National Society but should " ' such scheme ultimately in the opinion of the bishop the " ' administrative trustees and the committee not be found to be " ' of the best service in furthering the spread of Christianity " ' at home or abroad this alternative may be adopted (a) to use " ' or allocate the honse and as much of the property as may be " ' required for some other religious purpose and (b) sell that not " ' required for that purpose and devote the proceeds of sale " ' together with the income arising therefrom to the objects " ' above mentioned.' "

The evidence was that by the " National Society " the testatrix must have meant the National Society for promoting religious education in accordance with the principles of the Church of England.

The testatrix died on May 21, 1946.

The question on this summons for the determination of the court was whether, the trusts relating to the residue of the testatrix beginning " And ultimately," were valid charitable trusts or void for uncertainty.

*G. A. Rink* for the trustees.

*C. V. Rawlence* for the Salisbury Diocesan Board of Finance.

*J. V. Nesbitt* for the next-of-kin.

*Denys Buckley* and *B. J. H. Clauson* for the Attorney-General.

Cases cited in argument: *Baddeley* v. *Inland Revenue Commissioners* [1]; *Cocks* v. *Manners* [2]; *In re Delany* [3]; *In re Flinn* [4]; *In re Garrard* [5]; *Gilmour* v. *Coats* [6]; *In re White*.[7]

HARMAN J. There are two views; one is that the administrative trustees have an absolute discretion to establish a scheme for the future use of the residence; and the other is that they are limited to the purposes set out in what is called the " rough " outline," which must be considered as mandatory and not merely as an expression of her wishes.

Supposing that the first view is right—as I am inclined to think that it is—then, in my judgment, there are no limits upon what the administrative trustees may direct, and the fact that the holding trustee, for whom the scheme is to be established, may have exclusively charitable objects, does not seem to

[1] [1953] 1 W.L.R. 84; [1953] 1 All E.R. 63.
[2] (1871) L.R. 12 Eq. 574.
[3] [1902] 2 Ch. 642; 18 T.L.R. 741.
[4] [1948] Ch. 241; 64 T.L.R. 203; [1948] 1 All E.R. 541.
[5] [1907] 1 Ch. 382; 23 T.L.R. 256.
[6] [1949] A.C. 426; 65 T.L.R. 234; [1949] 1 All E.R. 848.
[7] [1893] 2 Ch. 41; 9 T.L.R. 32, 261.

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me to make any difference. Therefore even if a gift to the board for its general purposes were essentially a gift for charitable objects, this being a gift to them purely as trustees is not such a gift since a scheme is to be established which may or may not have something to do with their own objects. If, therefore, on the true construction of this will—being the view to which I am inclined—the wishes of the testatrix are merely precatory and not mandatory, I should hold the gift void for uncertainty.

Supposing I should be wrong about that, and the so-called wishes are mandatory, then it remains to be seen whether those wishes themselves are exclusively charitable.

The first wish expressed by the testatrix is the use of her residence for St. Andrew's Missioners; that I need not go into because the St. Andrew's Missioners had ceased to be actively in existence well before the date of her will. Their activities were not officially wound up until a somewhat later date, but that object has always been impossible on any date when the administrative trustees could have started a scheme.

The testatrix proposed secondly what she called a retreat house; this phrase is explained as meaning a house devoted to a form of religious activity or inactivity which is known as a "retreat," and that is a well understood form of religious experience in the Church of England. It is a retirement from the activities of the world for a space of time for religious contemplation and the cleansing of the soul. No doubt that it is a highly beneficial activity for the person who undertakes it, but it is not an activity, which for the reasons so often set out in English law is a charitable activity. In *Cocks* v. *Manners* [1] which was recently affirmed by the House of Lords in *Gilmour* v. *Coats*,[2] Sir John Wickens V.-C., said [3]: "A voluntary association of "women for the purpose of working out their own salvation by "religious exercises and self-denial seems to me to have none of "the requisites of a charitable institution, whether the word "'charitable' is used in its popular sense or in its legal sense. It "is said, in some of the cases, that religious purposes are charit-"able, but that can only be true as to religious services tending "directly or indirectly towards the instruction or the edification "of the public. . . ." *Gilmour* v. *Coats* [4] was concerned with a trust for a certain Roman Catholic priory which consisted of cloistered nuns, who devoted their life to prayer, contemplation, penance and self-sanctification within their convent and engaged in no exterior works; there was evidence as to the doctrine of the Roman Catholic Church with regard to the benefit conferred by the contemplative life, not only on those who followed it themselves, but also through the efficacy of their intercessory prayers. The House of Lords held that the element of public benefit essential to render a purpose charitable applied equally to religious

[1] (1871) L.R. 12 Eq. 574.
[2] [1949] A.C. 426; 65 T.L.R. 234; [1949] 1 All E.R. 848.
[3] L.R. 12 Eq. 585.
[4] [1949] A.C. 426.

charities as to other charities. By that decision therefore the House declined to go beyond the *Cocks* v. *Manners* [5] doctrine.

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Activities which do not in any way affect the public or any section of it are not charitable. Pious contemplation and prayer are no doubt good for the soul, and may be of benefit by some intercessory process, of which the law takes no notice, but they are not (legally speaking) charitable activities. It follows, then, that if the purposes indicated by way of confining the absolute discretion given to the trustees include a purpose which is not charitable, the trustees are, on this view, enjoined to embark on a purpose which is not charitable.

At the end of the paragraph in which the wishes of the testatrix are set out, there is a sweeping up clause including objects which are themselves no doubt charitable; but that cannot preserve the objects going before them if they are not charitable. Similarly there is a discretion given to the administrative trustees, if they find that the wishes set out in the "rough outline" are not serving the testatrix's purpose, which she describes as "furthering the spread of Christianity," to adopt certain alternatives which on the face of them look as if they are charitable purposes. The fact that the testatrix thought her purpose would serve the cause or spread of Christianity does not make this a charitable purpose and prevent these trusts from being bad.

I conclude that this residuary gift fails, and that the residue passes as on intestacy to the representatives of the sister of the testatrix. I hold that these trusts not being exclusively charitable are therefore void for uncertainty.

*Declaration accordingly.*

Solicitors: *Darley, Cumberland & Co. for Jonas & Parker, Salisbury; Taylor, Jelf & Co. for Wilson & Sons, Salisbury; Field, Roscoe & Co. for Pye-Smith, Hulbert & Kildahl, Salisbury; Solicitor for Inland Revenue.*

I. G. R. M.

[5] L.R. 12 Eq. 574.

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[CHANCERY DIVISION.]

## *HUTTON *v.* INLAND REVENUE COMMISSIONERS.

1953
*Apr.* 21, 22, 23; *May* 1.

Upjohn J.

*Revenue—Income tax—Tax reserve certificates—Interest free of tax when applied in payment of tax—Company's distribution of interest—Shareholder's liability to tax—Income Tax Act*, 1918 (8 & 9 *Geo.* 5, *c.* 40), *All Schedules Rules*, *r.* 20—*Finance Act*, 1942 (5 & 6 *Geo.* 6, *c.* 21), *s.* 29.

Money invested in tax reserve certificates carries interest at 1 per cent. per annum in so far as they are applied in payment of tax; this interest is by section 29 of the Finance Act, 1942, exempted from tax.

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A company in discharging its liability to tax used tax reserve certificates to the value of £18,600 and interest on those certificates to the value of £78. The company distributed to the appellant £39, being his share of the interest in proportion to his share holding in the company. The appellant claimed that the company was not bound to deduct tax in distributing this interest pursuant to rule 20 of the All Schedules Rules. He contended that the profit and loss account of the company was increased by a sum of £78 which was exempted from tax by statute:—

*Held*, that, though the payment by the company of its tax by means of tax reserve certificates resulted in a sum larger by £78 standing to the credit of the profit and loss account than there would have been had the tax been paid in cash, that was analogous to receiving a trade discount, and the company was not left with a separate tax-free item in its profit and loss account; and that accordingly the company was not entitled to distribute the interest without deduction of tax.

*Corporation of Birmingham* v. *Inland Revenue Commissioners* [1930] A.C. 307; 46 T.L.R. 262 and *Central London Railway* v. *Inland Revenue Commissioners* [1937] A.C. 77; 52 T.L.R. 581; [1936] 2 All E.R. 375 distinguished.

CASE STATED.

The taxpayer appealed from a decision of the Commissioners for the Special Purposes of the Income Tax Acts, affirming additional assessments to surtax for the years 1943–44 to 1948–49 inclusive, which included as part of his income for surtax purposes the distribution by a company of interest on tax reserve certificates.

Tax reserve certificates were created and issued as a result of a Treasury Memorandum dated December 22, 1941. By the terms of issue the certificates earned interest at 1 per cent. per annum, in so far as they were applied to payment of certain taxes, but carried no interest to the extent to which they were not so applied. The interest so earned was not returnable by the holder as part of his income or profit, and thus was not liable to income tax, surtax, National Defence Contribution or excess profits tax. Statutory authority for such exemption from tax was given by section 29 of the Finance Act, 1942. There was a further issue of Tax Reserve Certificates in 1946, but that issue was not here relevant.

Shortly after the creation of the certificates the Hutton Shoe Co. Ld. (in which at all material times the appellant held 50 per cent. of the shares) purchased tax reserve certificates to meet its income tax liabilities. It purchased certificates to the value of £10,400 in 1942, and subsequently made purchases until the end of 1946, when it had purchased certificates to the value of £148,600. All but £2,000 of these certificates were surrendered from time to time in discharge in whole or in part of income tax liability, the last tax liability being that for the year ended June 30, 1950. The amount of interest credited to the company on payment of its tax in this way amounted in the aggregate to £1,546 3s. 4d.

In the first year, 1943, the company applied in or towards discharge of its tax liability tax reserve certificates to the nominal value of £18,600, and was credited with £78 13s. 4d. interest on them and thus discharged £18,678 13s. 4d. of its total tax liability for that year.

In the annual accounts of the company for that year the amount of interest saved, £78, by discharging its income tax in this manner was shown as a separate credit in the profit and loss account. By a resolution dated July 30, 1943, the company resolved that the sum of £78 13s. 4d. received in respect of interest on tax reserve certificates for the year to June 30, 1943, be paid direct to the shareholders individually in proportion to their holdings of shares as at June 30, 1943. The appellant, by virtue of his 50 per cent. shareholding, duly received in cash some £39. This practice was regularly followed by the company throughout the relevant years. For convenience, reference was made to the figure of 1943 by way of example.

*Geoffrey Tribe* for the appellant.

*Frederick Grant Q.C.*, *J. H. Stamp* and *Sir Reginald Hills* for the Crown.

The cases referred to in argument are set out in the judgment.

*Cur. adv. vult.*

UPJOHN J., reading his judgment:—This appeal raises a neat point whether a company, having made substantial savings in its cash liability to income tax by a prudent application of tax reserve certificates thereto, is entitled to distribute amongst its shareholders the amount of the interest earned by such certificates (such interest being admittedly tax free in the hands of the company) without deducting tax from such distribution.

[His Lordship stated the facts and continued:] The company claim to be entitled to distribute that sum of £78 without being bound to deduct tax pursuant to rule 20 of the All Schedules Rules, on the ground that the distribution is in respect of interest on the tax reserve certificates, and that interest not having borne tax in the hands of the company, they are neither bound nor entitled to deduct tax therefrom in making the distribution by way of dividend to the shareholders. It is not in dispute, having regard to the well known principles laid down by Lord Tomlin in *Neumann* v. *Inland Revenue Commissioners*,[1] that,[2] if the company are entitled to regard the distribution of £78 as being the distribution of a sum which has not borne tax in their hands, then they are not entitled to deduct tax on making the payment, and that the sum so distributed is not subject to income tax or

[1] [1934] A.C. 215; 50 T.L.R. 246; 18 Tax Cas. 332.

[2] [1934] A.C. 227, 228.

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surtax in the hands of the payee. The sole question which I have to consider is whether the company are entitled to regard the distribution as the distribution of a fund which has not borne tax in their hands.

Mr. Tribe, for the appellant, put his case in this way. He says that the matter is one entirely of account, and that it matters not that the interest on the tax reserve certificates was in fact applied, as it had to be, towards payment of the tax due from the company. In support of that submission he referred me to two cases to illustrate his general proposition: *Montague Burton Ld.* v. *Inland Revenue Commissioners*,[3] and in particular to the observations of Romer L.J.,[4] and *Fattorini (Lancashire) Ld.* v. *Inland Revenue Commissioners*.[5] In the latter case a holding company had by contract bound itself to pay to its bankers in reduction of a loan, dividends received from certain operating companies in which it was the principal shareholder; but it was held, nevertheless, that these dividends were properly a credit to the profit and loss account of the holding company and, accordingly, that it was entitled out of other available assets to pay a dividend corresponding to the amount of the dividends received. That, Mr. Tribe contended, was exactly the position here. Lord Simon put the matter thus[6]: "As "regards para. 23 of the special case, I agree that the contract "with the bank did not bind the appellant company not to "distribute a dividend, and inasmuch as the appellant company "made profits in each of the years in question, the fact that it "used the dividends it received (as it was bound to do) in "reducing the charge on the shares did not make it unlawful to "distribute a dividend. There is nothing in law to prevent a "company using an income receipt as cash in its hands to dis-"charge a capital liability or to purchase a capital asset and "then, after the close of its financial year, paying a dividend "out of other cash or borrowing for the purpose to the extent "of the credit balance standing on profit and loss account. This "was very clearly explained by my noble and learned friend "Lord Romer, when sitting in the Court of Appeal in *Montague* "*Burton Ld.* v. *Inland Revenue Commissioners*,[7] and his view "was affirmed on appeal to this House, particularly in the "speeches of Lord Hailsham L.C. and of Lord Russell of "Killowen.[8] The Board of Referees sought to distinguish the "decision of Rowlatt J. in *Glazed Kid Ld.* v. *Inland Revenue* "*Commissioners*,[9] where the company made a very similar "arrangement to borrow from a bank the purchase price of "shares on the terms that it paid over to the bank the dividends "as received. Macnaghten J., in reversing the decision of the

[3] (1933–37) 20 Tax Cas. 48.
[4] Ibid. 70.
[5] [1942] A.C. 643; [1942] 1 All E.R. 619; 24 Tax Cas. 328.
[6] [1942] A.C. 652.
[7] 20 Tax Cas. 48, 70.
[8] Ibid. 77.
[9] (1930) 15 Tax Cas. 445.

" Board of Referees, declared himself unable to see the distinc-
" tion, and I agree with him. The judgments in income tax
" cases of Rowlatt J. deserve, in my opinion, particular atten-
" tion, but in this instance, with all respect to that learned judge,
" his view cannot be upheld. He said [10]: 'It is not open to
" 'anyone to say that they' [the Glazed Kid Company] 'have
" 'not distributed a reasonable part when they could not distri-
" 'bute any part of what were their profits, because every penny
" 'of those profits, which solely consisted of these dividends,
" 'were under contract receivable by somebody else.' This is
" to confuse the use made of an income receipt to discharge a
" capital liability with the quite distinct question of the use of
" a credit balance on the profit and loss account to justify the
" distribution of a dividend."

The Crown concedes that the matter is one of account, and the fact that the interest on the tax reserve certificates had been applied in payment of the tax liability taken in isolation is irrelevant. Mr. Tribe's argument, however, proceeds: the liability to taxation having been discharged by the surrender of tax reserve certificates, the general fund standing to the credit of profit and loss in the accounts of the company is increased by the sum of £78. He posed the question: how is that increase achieved? He says that the source of that increase was quite plain. It is a perfectly ascertainable figure and represents the interest on surrendered tax reserve certificates. He submits that it does not form part of the general taxed funds standing to the credit of the profit and loss account because the interest is exempted from income tax and, therefore, it cannot be said that that particular item of £78 in the profit and loss account has been taxed. He further said that this sum cannot be regarded as arising from any diminution of the company's liability to income tax for that liability to income tax is in no way diminished. It remains for the first year what it always has been, that is to say, the sum of £18,678 13s. 4d. which had been discharged by the surrender of £18,600 tax reserve certificates and interest on them. He submits that this sum of £78 is a sum apart from the ordinary trading and other profits made by the company and is a sum which has not been taxed in the hands of the company. It is in truth tax-free interest on valuable securities, namely, tax reserve certificates purchased by the company. Therefore, he says, if the company like to distribute that definite and ascertained sum by way of dividend, they are entitled to do so, and as it represented an untaxed fund in their hands they cannot deduct tax from it pursuant to rule 20, and so in the hands of the appellant it is free of income tax and surtax.

Mr. Grant, for the Crown, admits that the fund standing to the credit of profit and loss account is increased by the sum of

[10] Ibid. 456.

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£78, and he admits that that item is available for distribution by way of dividend, but he says that tax must be deducted. He submits that that is so for two reasons. First, he says that the company could only receive interest upon the tax reserve certificates by applying them towards tax. Therefore, he says, the interest no longer existed, and all that has happened is that the general fund of taxed profits has been increased in this sense, that a smaller sum, smaller by £78, has had to be applied out of those profits in payment of the relevant tax liability, but that sum appearing in the general fund of profit and loss never represented the interest upon the tax reserve certificates. Secondly, he says that the company's action has been inconsistent, and that having applied the interest in payment of tax they cannot now contend that that item of interest is now in the general fund of profit and loss representing that interest.

In support of that submission he referred me to two cases. The first was *Corporation of Birmingham* v. *Inland Revenue Commissioners*.[11] That was a complicated case and the actual decision went on an entirely different point. Briefly the facts were these: The Birmingham Corporation borrowed money for a housing scheme and in accordance with the Housing Act, 1919, they were entitled to recoupment from the Crown of loss made upon that scheme subject to a certain contribution. As part of that loss they showed, as they were entitled to, the interest upon the money borrowed for the purpose of the scheme. Of course, when they had paid interest to the lenders they had deducted income tax, but they showed in their loss for the purpose of the subsidy the gross amount of the interest. That would be right if they had paid the interest out of funds which had not borne tax in their hands, and they would then be accountable to the Revenue for the sum so deducted having regard to rule 21 of the All Schedules Rules. Later, for the purposes of income tax, the corporation claimed in effect that the interest on the borrowed money had been paid out of their taxed funds, and, therefore, that they were entitled, pursuant to rule 19, to retain tax deducted from the interest payable to the lenders. The House of Lords said that that was quite inconsistent, and that, having claimed against one department of the Crown that they had paid the interest out of capital, they could not then claim against another department of the same person, the Crown, that they had paid the interest out of income. It was said by Lord Atkin that the original claim to the subsidy was conclusive proof that the corporation had in fact paid the interest out of untaxed funds.

The second case was *Central London Railway* v. *Inland Revenue Commissioners*,[12] and again the decision was upon an entirely different point, but it was held by the House of Lords that the appellants were making quite inconsistent claims. As

[11] [1930] A.C. 307; 46 T.L.R. 262.

[12] [1937] A.C. 77; 52 T.L.R. 581; [1936] 2 All E.R. 375.

Lord Macmillan said [13]: "My Lords, I do not think that the "same sum can be utilized by the railway company to render "them those two inconsistent services in the same tax year, so "as to entitle them first to attribute the £2,340 1s. 11d. to the "payment of interest to their creditors and claim to retain the "tax deducted therefrom as if it were paid out of revenue, and "then, by debiting it to capital, to enhance the dividend fund "and claim to retain the tax deducted from their shareholders on "paying them their dividends. Whatever view be taken of the "meaning of rule 19 I do not think that the railway company "can bring such a case within it."

Those two cases were very special cases, as was pointed out by Lord Greene in *Allchin* v. *Coulthard*.[14] That case went to the House of Lords where the judgment of the Master of the Rolls was approved in its entirety, and Lord Simon said [15]: "Neither "is there anything in the present case which goes to show that "they have precluded themselves by inconsistent action (as was "the case in *Birmingham Corporation* v. *Inland Revenue Com-"missioners* [16]) from being treated as paying the interest out of "profits or gains brought into charge. The corporation claims "to be so treated, and the claim is justified."

In my judgment those two cases relied on by the Crown have no application to the case before me. They depended upon the existence of a factual inconsistency, i.e., if for one purpose a company says it has made a payment out of fund A it cannot, at all events, against the same person (the Crown) for another purpose say it made the payment out of fund B. There is no inconsistent claim here set up by the appellant. He says, and relies upon the fact, that he has surrendered tax reserve certificates in payment of his tax and has received interest thereon, but he contends for the reasons which I have already endeavoured to summarize, that the result of that transaction is to produce as an item in his profit and loss account a sum of £78 which is a tax-free item in his accounts. If he is right on that, he has done nothing inconsistent with his surrender of tax reserve certificates and interest in discharge of his income tax liability. In truth this case gives rise to a short but, to me, difficult point.

In my judgment the true solution is to be found in these considerations: The company in the course of carrying on its business has made profits. Upon those profits it has to pay tax, and it can pay tax in two ways, either by waiting for the due date, and then paying cash out of its general fund standing to the credit of profit and loss; or by making an estimate of its tax liabilities and making provision by the purchase of tax reserve certificates well in advance of the due date, and in due course surrendering those tax reserve certificates and claiming interest thereon. If the company follows the latter course, the result is

[13] [1937] A.C. 90.
[14] [1942] 2 K.B. 228; 58 T.L.R. 285; [1942] 2 All E.R. 39.
[15] [1943] A.C. 607, 623; 59 T.L.R. 396; [1943] 2 All E.R. 352.
[16] [1930] A.C. 307.

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that its general fund standing to the credit of profit and loss is larger than it otherwise would be or, what comes to the same thing, it has had to deplete that fund by less than it would have had to do had it paid its tax in cash. All that has happened is this, that the general fund standing to the credit of profit and loss has been swollen by the sum of £78. The case is analogous to receiving a discount on a trade debt. The company is left with a larger general fund to the credit of profit and loss and not with a separate item in its profit fund representing a tax free item. Accordingly, in my judgment, the Special Commissioners reached a correct decision.

In the result the appeal must be dismissed.

*Appeal dismissed.*

Solicitors: *Wigan & Co. for Phipps & Troup, Northampton; Solicitor of Inland Revenue.*

I. G. R. M.

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[BIRMINGHAM ASSIZES.]

## * BLOUNT *v.* WAR OFFICE.

1953
*Apr.* 1.

Ormerod J.

*Bailment—Voluntary bailment—Negligence—Theft of goods deposited. Emergency legislation — Requisitioning — Power of requisitioning authority to transfer requisition to another authority—Liability of requisitioning authority in respect of collateral arrangement with owner—Defence (General) Regulations,* 1939 (*S.R. & O.* 1939, *No.* 927), *reg.* 51 (1), (2).

A landowner made an arrangement with the War Office, who were requisitioning his house under regulation 51 of the Defence (General) Regulations, 1939, whereby he was allowed to leave certain of his goods in a locked room in the house. Some years later the War Office purported to transfer the requisition to the Ministry of Works, who subsequently purported to pass it to the Ministry of Agriculture. The latter ministry used the house for the accommodation of displaced persons from Europe, but exercised so little control or discipline over them that two of them broke into the room and stole some of the goods there stored:—

*Held,* (1) that the War Office were bailees of the goods and as such were liable for their loss, which was caused by the negligent manner in which the house had been managed; and (2) that, the bailment was a collateral arrangement not transferable without the consent of the bailor. There was nothing in the regulations to justify the contention that one authority might transfer the requisitioned property to another authority, thereby divesting itself of all responsibility with regard to the requisition.

ACTION.

The plaintiff, Sir Walter Aston Blount, was at all material times the owner of a house known as Mawley Hall, Cleobury

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[Reported by NIUL HOGG, Esq., Barrister-at-Law.]

Mortimer, in the county of Shropshire. About August, 1940, the house and premises were requisitioned by the defendants, the War Office, under the powers contained in regulation 51 of the Defence (General) Regulations, 1939.[1] The plaintiff was willing that his house should be requisitioned for the purpose for which it was required, namely, the billeting of troops, but he had on his premises a large amount of furniture and a considerable quantity of valuable silver and other effects which it was difficult for him to store in any place other than the house.

Shortly after the premises had been requisitioned he had an interview with a Major Ingleby, who was the officer in charge of the billeting for the area. At that interview arrangements were made for the handing over of the hall to the authorities by the plaintiff, and the question of the storage of the furniture and other articles was discussed. It was arranged that in the circumstances the defendants would allow the plaintiff to store the whole of his furniture in some of the downstairs rooms of the house. By dint of careful packing, the whole of the furniture and effects were stored in two rooms, which were locked and sealed by the plaintiff with his own seal in the presence of a representative of the defendants.

There was in the house, opening out from the butler's pantry, a strong room, which was some 10 feet by eight feet, with a strong iron inner door in the form of a grill, and a strong outer door of iron and wood, and it was quite obviously a strong room. When this matter was discussed, according to his evidence, the plaintiff said that he was also storing some articles in the strong room, although he did not specify any particular articles or give any estimate of their value, and that that was agreed to by Major Ingleby. The strong room was, therefore, filled with silver and other articles and locked and sealed by the plaintiff with his own seal in the presence of representatives of the defendants.

The defendants remained in possession of those premises from August, 1940, until 1944. During that time there were a number of changes of occupation by various troops, and from time to time the plaintiff went on to the premises. He found, on the whole, that the premises were being carefully and properly looked after. He had some complaints to make from time to time that the seals were broken on the doors which he had

[1] The Defence (General) Regulations, 1939, reg. 51: "(1) A competent authority, if it appears to that authority to be necessary or expedient so to do in the interests of the public safety, the defence of the realm or the efficient prosecution of the war, or for maintaining supplies and services essential to the life of the community, may take possession of any land, and may give such directions as appear to the competent authority to be necessary or expedient in connexion with the taking possession of that land."

"(2) While any land is in the possession of a competent authority by virtue of this regulation . . . the land may . . . be used by, or under the authority of, the competent authority for such purpose, and in such manner, as that authority thinks expedient in the interests of the public safety, . . ."

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locked, but they were reinstated and he made no further complaint about it.

In 1944 the plaintiff received a notice that the requisition had been transferred to the Ministry of Works. He was not asked to consent to the transfer, he was merely told what had happened, and thereafter the compensation rental was paid to him, not by the defendants, but by the Ministry of Works. During the occupation by the Ministry of Works the plaintiff had no serious ground for complaint about the way in which the premises were being looked after.

At some period, of which the plaintiff had no notice, and about which he knew nothing for some time, the premises came into the possession of the Ministry of Agriculture, and were then used for the accommodation of some 50 to 70 Latvian displaced persons. During that time the premises were in the charge of a warden, who was there purely for administrative purposes and was not in any way in charge of the men accommodated there from a disciplinary point of view. From time to time, particularly after the men had been paid, there was a good deal of rowdiness.

On February 21, 1951, in consequence of a communication which was made to him by a police officer, the plaintiff went to the premises and found that the strong room had been broken into, that a large quantity of silver plate was missing, and that some of it had actually been melted down and dealt with on the premises. Eventually, two of the Latvian displaced persons were charged with the theft of the articles and they pleaded guilty and were sentenced.

In those circumstances the plaintiff brought this action, alleging that there had been a bailment of the goods by him to the defendants, that they had been negligent as bailees, and that in consequence of their negligence he had suffered loss in that the articles had been stolen.

For the defence it was contended, first, that there had been no bailment, in that there had never at any time during the taking over of the premises been any mention of the strong room or of the fact that there were any articles of any kind in the strong room, and that, in such circumstances, if articles had been left there, they had been left by the plaintiff at his own risk and on his own account and the defendants could have no responsibility for them. In the second place, the defendants said that even if there had been a bailment there had been no negligence proved on the part of the bailees, and that in such circumstances they could not be held responsible for the loss of the goods. Thirdly, it was said that in any event the defendants could not be held responsible, because the requisitioning of the premises had been transferred in 1944 from them to the Ministry of Works and that, in those circumstances, if there was any responsibility on the persons in possession of the premises for

the custody of the goods it was not on the defendants, but on the Ministry of Works.

*J. F. Bourke* for the plaintiff.
*A. E. James* for the defendants.

ORMEROD J., having stated the facts and considered the evidence, continued:—I have to decide, in the first place, whether or not in fact there was a bailment of these goods. I am satisfied that I should accept the recollection of the plaintiff on this matter. I am satisfied that although the specific value, and, indeed, the nature of the goods, may not have been discussed between the plaintiff and Major Ingleby, in fact the plaintiff did point out to him that he had goods stored in the strong room, and that Major Ingleby consented to the goods remaining there and to the strong room being locked and dealt with in the way in which the other two rooms, in which the furniture was stored, were being dealt. It was contended by counsel for the defendants that even if that were the proper version of the facts, and I am satisfied it is, that would not constitute a bailment, because what in fact was happening was that these goods remained in the constructive possession of the plaintiff, in that, those rooms being locked, they were not under the control of the defendants and, therefore, the goods could not possibly be said to be in their possession.

I cannot accept that view; I think that there is no substance in the contention at all. The power to requisition is a power to requisition land, and, of course, everything which is on the land in the way of buildings, and in this case the land and buildings were requisitioned. It appears to me that in those circumstances the defendants, in allowing the plaintiff to store his goods and to leave them in those two rooms and in this strong room, did in fact take possession of the goods; and if they took possession of the goods then, clearly, they were bailees of the goods. As to the nature of the bailment, I think that it was clearly a voluntary bailment, the type of bailment which is generally known as a depositing bailment.

The next question is whether or not there was negligence on the part of the defendants in the performance of their duty as bailees which resulted in the loss of this property. I have to consider, first, what is the standard of care which is required from a bailee in these circumstances. As this is a voluntary bailment, I think the position is clear that the standard of care which is required is the reasonable care which any man would take of his own property.

The circumstances here were that in the period for some months before these goods were stolen this house was occupied by a number of displaced persons. They appear from time to time to have been rowdy, and they appear to have had no regard for locks and bolts. The evidence of the plaintiff, which was not

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disputed, was that on one occasion he found that the lock on the door of one of the rooms in which the furniture had been stored had been forced, and that it was even occupied by one of these displaced persons, who, apparently, had put a bed in this room and had made it comfortable for himself. That, I think, is a very clear indication, although, of course, it did not refer to the strong room, of the regard that those in authority had for the building and for the goods which were stored in this room.

Again, so far as the evidence can help me on this matter, I look to the evidence of the police officer who was responsible for investigating this theft. It is clear from his evidence that this theft had occurred some months before it was discovered and the police communicated with in February, 1952. All the appearances were that the theft and breaking in had been taking place over some considerable time. In spite of that, it appears to have been a matter of months before anybody discovered that this strong room was being broken into and that articles were being taken from it.

I find it hard to believe that any reasonable man who had valuable property of his own, or, indeed, any property of his own, stored under those circumstances, would leave it to the tender mercies of 70 or 80 displaced persons of this type without taking some precaution to see that the efforts which he had made to keep this property separate from the rest of the building were being of some effect.

I am quite satisfied that there was no attempt to look after these goods when the building came in some way or other into the possession of the Ministry of Agriculture, and that there was clearly negligence which resulted in these goods being stolen and the plaintiff suffering this loss.

In those circumstances, clearly the plaintiff is entitled to succeed, unless there is substance in the contention of the defendants that they, having transferred this requisition to the Ministry of Works in 1944, had thereby divested themselves of all responsibility for the bailment which they undertook.

The right to requisition land, and the right under which the requisition in this action was made, is provided in regulation 51 of the Defence (General) Regulations of 1939. [His Lordship read paras. (1) and (2) of the regulation and continued.] It is contended on behalf of the defendants that the powers there are very wide, as indeed they are, and are sufficiently wide to warrant or to justify the requisitioning authority, if he deems it expedient, transferring any requisitioned property to another authority.

It is, I think, clear that that is the procedure which was adopted during this period by these various authorities which were competent to requisition property. If property was requisitioned by one authority, and then not required by that authority, but required by another, the process appears to have been adopted of transferring the requisition from one authority to another.

That, no doubt, was a matter of great convenience to the authorities, but, as I see it, it does not come within the powers given to an authority by these regulations, and counsel on both sides agreed that apart from that regulation there was nothing in the regulations which gave any authority power, under those circumstances, to transfer a requisition to another authority. It might well be that an authority, having requisitioned property and not requiring it for the time being, might properly licence the use of it to some other authority, but I see nothing in the regulations to justify the contention that one authority may transfer the requisitioned property to another authority, and thereby divest itself of all responsibility with regard to that requisition.

Applying that to this case, the position appears to be this: the defendants requisitioned this property, and in the course of requisitioning it they agreed to become voluntary bailees of the chattels which they allowed the plaintiff to leave on the premises, and I am satisfied that in those circumstances they could not, without the consent of the plaintiff, which admittedly was never given, divest themselves of the responsibility for that bailment merely by transferring, or purporting to transfer, the requisition from themselves to the Ministry of Works or to any other competent authority.

Another way, of course, of looking at the matter, and the result is the same, is that this arrangement to become bailees of these goods was something which was merely collateral to the actual requisition, and even if the defendants had the power to transfer the requisition to another authority it by no means follows, and, indeed, I do not think that it follows at all, that they could at the same time, without the consent of the owner of the goods, transfer their responsibility for the bailment of these goods.

In all the circumstances I am satisfied that this contention, that if there is any liability it is the liability of some authority other than the defendants, is as much without substance as it is without merit.

The only other question is as to the amount of damage which the plaintiff has sustained. I am quite satisfied that the estimate which he has made of his loss is an extremely modest one, and that he is certainly entitled to damages in the amount which he has claimed. In consequence, therefore, there will be judgment for the plaintiff for £1,033, together with interest at the rate of five per cent. per annum up to the date of the judgment, with costs.

*Judgment for the plaintiff.*

Solicitors: *Weston, Fisher & Weston, Kidderminster; Beale & Co., Birmingham, for the Treasury Solicitor.*

[COURT OF APPEAL.]

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Lord Goddard C.J., Birkett and Hodson L.JJ.

## *GATEHOUSE *v.* JOHN SUMMERS & SONS LD.

[1951 G. No. 264.]

*Factory — Electric cable — Injury "attendant upon the generation, transformation, distribution or use of electrical energy"—Regulation providing for proper construction of electrical joint as regards mechanical strength—No current passing through cable—Accident due to breaking of cable—Defective joint—Breach of statutory duty —Electricity Regulations,* 1908 (*S.R. & O.,* 1908, *No.* 1312), *reg.* 6.

Although the main object of the Electricity Regulations, 1908 (S.R. & O., 1908, No. 1312) made under the Factories Acts is the protection from "danger to health or danger to life or limb from "shock, burn or other injury to persons employed, or from fire "attendant upon the generation, transformation, distribution or "use of electrical energy," there is a breach of the provisions in regulation 6 which provides that "every electrical joint and con- "nexion shall be of proper construction as regards . . . mechanical "strength and protection" where a workman is killed or injured by the breaking of an electric cable due to a defective joint although at the time no current is passing through the cable so that the injury received is not an electrical burn or shock.

APPEAL and cross-appeal from Pearson J. sitting at Chester Assizes.

The plaintiff, Margaret Lydia Gatehouse, the widow and administratrix of her husband, Frank Nelson Gatehouse, sued the defendants, John Summers & Sons Ld., under the Fatal Accidents Acts, 1846 to 1908, and, as her husband's administratrix, under the Law Reform (Miscellaneous Provisions) Act, 1934, for damages in respect of the death of her husband owing to the alleged negligence or breach of statutory duty of the defendants by whom he was employed as an electrician at their steel works at Shotton, Cheshire. In the works there was a travelling crane which ran up and down on a gantry on rails situated at a height of some 26 feet from the ground. The object of the crane was to lift scrap steel, the lifting being done by a powerful steel magnet weighing several tons, which had to be kept electrified. Accordingly, quite independent of the lifting machinery required to haul up the magnet when it had attracted the metal to be moved, there was a cable which carried electrical current to the magnet. The electrical cable was wound on a separate drum and, as the result of the gantry being situated near the sea, it was exposed to considerable wind power which, from time to time, blew the cable off the drum. As a rule, when that happened the cable was blown off the drum to the side nearest to the cat-walk or gangway along which workmen could walk. It was a rare and exceptional, but not an extraordinary occurrence for the cable to be blown off on the far side from that to which an electrician would go to adjust the cable if it had been blown off the drum.

On April 9, 1951, the cable was blown off the far side of the drum and also jammed, and the plaintiff's husband was called on to release the jamming. The electric current was cut off and he went up the ladder and stood with one foot on the rail on which the crane ran and the other on the pedestal at the foot of the crane, a position which was undoubtedly a very dangerous one, since he was immediately over a space some 26ft. from the ground. Being in that position, he placed both hands on the electric cable with the object of releasing it from the jam, but owing to the fact that it had a defective joint, the cable broke and the man fell backward and was killed. Evidence was given that the cable was of substantial construction and should have borne the strain of eight men, and that had the joint been properly made, the cable would have been as strong as if it had been new.

By her statement of claim the plaintiff alleged: (1) that the defendants were liable for negligence at common law in failing to provide proper or suitable plant for the deceased man, and in failing to provide a proper or safe system of working; (2) that the accident was caused by the defendants' breach of statutory duty in that (a) the cable being part of a lifting machine did not comply with the requirements of section 24 (1) of the Factories Act 1937,[1] and (b) that the joint in the cable was not of proper construction as regarded mechanical strength, contrary to regulation 6 of the principal regulations of the Electricity (Factories Act) Special Regulations, 1908 and 1944.

The defendants denied liability.

Pearson J. gave judgment for the plaintiff. He found that the main cause of the accident was the breaking of the cable owing to the defective joint, but that by standing in a hazardous position the workman had contributed to the accident to the extent of 25 per cent. He did not, however, base his judgment on the ground of common law negligence, but on the ground that there had been a breach by the defendants of section 24 (1) of the Factories Act, 1937, and also of regulation 6 of the Electricity Regulations. He assessed the damages to which the plaintiff was entitled at £4,500, and, deducting 25 per cent. on the ground of the contributory negligence of the deceased, gave judgment for the plaintiff for £3,375.

The defendants appealed, and the plaintiff cross-appealed on the question of contributory negligence.

[1] Factories Act, 1937, s. 24: "(1) "All parts and working gear whether "fixed or movable . . . of every "lifting machine shall be of good "construction, sound material, ade- "quate strength and free from patent "defect, and shall be properly main- "tained."

Electricity Regulations, 1908 (S.R. & O., 1908, No. 1312), reg. 6: "Every "electrical joint and connexion shall "be of proper construction as regards "conductivity, insulation, mechanical "strength and protection."

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*H. Edmund Davies Q.C.* and *W. L. Mars-Jones* for the defendants.

*F. W. Beney Q.C.* and *F. Elwyn Jones Q.C.* for the plaintiff.

The following cases were cited in argument:—*Gorris* v. *Scott*[2]; *Carroll* v. *Andrew Barclay & Sons Ld.*[3]; *Watts* v. *Enfield Rolling Mills (Aluminium) Ld.*[4]; *Mayne* v. *Johnstone & Cumbers Ld.*[5]; *Hutchinson* v. *London and North Eastern Ry. Co.*[6]

Lord GODDARD C.J. stated the facts and continued: The action was framed on two grounds. First, it was said that there was negligence at common law in not providing the deceased man with proper plant because there was a defect in the plant which it was the duty of the defendants to provide for the safe working of their men; and, secondly, it was put on the ground of breaches of section 24 (1) of the Factories Act, 1937, and of one of the electricity regulations made under the Factories Acts.

There is no question that the position which the deceased man took up and the method which he adopted for remedying the jam was dangerous. In fact, the plaintiff's own expert agreed that the method which he employed was about the most dangerous that he could have adopted. He could have adopted other methods. The most simple would seem to have been to have given a direction to the crane man to lower the magnet slowly in the hope that that would (as apparently expected by the crane man) have loosened the jam sufficiently for the deceased man to get the cable back on to the drum. Again, he might have had the crane taken along the gantry to the end, where he could have stood in a position of some greater safety, or he might have used planks and put them across the rail; but even then, if he had adopted that method, he would have been standing on two planks which would have formed a sort of platform, and if he was pulling hard on to this defective cable and it had broken, the same accident would probably have happened.

However that may be, the judge has found—and this court sees no reason to differ from him—that the main cause of the accident was the breaking of the cable owing to the defective joint. But the judge had also found—and again, this court can see no reason for differing from him—that the man contributed to his own misfortune by standing in the position that he did, and using both hands to pull at the cable. He was standing in a hazardous position in which he might have only pulled with one hand, while holding on to something with the other hand; but,

[2] (1874) L.R. 9 Ex. 125.
[3] [1948] A.C. 477; 64 T.L.R. 384; [1948] 2 All E.R. 386.
[4] [1952] 1 T.L.R. 733; [1952] 1 All E.R. 1013.
[5] [1947] 2 All E.R. 159.
[6] [1942] 1 K.B. 481; 58 T.L.R. 174; [1942] 1 All E.R. 330.

as I say, the judge thought that the main cause of the accident was the breaking of the cable.

As the cable broke in the way in which it did, it seems to follow inevitably that there was a defect in the plant, because the man, seeing the cable, which was something over an inch thick, and which would carry the weight of eight men, was certainly entitled to assume that, if he pulled on the cable, whether he used one hand or two, and put his whole weight into the pull, it would bear him. Instead of that, it broke.

This court has come to the conclusion that there was here a defect in the plant which ought not to have existed. It was the duty of the defendants to supply their men with proper plant and not with defective plant. The man was doing something which was certainly one method of righting the cable, and no one could say, and certainly Pearson J. did not find, that he was adopting a wholly improper method. He found, as I have said, that the man contributed to his own misfortune to the extent of 25 per cent., and this court does not see any ground upon which they can differ from that finding. The judge, however, did not base his judgment on the ground of common law negligence, but on a breach of the defendants' statutory duty.

This court thinks that on the facts as found by the judge he could have found, and ought to have found, that there was a breach of the defendants' common law duty as well. That is really enough to dispose of the case, because if there was a breach of the common law duty owed to the deceased, Mr. Beney, on behalf of the plaintiff, was quite entitled to uphold the judgment on that ground whether the court thought that there had been a breach of statutory duty or not.

At the same time, we have been much pressed to give an opinion on the question of the breach of statutory duty. For myself, I think that there was a breach of that duty in this case, though not a breach of section 24 (1) of the Factories Act, 1937, which concerns lifting machinery, because the cable that broke in this instance was no part of the lifting machinery; it was a mere electrical lead, and had nothing to do with the winding up or raising of the magnet, but simply electrified it. I think that it would be wrong, therefore, to say—and I respectfully differ from the judge on this point—that it was part of the lifting working gear of the crane and, therefore, came within section 24 (1).

There are, however, electricity regulations made under the Factories Acts to be considered. Their object is shown by the preamble: "Whereas the generation, transformation, distribu-"tion and use of electrical energy in any factory or workshop "or any place to which the provisions of section 79 of the "Factory and Workshop Act, 1901 are applied by that Act, have "been certified in pursuance of the said section to be dangerous." The following regulations are made. Danger is defined in these

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regulations as meaning "danger to health or danger to life or limb "from shock, burn or other injury to persons employed, or from "fire attendant upon the generation, transformation, distribution "or use of electrical energy." I think, on those words, that Mr. Davies is justified in saying that the main object of these regulations is to protect the workmen from what may be called electrical injury.

When one comes to regulation 6 it is found that in contradistinction to several of these regulations the word "danger" does not appear. What regulation 6 provides is that "Every "electrical joint and connexion shall be of proper construction "as regards conductivity, insulation, mechanical strength and "protection." It is clear that when there is an electrical installation which comprises dynamos, converters, engines, and so forth, there will also be cables, and in some cases, I suppose, pylons and various other appliances of that kind which are used for the transmission of electricity from one point to another. The wording of the regulation seems to be perfectly clear; it is not limited in any way. It is: "Every electrical joint shall be "of proper construction as regards mechanical strength and "protection." Therefore, if an electrician is working on an electrical installation, for instance, on the cables, which may be a considerable distance from the pylons, although the electrical current is not at the moment passing through the cables (as would necessarily be the case if there were workmen at work upon the cables) the workman is none the less entitled to assume that the cables are safe and that any joints that are in them will be of proper construction as regards mechanical strength and protection.

If a workman who is working on one of the cables feels that it is necessary to haul on the cable and give it a strong pull or put weight upon it, he is entitled to assume that the regulations have been carried out, and that if there is an electrical joint in the cable it will have been so constructed as to provide for adequate mechanical strength and protection. The joint in the present case was not, and it does not seem to me, therefore, that it matters whether the injury which the man received was an electrical burn or shock or some other form of injury, provided that it resulted from a defect in the electrical joint and was therefore caused by a breach of regulation 6.

We were pressed with the well-known case of *Gorris* v. *Scott*,[1] which shows that where certain regulations or statutory provisions are made for one object and the damage which is complained of is divorced from the purpose for which those regulations were passed, it does not give a cause of action. In that case certain regulations were made under the Contagious Diseases (Animals) Act, 1869, providing that in ships the animals should be separately and properly penned. The animals in that

[1] (1874) L.R. 9 Ex. 125.

instance were not properly or securely penned in the ship, with the result that they were lost, not by reason of any contagious disease, but by perils of the sea; they were washed overboard. The only cause of action that was alleged in that case was that the provisions which had been made under an Act for the prevention of contagious diseases had been broken. It was argued that any damage which resulted from a breach of the regulation could form a cause of action. The court said: "Not so. These "regulations had nothing to do with the perils of the sea or "with precautions against the animals being washed overboard. "They were simply provisions against contagious diseases."

In a recent case in the House of Lords, *Carroll* v. *Andrew Barclay & Sons Ld.*[2] it was held that where a statute required machinery to be fenced, no cause of action would exist if, in the absence of a fence, a piece of machinery broke and flew out and injured or killed a man who was standing near, because the object of the Act was not to prevent a piece of machinery flying out but to prevent the workmen from coming in contact with the moving machine. I do not think, however, that that decision applies to this particular case with which we are dealing.

The statutory requirement is that the electrical joints are to be perfect, or as near perfect as they can be made by ordinary care and skill. They are to be of proper construction as regards mechanical strength. This one was not of proper construction as regards mechanical strength, and an electrician who was working on it, and was therefore one of the persons whom these regulations are designed to protect, was injured thereby. Whether he received one kind of injury or another seems to me to be immaterial. He was injured by reason of the defect in the mechanical construction of this electrical joint, and, therefore, I think that there was a breach of the regulation.

As a result, while we differ from the judge in that we think that there was here a breach of common law duty as well as the breach of statutory duty, it follows that we uphold his judgment for the plaintiff, and we see no reason to differ from him in the assessment of the proportion of the grave responsibility to be attributed to the deceased. Accordingly, this appeal fails and is dismissed.

BIRKETT L.J. [after stating that he agreed with Lord Goddard C.J. that the defendants were liable for negligence at common law and that section 24 (1) of the Factories Act, 1937, had no application to the present case, continued:] With regard to regulation 6, upon which there was considerable argument, I gather that what was said on behalf of the defendants was that if the whole purport of these regulations was looked at it would be found that they were concerned to deal with the danger

[2] [1948] A.C. 477; 64 T.L.R. 384; [1948] 2 All E.R. 386.

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which quite naturally may arise from the use of electricity, and that on the facts of this case it could not be said that the accident was in any sense concerned with electricity, and much reliance was placed on the definition of "danger" contained in the regulations.

The material words of regulation 6 are "Every electrical "joint and connexion shall be of proper construction as "regards conductivity, insulation, mechanical strength and "protection." That is a plain statement and, as my Lord has said, it has no reference to any danger immediate or to be apprehended. It is a duty laid by the regulation upon the employers with which they must comply. If that is the proper construction to be put upon the regulation, there is nothing more to be said, for it is not to be doubted on the facts of this case that the judge clearly came to the conclusion that the main cause of the accident was the fact that the electrical joint was not of the construction and the mechanical strength laid down by the regulation. I think, therefore, that regulation 6 is applicable in this case, though section 24 (1) of the Act of 1937 is not. [Birkett L.J. agreed with the proportion of responsibility for the accident to be attributed to the deceased man.]

HODSON L.J. referred to the facts and continued: In those circumstances, Pearson J. found that the defendants were in breach of regulation 6 of the electricity regulations made under the Factories Act but not in breach of their common law liability. The plaintiff having relied in her pleading on the inadequate strength of the cable as part of the working gear with which the deceased man was provided, it seems to me that the finding of inadequate strength, with the finding that this was the primary cause of the accident, carries with it necessarily the common law liability of the defendants. The judge approached the case, I think, on the basis that the common law attack was really made on the lines that there was no proper system of work, in that no satisfactory platform was provided for the deceased man, and, having found against the plaintiff on that, he dismissed that part of the claim and concentrated on the breach of statutory regulations, and under that head dealt with the question of liability.

For the reasons which my Lords have given, I agree that the two matters overlap. Not only are the defendants liable at common law, but they are also liable under regulation 6, which states: "Every electrical joint and connexion shall be of proper "construction as regards the conductivity, insulation, mechanical "strength and protection." Having regard to the use of the word "conductivity," it is difficult to give any useful meaning to the words "mechanical strength" unless one treats them as covering strength apart from the strength necessary to carry electric current; in other words, the strength necessary to resist such pull as a workman may be likely to want to exert in carrying out such a task as freeing a jammed cable.

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I agree also, that although the electricity regulations apply, section 24 (1) of the Act of 1937, dealing with cranes and lifting machines does not apply, because I cannot hold that this cable, which was nothing more than a lead conducting electricity to the magnet, and had nothing to do with the crane as a lifting machine, comes within the language of section 24 " All parts and " working gear . . . shall be of good construction, sound material, " and adequate strength. . . ." This was not part of the lifting machinery at all, and I agree that section 24 does not apply.

With regard to the appeal on contributory negligence, I notice that the judge directed himself by the case of *Caswell* v. *Powell Duffryn Associated Collieries*,[3] where Lord Wright drew attention to some earlier words of Lawrence J. in *Flower* v. *Ebbw Vale Steel, Iron and Coal Co. Ld.*,[4] where he pointed out that where a workman is concentrating on his job in the circumstances of factory life the courts will not be ready lightly to find him guilty of contributory negligence so as to prevent him recovering from his employers. Having directed himself in that way, Pearson J. felt bound, as I think quite rightly, to find that a proportion of the blame must be attributed to this man. The main ground on which he based his decision was that, instead of holding on with one hand and pulling with the other, while standing in this precarious position 26 feet above the ground, he let go with both hands, and applied both hands to the cable to free the jam. It is obvious that, as the expert said, it was an exceedingly dangerous operation. Whether the cable broke or whether the jam freed itself suddenly, the risk which the man was running was a very great one.

I agree, therefore, with the finding of the judge on that aspect of the case.

*Appeal dismissed.*

Solicitors: *Carpenters for Laces & Co., Liverpool; Rowley, Ashworth & Co.*

P. B. D.

[3] [1940] A.C. 152; 55 T.L.R. 1004; [1939] 3 All E.R. 722.
[4] [1934] 2 K.B. 132, 140.

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[CHANCERY DIVISION.]

## *JOHN HUDSON & CO. LD. *v.* KIRKNESS (INSPECTOR OF TAXES).

1953
*Apr.* 28, 29.
Upjohn J.

*Revenue—Income tax—Balancing charge—"Sale"—Railway wagons vested in Transport Commission—Compensation—Whether transaction a sale—Assessment to income tax—Liability to balancing charge—Income Tax Act*, 1945 (8 & 9 *Geo.* 6, *c.* 32), *s.* 17 (1) (*a*), (3) *—Transport Act*, 1947 (10 & 11 *Geo.* 6, *c.* 49), *ss.* 29, 30.

Certain railway wagons, the property of a company, which carried on the business of coal owners, became vested in the

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Transport Commission under section 29 of the Transport Act, 1947:—

*Held*, that the transfer did not constitute a sale for the purposes of section 17 of the Income Tax Act, 1945, so as to render the company liable to a balancing charge under that section.

APPEAL by case stated from the commissioners for the special purposes of the Income Tax Acts.

The taxpayers, John Hudson & Co. Ld. appealed against an assessment made on them for the year 1948/49 under Case I of Sch. D to the Income Tax Act, 1918, in the sum of £29,021. The assessment was made in order to give effect to a balancing charge on the company under section 17 of the Income Tax Act, 1945,[1] it being alleged by the Crown that such a charge arose by virtue of the receipt by the taxpayers of compensation under section 30 of the Transport Act, 1947, in respect of a number of railway wagons belonging to the taxpayers which vested in the Transport Commission under section 29[2] of that Act.

[1] Income Tax Act, 1945, s. 17: "(1) Subject to the provisions of this section, where, on or after the appointed day [April 6, 1946], any of the following events occurs in the case of any machinery or plant in respect of which an initial allowance or a deduction under Rule 6 of the Rules applicable to Cases I and II of Schedule D has been made or allowed for any year of assessment to a person carrying on a trade, that is to say, either—(*a*) the machinery or plant is sold, whether while still in use or not; or (*b*) the machinery or plant, whether still in use or not, ceases to belong to the person carrying on the trade by reason of the coming to an end of a foreign concession; or (*c*) the machinery or plant is destroyed; or (*d*) the machinery or plant is put out of use as being worn out or obsolete or otherwise useless or no longer required, and the event in question occurs before the trade is permanently discontinued, an allowance or charge (in this Part of this Act referred to as 'a balancing 'allowance' or 'a balancing 'charge') shall, in the circumstances mentioned in this section, be made to, or, as the case may be, on, that person for the year of assessment in his basis period for which that event occurs. . . . (3) If the sale, insurance, salvage or compensation moneys exceed the amount, if any, of the said expenditure still unallowed as at the time of the event, a balancing charge shall be made, and the amount on which it is made shall be an amount equal to the excess or, where the said amount still unallowed is nil, to the said moneys."

[2] Transport Act, 1947, s. 29: "Where, immediately before the date of transfer, any privately owned railway wagon is under requisition by virtue of an exercise of the powers in that behalf conferred by Regulation 53 of the Defence (General) Regulations, 1939—(*a*) the property in that wagon shall vest in the Commission on the date of transfer, free from any mortgage or other like incumbrance, and the requisition shall then cease; and (*b*) the Crown shall not be liable for any compensation under the Compensation (Defence) Act, 1939, or otherwise in respect of any damage to the wagon occurring during the period of requisition."

S. 30: "(1) Where under the last preceding section the property in any wagon vests in the Commission, the Commission shall, subject to the provisions of the three next succeeding subsections, pay as compensation in respect thereof an amount determined, by reference to the type of wagon and the year in which the wagon was first built, in accordance with the Table set out in the Sixth Schedule to this Act. . . . (6) No compensation, other than that payable under this section, shall be payable in respect of the vesting, under the last preceding section, of the property in any wagon in the Commission."

S. 31: "(1) Subject to the provisions of this section, the compensation payable by the Commission in

The question for the consideration of the court was whether or not the transfer of the wagons under section 29 of the Transport Act, 1947, was a sale for the purpose of making the above-mentioned balancing charge.

The following facts are taken from the case stated: The company, which was incorporated on April 6, 1920, for the purpose of carrying on the business of coal merchants, owned railway wagons, which were used for the transport of coal in which the company and its subsidiary companies were dealing.

On September 3, 1939, the Minister of Transport gave notice under the Defence (General) Regulations, 1939, requisitioning the wagons of the company and its subsidiary companies.

On January 1, 1948, the property in the requisitioned wagons was transferred to and vested in the British Transport Commission under section 29 of the Transport Act, 1947. Section 32 of that statute provided that the amount payable under section 29 by way of compensation should be satisfied by the issue to the person entitled thereto of British Transport stock.

The company in due course received compensation for its wagons, the property in which was vested in the commission. The amount of the compensation was substantially higher than the written down value of the wagons for income tax purposes as appearing in the company's books. This written down value was substantially lower than the original cost of the wagons. The balancing charge of £29,021, given effect to in the assessment to income tax for 1948-49 under appeal, represented (with the exception of £963 referable to other matters and not in dispute) the excess of the original cost over the said written down value. The provisions under which the balancing charge was made on the company were those of section 17 of the Income Tax Act, 1945, and the wagons in the present case fell within the description of the machinery or plant in the opening words of the section.

It was contended on behalf of the company (1) that, for a transaction to constitute a sale, there must be mutual assent between the parties (reference being made to Benjamin on Sale, 8th ed., p. 2; (2) that the law with regard to exchange was the same as that with regard to sale, mutual assent being equally required (reference being made to Halsbury's Laws of England, 2nd ed., vol. 25, para. 367, and vol. 29, para. 1); (3) that the compulsory vesting of the wagons in the commission was not a sale within the meaning of para. (a) of section 17 (1) of the Income Tax Act, 1945, nor by reference to the fact that

"respect of a privately owned wagon "vesting in them on the date of "transfer shall be paid to the person "who, immediately before the date of "transfer, was the owner of the "wagon."

S. 32: "(1) The amount payable "by way of compensation in respect "of a wagon the property in which "vests in the Commission on the date "of transfer shall be satisfied in the "manner provided by Part VI of "this Act by the issue to the person "entitled thereto of British transport "stock."

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the company received its compensation in transport stock) an exchange within the said meaning, as extended by section 58 (3) of that statute; and (4) that the transaction did not fall within any of the events specified in section 17, and that, therefore, no balancing charge could be raised in respect thereof.

It was contended on behalf of the Crown (1) that sale was the transfer of the ownership of a thing from one person to another for a money price (reference being made to Halsbury's Laws of England, 2nd ed., vol. 29, para. 1); (2) that such a transfer took place on the compulsory vesting of the property in the company's wagons in the commission under section 29 of the Transport Act, 1947; (3) that the mere fact that the vesting of the property in the wagons was compulsory in no way negatived a sale; and (4) that consequently the transfer was a sale within the meaning of section 17 (1) (*a*) of the Income Tax Act, 1945, and was an "event" within that subsection, which, on the facts of the case, required a balancing charge to be made on the company under subsection (3) of section 17.

The Special Commissioners were of the following opinion: "What took place was in our opinion 'a transfer of the ownership "'of a thing from one person to another for a money price' "(Halsbury's Laws of England, vol. 29, p. 5, para. 1), and we "hold that it was a sale. We do not doubt that the wrongful "confiscation of a chattel, although accompanied by a subse- "quent payment of a sum called 'compensation' would not "constitute a sale. In this case, however, section 29 of the "Transport Act, 1947, vested the property in the company's "wagons, which were already lawfully in the possession of the "Minister of Transport under S.R. & O. No. 1085 of 1939, in "the commission, and the same enactment, by section 30, "provided compensation, to be computed under the provisions "of the Sixth Schedule, which we hold was a money price. We "think also that, if assent is necessary to the conclusion of a "valid sale, it must be assumed to be present when a statute, "such as the Transport Act, 1947, becomes law, since the "company as a person living within the jurisdiction of the "British Crown must assent to all such laws as are duly "enacted, including the enactments contained in sections 29 "and 30 aforesaid. We are to some extent fortified in this "opinion by reference to section 8 of the Transport Act, 1947, "which deals with the 'compulsory purchase of land,' as in our "opinion the assent necessary in the vendor to give a valid title "in land to the commission as purchaser is therein assumed to "be compatible with a 'compulsory' sale of real property. . . ."

The company appealed.

*Frederick Grant, Q.C.*, *John Senter, Q.C.*, and *Anthony Barber* for the company.

*Cyril King, Q.C.*, and *Sir Reginald P. Hills* for the Crown.

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UPJOHN J. stated the nature of the case and continued: The appellant company are coal merchants, and, in connection with their business, they owned in the year 1947, 633 railway wagons. Those railway wagons had in fact been under requisition to the Ministry of Transport from some date in 1939. That fact is irrelevant to the point which I have to consider (except to bring the matter within section 29 of the Transport Act, 1947, referred to later); but I mention it because there is a second point in the case to which that fact is directly relevant. That is a point which depends on section 22 of the Finance Act, 1936, but the company is precluded from arguing it in this court by reason of the recent decision of the Court of Appeal in *North Central Wagon Co. Ld.* v. *Fifield*.[1] The point is formally reserved by the company for argument should this case go to a higher court.

The point, which I have to consider, is purely one of the construction of certain Acts. When the Transport Act, 1947, came into force on January 1, 1948, the property in the company's railway wagons was transferred to and vested in the British Transport Commission under section 29 of the Act.

It is argued by the Crown, and was held by the special commissioners, that that transfer was a sale for the purposes of making a balancing charge under the provisions of section 17 of the Income Tax Act, 1945. That is the whole question. I must now turn to that section; its general object appears to be this: if plant and machinery have been depreciated in the company's books and the appropriate income tax allowances have been made, and the plant or machinery is subsequently sold at a higher price than its depreciated price, then the excess of the one over the other is subject to a balancing charge on which income tax can be levied. On the other hand, if the price for which the plant or machinery is disposed of is less than its written down price, an allowance is to be made to the taxpayer. [His Lordship read subsections (1) and (3) of section 17, and continued:] The special commissioners seem to have thought that the reference to "com- " pensation moneys " was a reference to a sale, and that was an element, I think, which induced them to come to the conclusion that the transfer under the Transport Act was a sale. But, when reference is made to the definition section, section 68, where " sale, insurance, salvage or compensation moneys " are defined, it is perfectly clear that the words " compensation moneys " are inserted to deal with the case where a foreign concession has come to an end, or where there has been some loss to the plant and compensation by way of damages or otherwise is paid. Therefore, those words do not assist me one way or the other.

As I have said, it is common ground that the sole point I have to consider is whether the transfer to the Transport Commission falls within section 17 (1) (*a*)—that is: has there been a sale?

[1] [1953] 1 W.L.R. 610; [1953] 1 All E.R. 1009.

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I turn next to the Transport Act. [His Lordship read sections 29, 30 (1), (6), 31 (1), and 32 (1).]

Sch. VI makes provision for compensation for the acquisition of privately-owned wagons, and it makes the following provision which is undoubtedly a very sensible provision when many thousands of railway wagons are to be acquired. The compensation depends entirely on this principle: there is a sliding scale governed entirely by the year in which the wagon was built, and in accordance with its specification, that is to say, its weight and its tare. Thus, if the wagon was built in 1946 and is a 10-ton wagon, the amount to be paid by way of compensation was £248. It matters not one iota whether the wagon was in an excellent state of repair or in a very bad state of repair.

It is contended by the company that that acquisition of railway wagons by the Transport Commission cannot properly be described as "a sale" for the purposes of section 17. A sale at common law has been well defined by the late Mr. Benjamin in his treatise on "Sale of Personal Property" (2nd ed., p. 2, prepared, I think, by himself) in these terms: "By the common "law a sale of personal property was usually termed 'a bargain "'and sale of goods.' It may be defined to be a transfer of the "absolute or general property in a thing for a price in money. "Hence it follows that, to constitute a valid sale, there must "be concurrence of the following elements, viz.: (1) parties "competent to contract; (2) mutual assent; (3) a thing, the "absolute or general property in which is transferred from the "seller to the buyer; and (4) a price in money paid or promised. "That it requires parties competent to contract, and mutual "assent, in order to effect a sale, is manifest from the general "principles which govern all contracts."

It has been submitted by the Crown that it is sufficient, in order to constitute a sale, that there should be a transfer of property and payment of a price, and that mutual assent or consensus ad idem is not necessary. It is pointed out that a sale may be wider and have more far-reaching effects than a contract of sale. A sale itself, it is said, need not have mutual assent. It is conceded by the Crown in this case that, by the transfer on January 1, 1948, there could not properly be said to be any mutual assent about the matter at all, and the Crown did not attempt to support a finding by the commissioners that everyone must be presumed to have assented to an Act of Parliament transferring the property. I cannot accept this contention on behalf of the Crown. A sale is really a shorthand way of referring to a bargain and sale, and at common law there cannot be a sale without a bargain. Mutual assent is an essential ingredient. Therefore, at common law, it seems to me quite plain that what happened here cannot possibly be described as "a sale."

However, that does not necessarily end the matter in favour of the company, because it is said by the Crown: "In any event "here is a compulsory purchase, and that connotes a compulsory

"sale, and that is a sale and, therefore, it is within section 17 of "the Income Tax Act, 1945." The company does not concede that a compulsory sale would necessarily be within the Act, but submits that when the Transport Act is properly construed the transaction cannot be even described as a compulsory purchase or a compulsory sale. Now it is a very familiar part of our law to have compulsory purchase powers vested in various authorities for public purposes. I refer to one or two Acts merely by way of illustration. An early one was the Lands Clauses (Consolidation) Act of 1845, where there are elaborate provisions for the ascertainment of price, for the matter to be referred to a jury where it is impossible to agree, for payment in proper cases of the purchase-money into court, for execution of conveyances, and, if necessary, for the execution of a deed poll by the purchasing company where the vendor refuses or is unable to execute a deed. That is a typical compulsory purchase provision.

I was also referred to a later example, the Acquisition of Land (Authorization Procedure) Act, 1946, where again there are elaborate provisions for the vesting of property and for the ascertainment of the price by a panel of arbitrators.

I need only refer to one other example, which is an important one, because it is to be found in the Transport Act itself. It is in section 8. It is in these terms: "The Minister may authorize "the Commission to purchase compulsorily any land which they "require for any purpose connected with the discharge of their "functions, and the Acquisition of Land (Authorization Pro- "cedure) Act, 1946 (except section 2 thereof) shall apply as if "the Commission were a local authority within the meaning of "that Act and as if this Act had been in force immediately "before the commencement of that Act."

In my judgment, the question is really one of construction of the Transport Act—that is, whether the provision to which I have already referred can properly be described as a compulsory purchase and a compulsory sale.

Mr. King, for the Crown, has referred me to two authorities. The first was the *Great Western Ry. Co.* v. *Inland Revenue Commissioners.*[2] That was a stamp duty case. The second case was *Inland Revenue Commissioners* v. *The Newcastle Breweries Ld.*[3] But I do not find in either of those cases any principles laid down as to the proper canons of construction which I should apply in this case, and, therefore, I forbear to mention them in greater detail.

I turn to the construction of the Transport Act. In section 29 there is a vesting. By section 30 compensation, not a price, is to be paid, and that compensation is to be a sum fixed according to the age and type of wagon and has no relation to the actual worth of the wagon. In my

[2] [1894] 1 Q.B. 507; 10 T.L.R. 128.

[3] (1925) 42 T.L.R. 185; (1926) 42 T.L.R. 609; 43 T.L.R. 476; 12 T.C. 927.

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judgment, it is not a proper use of legal language to describe such a transaction as a compulsory purchase. No doubt Parliament could have dealt with the matter by way of compulsory purchase; but, in my opinion, it has not done so. It has dealt with the matter by way of compulsory acquisition and compulsory transfer of the property in the wagons to the Commission and the payment of compensation. That cannot, in my judgment at all events, properly be described as a compulsory purchase and a compulsory sale; it is a compulsory acquisition.

I ought to mention one further point that was taken by the Crown depending on sections 34 and 35 of the Finance Act, 1948. It is suggested that those two sections show that Parliament thought that the provisions of the Transport Act to which I have referred constituted a sale for the purposes of section 17 of the Income Tax Act, 1945. So far as section 34 is concerned, all I will say about it is that, in so far as it is relevant at all, it appears to me to support the case of the company rather than the case of the Crown. With regard to section 35, it is perfectly true that that section does seem to proceed on the basis that a balancing charge under section 17 would arise on a transfer of property to the British Transport Commission; but, in my judgment, that is not really an element which I can properly take into account. The fact that Parliament may have proceeded on an erroneous assumption as to the effect of a taxing Act is no ground for construing that Act in a manner adverse to the taxpayer.

That is well shown by the recent case of *Inland Revenue Commissioners* v. *Dowdall, O'Mahoney & Co. Ld.*[4] Lord Radcliffe said: "What it comes to is this. Parliament has not made any "enactment that requires or authorizes the making of the allow- "ances now claimed. It has not declared the law to be that "such allowances are proper deductions. The most that can be "said is that it is fairly certain that those who framed section 30 "of the Finance Act, 1940, believed that such allowances ought "to be given or were in fact being given (which is not always "quite the same thing in this field). But if that is all that can "be said, it is, with all respect to the Court of Appeal, a misuse "of words to say that the law courts ought to give effect to the "'intention' of Parliament that overseas excess profits tax "should be allowed. The beliefs or assumptions of those who "frame Acts of Parliament cannot make the law. Section 30 "will be just as much effective in those cases when it does "operate as it would be if overseas excess profits tax were not, "in general, an allowable deduction, for wherever it operates it "operates under the authority given by Parliament in that Act "and not otherwise. This is not the first occasion on which a "somewhat similar problem has been presented to your Lord- "ships' House, and in face of the abiding complexity of income "tax legislation I do not suppose that it will be the last. But if

[4] [1952] A.C. 401, 426; [1952] 1 T.L.R. 560; [1952] 1 All E.R. 531.

"the House felt no difficulty in *Ayrshire Employers' Mutual Insurance Association Ld.* v. *Inland Revenue Commissioners* [5] in disregarding the plain, though mistaken, assumption of the legislature as to the prevailing law, I do not think that your Lordships need feel even as much embarrassment in the present case." That seems to me abundantly to cover the argument that was addressed to me on section 35 of the Finance Act, 1948.

In my judgment, for the reasons I have given, there has been no sale in this case for the purposes of section 17 (1) (*a*) of the Income Tax Act, 1945. Accordingly, this appeal must be allowed.

*Appeal allowed.*

Solicitors: *Willis & Willis for Taynton & Son, Gloucester; Solicitor of Inland Revenue.*

J. L. D.

[5] 1946 S.C.(H.L.) 1; 62 T.L.R. 317; [1946] 1 All E.R. 637; 27 T.C. 331.

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Upjohn J.

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[COURT OF APPEAL.]

## * TIMMINS *v.* TIMMINS.

C. A.

1953 *Apr.* 15, 16, 17; *May* 18.

[1951 D. No. 46.]

Denning and Hodson L.JJ. and Lloyd-Jacob J.

*Husband and Wife—Divorce—Restitution of conjugal rights—Cruelty—Domineering conduct falling short of legal cruelty—Defence to decree of restitution.*

A husband, whose wife had left him after suffering a mental breakdown, filed a petition for a decree of restitution of conjugal rights. The wife, by her answer, asked for a divorce on the ground of the husband's alleged cruelty. The trial judge found that though the husband was inclined to be domineering and overbearing, no wrongful conduct amounting to cruelty on his part or such as to have caused the mental breakdown had been established, and he refused to grant the wife a decree of divorce. Having so decided, he held himself bound to grant the husband's petition for restitution, though he expressed anxiety lest the wife, if obliged to return, might again suffer a mental breakdown as a result of the husband's behaviour. On appeal by the wife:—

*Held*, (1) per curiam, that the trial judge's finding that cruelty on the husband's part had not been established must be upheld; (2) quashing the order for restitution (Hodson L.J. dissenting), that the court was not bound to grant a decree of restitution of conjugal rights to a husband if his conduct, though falling short of the matrimonial offence of cruelty, might have afforded good cause for her leaving him, since such conduct might be a defence to a suit for restitution.

Wallington J. affirmed on the petition for divorce and reversed on the suit for restitution of conjugal rights.

*Per* Hodson L.J. The court should grant a decree of restitution to a husband whose conduct, falling short of legal cruelty, has

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not been proved to be of so grave and weighty a character as to justify the wife's living apart from him.

Observations of Denning L.J. in *Pike* v. *Pike* (November 20, 1952) [1953] 1 All E.R. 232 explained.

APPEAL from Wallington J.

The parties, Albert Edward Timmins and his wife, Dora Timmins, were married in February, 1938. There were three children of the marriage. On March 13, 1951, the wife had a mental breakdown, for which she was treated in the mental ward of a hospital for 14 days, when she displayed symptoms which, in the opinion of the doctor, were of the nature of delusions of persecution at the hands of her husband, including allegations of attempts to murder her. On March 30 she returned home; but on April 13 she left, taking one of the children with her. Her husband found her and the child three weeks later, and took the child, in tears, away from her. Two weeks later he brought his wife home, but she stayed one night only and then again left. Meanwhile, on May 10, 1951, the husband had filed a petition for restitution of conjugal rights, alleging that the wife had without cause withdrawn from cohabitation and refused to return to him. By her answer the wife, while admitting that she had ceased to live with him, alleged that she had good cause for so doing, and gave particulars of a number of alleged acts of physical cruelty beginning in December, 1948. She claimed that her health had been seriously affected because of her husband's treatment, and she asked for a decree of dissolution of the marriage on the ground of his cruelty. In his reply the husband denied that he had been guilty of cruelty.

Long after the proceedings had begun the wife returned to the home and said that she had come back for three days. The husband told her that she must come back for good or not at all. She went away again and did not return.

During the trial the wife made many charges of violence against the husband, but these were uncorroborated, and the judge found only one specific incident proved, which was admitted by the husband, namely, that in December, 1948, more than two years before the final parting, he had hit his wife on the shoulders and in the mouth. Wallington J. found that that behaviour was "wholly without excuse."

In his judgment on October 17, 1952, Wallington J. said that the onus of proving just cause was on the wife, since she had admitted that she had stayed away from the matrimonial home. He found that she had not established that her husband's conduct amounted to cruelty, though he said that he had formed the view that the husband was inclined to be overbearing, domineering, insistent on maintaining his rights as a husband to have the household conducted in accordance with his ideas, and that he had a hasty temper and habitually expressed himself in rather rapid unmeasured terms, which might have had an effect on the wife's mind from time to time; but that he was not a man to

indulge in physical violence except under very strong provocation. The judge found no evidence that the wife's breakdown was due to any wrongful conduct on the part of the husband, and that she had not made out her just cause for leaving him; but he expressed anxiety whether, if he made an order for the restitution of conjugal rights and the wife went back to her husband in obedience to it, she might not receive from him treatment which might cause another mental breakdown.

The judge concluded, however, that the law was clear that if a petitioner in a suit for restitution of conjugal rights proved the facts alleged in his petition, and no legal ground was found for refusing an order for restitution, that order must be made. He rejected the wife's prayer for dissolution of the marriage and granted the husband a decree of restitution of conjugal rights, but he allowed the wife two months from the service of the order in which to comply.

The wife appealed against the decree of restitution and also against the rejection of her prayer for divorce on the ground of cruelty.

*Ifor Lloyd Q.C.* and *D. A. Fairweather* for the wife.
*J. E. S. Simon Q.C.* and *A. A. Shenfield* for the husband.

The following cases were cited in the argument: *Butland* v. *Butland* [1]; *Russell* v. *Russell* [2]; *Oldroyd* v. *Oldroyd* [3]; *Yeatman* v. *Yeatman* [4]; *Beer* v. *Beer* [5]; *Fletcher* v. *Fletcher* [6]; *Pike* v. *Pike* [7]; *Fisk* v. *Fisk* [8]; *Russell (Marchioness of Tavistock)* v. *Russell (Marquis of Tavistock)* [9]; *Buchler* v. *Buchler* [10]; *Haswell* v. *Haswell* [11]; *Leng* v. *Leng* [12]; *Dunn* v. *Dunn* [13]; *Williams* v. *Williams* [14]; *Edwards* v. *Edwards* [15]; and *Dixon* v. *Dixon.* [16]

*Cur. adv. vult.*

May 18. DENNING L.J. stated the facts and the judge's findings and continued: The judge's findings of fact were amply justified by the evidence. Not only were there the inexcusable blows in December, 1948, but there was also the way the husband treated the wife after her illness. On one occasion he took the child away from her in tears. On another, he told her that she must come back for good or not at all. That is hardly the way to treat a

[1] (1913) 29 T.L.R. 729.
[2] [1895] P. 315; 11 T.L.R. 579.
[3] [1896] P. 175; 12 T.L.R. 442.
[4] (1868) L.R. 1 P. & D. 489.
[5] (1906) 22 T.L.R. 338.
[6] (1915) 31 T.L.R. 306.
[7] November 20, 1952: [1953] 1 All E.R. 232.
[8] (1920) 36 T.L.R. 248.
[9] (1935) 80 S.J. 16.
[10] [1947] P. 25; 63 T.L.R. 100; [1947] 1 All E.R. 319.
[11] (1859) 1 Sw. & Tr. 502.
[12] (1946) 62 T.L.R. 722; [1946] 2 All E.R. 590.
[13] [1949] P. 98; 64 T.L.R. 570; [1948] 2 All E.R. 822.
[14] [1943] 2 All E.R. 746.
[15] [1950] P. 8; 65 T.L.R. 419; [1949] 2 All E.R. 145.
[16] [1953] 2 W.L.R. 748; [1953] 1 All E.R. 910.

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wife who has borne him three children and has only recently come out of hospital after a mental breakdown. Once it is accepted that the husband had the character and temperament described by the judge, one has an explanation of the breakdown, which is otherwise unexplained. On the evidence given and the facts as found, I am a little surprised that the judge acquitted the husband of cruelty. It seems clear that the husband's conduct caused injury to the wife's health, or, at any rate, reasonable apprehension of it, and it can hardly be denied that it was grave and weighty, seeing that it was such as to be likely to cause a mental breakdown. But the judge has expressly found that her breakdown was not due to any "wrongful conduct" on the part of the husband. Having regard to his other findings, this must mean, I think, that the domineering conduct of the husband was not done with any intent to injure or to inflict misery on the wife. It was simply a defect of temperament manifesting itself in a most unpleasant way.

It is well settled that an intent to injure, if not an essential element, is at any rate a most important element in cruelty. In the absence of an intent to injure, a judge may well be justified in refusing to find cruelty: see *per* Lord du Parcq in *Thomas* v. *Thomas*,[1] and *per* Lord Reid in *Jamieson* v. *Jamieson*[2] and in *King* v. *King*[3]; and see also the decisions of this court in *Cox* v. *Cox*[4] and *Fowler* v. *Fowler*,[5] *per* Hodson L.J. In these circumstances, the judge having acquitted this husband of cruelty, I do not think that we can interfere with his decision on that part of the case.

The other part—the decree of restitution—is a different matter, for the judge seems to have thought that, as matter of law, once the husband was acquitted of cruelty, he was entitled to a decree of restitution. I do not think that that is right. Take this very case. On the facts as found by the judge, I ask myself: is this court bound to order the wife to return to the husband? What would be the result of such an order? Either she will return in obedience to the order, in which case she may have another mental breakdown—the judge was very anxious about that; or (what is more likely) she will refuse to return, in which case she will forfeit any right to maintenance and will, at the end of three years, be liable to be divorced for desertion without cause. I decline to put this poor woman to such a cruel alternative. She has borne her husband three children, and has suffered a mental breakdown, through no fault of her own—that is certain—but possibly, as the judge thought, through her husband's conduct. The judge observed that he did not want to make an order against

[1] [1947] A.C. 484, 493; 176 L.T. 498, 507; 63 T.L.R. 314; [1947] 1 All E.R. 582.
[2] [1952] A.C. 525, 548–9; [1952] 1 T.L.R. 833; [1952] 1 All E.R. 875.
[3] [1953] A.C. 124, 139–40; [1952] 2 T.L.R. 429; [1952] 2 All E.R. 584.
[4] [1952] 2 T.L.R. 141.
[5] [1952] 2 T.L.R. 143.

her to return. He said that he much regretted it, but thought that he had no option. I think that he had an option. He ought, on his findings, to have refused an order for restitution.

The authorities are numerous, but there is a passage in the judgment of Lord Herschell L.C. in *Mackenzie* v. *Mackenzie* [6] which is particularly apt: "Take the case of a husband who has "heaped insults upon his wife, but has just stopped short of that "which the law regards as saevitia or cruelty; can he when his "own misconduct has led his wife to separate herself from him, "come into court, and avowing his misdeeds, insist that it is "bound to grant him a decree of adherence?" That was a Scottish case, but the words of Lord Herschell were accepted as good law in England by Gorell Barnes J. in *Oldroyd* v. *Oldroyd*,[7] a case which has always been regarded as laying down the law on this point. Since that time it has been repeatedly held, by some of the most eminent judges exercising this jurisdiction, that conduct which for one reason or another falls short of cruelty may nevertheless afford good cause for leaving, and be a defence to a suit for restitution. Instances are false accusations (*Russell* v. *Russell* [8])—the decision of this court; drunkenness (*Beer* v. *Beer*,[9] *per* Gorell Barnes J.); drunkenness and violence short of cruelty (*Butland* v. *Butland*,[10] *per* Bargrave Deane J.); extravagance (*G.* v. *G.*,[11] *per* Hill J.); wife's persistent friendship with another man (*Russell* (*Marchioness of Tavistock*) v. *Russell* (*Marquis of Tavistock*),[12] *per* Bucknill J.); husband's association with other women (*Glenister* v. *Glenister* [13] and *Chilton* v. *Chilton*,[14] *per* Lord Merriman P.).

In my opinion, domineering conduct comes within this principle, at any rate when it is such as to be likely to cause a mental breakdown. It may not be cruelty—it may fall short of that because of the absence of any intent to injure—but, nevertheless, it prevents the husband from getting a decree of restitution unless and until he satisfies the court that, if the wife returns, he will behave with conjugal kindness. He must get over his bad temper and cease to be overbearing. The refusal of the decree does not amount to a decree of judicial separation. It only means that at present the husband cannot insist on the return of the wife. But as soon as the court is satisfied that he will behave properly he will be entitled to it.

We were referred to *Pike* v. *Pike*,[15] and, in view of some comments made on it by Davies J. in *Dixon* v. *Dixon*,[16] I think that I ought to explain some of the things which I there said. In considering whether one party has good cause for leaving the other, much depends on whether the conduct complained of is of

[6] [1895] A.C. 384, 390.
[7] [1896] P. 175, 179–80.
[8] [1895] P. 315.
[9] (1906) 22 T.L.R. 388.
[10] (1913) 29 T.L.R. 729.
[11] [1930] P. 72; 46 T.L.R. 69.
[12] (1935) 80 S.J. 16.
[13] [1945] P. 30; [1945] 1 All E.R. 513.
[14] [1952] P. 196; [1952] 1 T.L.R. 1316; [1952] 1 All E.R. 1322.
[15] November 20, 1952: [1953] 1 All E.R. 232.
[16] [1953] 2 W.L.R. 748.

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a " grave and weighty " character or not. Conduct which is of a grave and weighty character may sometimes fall short of cruelty because it lacks the element of injury to health (as in *Russell* v. *Russell* [17] and *Edwards* v. *Edwards* [18]), or because it lacks the element of intent to injure (as in the case of drunkenness or association with other women); but nevertheless it may give good cause for leaving, as the cases which I have cited earlier amply show. On the other hand, conduct which is not " of a grave and " weighty character," and is for that reason not cruelty, does not give good cause for leaving: see *Yeatman* v. *Yeatman*.[19] It is conduct of that kind to which I referred in *Pike* v. *Pike* [20] when I said that conduct " less than cruelty " does not justify a spouse in leaving. In the present case the conduct of the husband was, I think, of a grave and weighty character, and the only reason why it was not cruelty was because there was no intent to injure. It comes, therefore, within the earlier cases to which I referred.

I would allow this appeal so far as to refuse the husband a decree of restitution, but I would not disturb the judge's finding that cruelty was not established.

HODSON L.J. stated the facts and continued: Having regard to the wife's recent breakdown, the attitude of the husband made, not unnaturally, a bad impression on the mind of the judge, but did not cause him to reach a conclusion that cruelty had been established. In this I agree with him. Having reached his conclusion on this part of the case, the judge came to the conclusion that there was nothing to justify his refusing a decree of restitution of conjugal rights. In this, again, I agree with him. It has been argued before us that the judge failed in some way to appreciate that conduct not amounting to cruelty was capable in law of amounting to just cause for a wife refusing to live with her husband. In my judgment this question does not arise. The judge negatived, with one exception, any wrongful acts on the part of the husband. His criticism of the husband's character and his expressed apprehensions as to the future cannot be translated into findings of overt acts adverse to the husband, findings which he has expressly refrained from making in other parts of his judgment. Cruelty does not, so to speak, shade off into just cause.

Since some observations of mine in earlier cases have, I am afraid, given rise to difficulty, I would refer, not to my own judgments, but to a judgment of Bucknill L.J. in *Edwards* v. *Edwards*,[21] cited by Davies J. in *Dixon* v. *Dixon* [22]: " ' If " ' Hodson J. meant to say that, once a charge of cruelty has " ' failed to be established, it is impossible for a wife to establish " ' grounds justifying her refusing to live with her husband,

[17] [1895] P. 315, 334.
[18] [1950] P. 8.
[19] L.R. 1 P. & D. 489.
[20] [1953] 1 All E.R. 232.
[21] [1950] P. 8.
[22] [1953] 2 W.L.R. 748, 758; [1953] 1 All E.R. 910, 918.

" ' with great respect to him, I think that inconsistent with . . .
" ' *Russell* v. *Russell*[23] and *Buchler* v. *Buchler*.[24] I think,
" ' however, that that is not what Hodson J. meant to say.
" ' What I think he meant to say was that either the blows
" ' inflicted by the husband on the wife amounted to cruelty
" ' in that they injured her health or were likely to injure her
" ' health, or they were not of such a nature. If they were
" ' not of such a nature then, there being no other evidence in
" ' the case at all, the court ought not to say that although
" ' they were trivial blows in effect, they justified the wife in
" ' leaving her husband.' "

The just cause which, on the authorities, must be proved, must be " grave and weighty ": *Yeatman* v. *Yeatman*,[25] *per* Lord Penzance L.J.; " grave and convincing," *Buchler* v. *Buchler*,[26] *per* Lord Greene M.R. It may, as Lord Penzance said, be distinct from a matrimonial offence. For example, such conduct may be distinct from cruelty in that it lacks the element of causing injury to health or reasonable apprehension of the same. To that extent such conduct falls short of, or is less than, cruelty, to use the language which is to be found in many of the authorities, but it must none the less be grave and weighty, and these attributes are not, I think, to be found as a rule in the kind of case to which Bucknill L.J. was referring in the passage which I have read from *Edwards* v. *Edwards*.[27]

I cannot read into the judgment of the judge, critical as he was of the husband's character and anxious lest the impact of his personality on the wife might lead to another breakdown of the wife's health, any justification for a finding of fact that the wife had established such misconduct on her husband's part as amounted to a grave and weighty matter justifying her in living apart from him. Moreover, medical evidence was called, but no witness said that it would be dangerous for the wife to return to her husband. She was discharged from hospital in the care of her husband, when he appeared to the medical authorities to be concerned for her welfare.

I would dismiss the appeal.

LLOYD-JACOB J. I would respectfully adopt Denning L.J.'s statement of the facts. The trial judge, having had the advantage of seeing and hearing the wife, came to the conclusion that he could not accept her testimony save where it was supported by corroboration. Having so found, he came to the conclusion that that disposed of the case. I agree that, so far as concerned the wife's cross-petition for divorce on the ground

[23] [1895] P. 315.
[24] [1947] P. 25.
[25] L.R. 1 P. & D. 489, 494.
[26] [1947] P. 25, 30.
[27] [1950] P. 8.

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of cruelty, that finding did dispose of the matter for the only admitted act of violence had been condoned by a period of cohabitation exceeding two years.

There remained, however, the wife's answer to the petition for restitution of conjugal rights. On this branch of the case, the judge came to the conclusion that the husband was a person inclined to be overbearing, domineering, insistent on maintaining his rights as a husband to have the household conducted in accordance with his desires, and that he had a hasty temper and habitually expressed himself in rather rapid unmeasured terms, which might have had an effect on the mind of the wife from time to time and tended to disturb the quietude of the matrimonial home. He further found that the petitioner was not a man to indulge in any physical violence except under very strong provocation. These criticisms of the husband as a measure of his frailty of temper are not in themselves any evidence of a matrimonial offence, and the court is concerned with them only to the extent to which they are manifested in such intolerable excesses as to create grave and weighty reasons for causing the wife to deny herself the comfort and protection of her husband and family and the matrimonial home.

The judge had felt constrained to hold that the wife's breakdown in mental health had not been proved to have been due to any wrongful conduct on the part of the husband. Having regard to the absence of any evidence pointing to any other cause, this finding must be interpreted as meaning, not that the husband's conduct had no effect on the wife's mental health, but that such conduct was not shown to be wrongful. Indeed, that the former meaning was plainly intended was indicated by the judge's confession of anxiety should the wife obey the order and return to her husband, in which event, he said, an effect could be produced on the wife's mind which might cause another breakdown.

In my judgment, the husband is not entitled to an order for the restitution of conjugal rights unless and until he can satisfy the court that the wife will not be hazarding her mental health should she obey the order of the court. The preservation of her sanity is, in my judgment, a grave and weighty matter, and for the husband to behave in an overbearing, domineering and dictatorial manner when he has once appreciated the consequences of such behaviour to her state of mind would no longer be an exercise of his frailty, but a wickedly cruel matrimonial offence. The husband's conduct in relation to the removal of his second child from the mother's custody, and his rejection of his wife's offer to return to the matrimonial home for a few days, illustrate such a lack of consideration as to satisfy me that a return under an order of the court might be fraught with the gravest peril. I could not be a party to such a consequence. I

would allow the appeal so far as concerns the husband's decree of restitution.

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*Appeal allowed against decree for restitution of conjugal rights. Appeal against refusal of decree for dissolution of marriage dismissed.*

Solicitors: *Langhams & Letts, for Philip Baker & Co., Birmingham; Bentleys, Stokes & Lowless, for Turner, Bayley & Co., Dudley.*

M. M. H.

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[CHANCERY DIVISION.]

## * *In re* MALTBY MARRIAGE SETTLEMENT. AYLEN *v.* GAUD.

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*May* 12.
Harman J.

[1953 M. 649.]

*Marriage Settlement—Covenant to settle wife's after-acquired property—Wife's reversion falling into possession after coverture—"Property "... to which the wife may afterwards during the marriage "become entitled in possession or reversion"—Operation of covenant.*

By a marriage settlement dated April 14, 1937, the wife covenanted that there should be duly vested in the trustees all real and personal property exceeding in value from the same source £200 to which she might afterwards become entitled in possession or reversion.

By the will of her grandfather, who died in 1927, his trustees were directed to hold £10,000 on trust, after certain life interests, which came to an end on January 21, 1951, for all his grandchildren (including the wife) in equal shares absolutely.

By the marriage settlement of the wife's parents, dated February 7, 1907, certain funds were settled on trust after the death of the survivor for such of the issue of the marriage as the parents should jointly appoint, or, in default of such appointment, as the survivor should appoint. By his will dated March 18, 1949, the wife's father appointed the funds on trust for three of his children (including her) in equal shares absolutely. This interest also fell into possession on January 21, 1951:—

*Held*, (a) that her interest in the £10,000 legacy, having been a vested interest before coverture, was not caught by the after-acquired property clause; and (b) that her interest under the marriage settlement of 1907 was an interest which had been created in her since her marriage and was, therefore, caught by that clause.

*In re Bland's Settlement* [1905] 1 Ch. 4; *In re Crook's Settlement* [1923] 2 Ch. 339, considered.

ADJOURNED SUMMONS.

By a marriage settlement dated April 14, 1937, made in contemplation of the marriage between Alice Brough Maltby

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(hereinafter called "the wife") and Ian Brough Aylen it was provided that the trustees should hold the funds thereby settled on trust to pay the income to the wife for life and after her death to the husband during his life and after the death of the survivor on trust for the children or remoter issue of the marriage as she should by will or codicil or by deed appoint and in default of appointment in trust for all the children of the marriage in manner therein mentioned.

By clause 4 of the settlement the wife covenanted with the trustees "that there shall be duly vested in the trustees . . . "all real and personal property exceeding in value from the same "source two hundred pounds to which the wife may afterwards "during the marriage become entitled in possession or reversion "or have any power of beneficial disposition over except by will "save and except [certain exceptions not material to be here "mentioned]," and it was further directed that "any property "vested in the trustees pursuant to this covenant shall be held "as part and upon the trusts of the trust fund hereby settled or "such of them as are subsisting and capable of taking effect."

By his will dated January 28, 1925, the wife's grandfather, who died on November 7, 1927, devised and bequeathed the residue of his estate to his trustees on trust (inter alia) to hold the sum of £10,000 on trust to pay the income thereof to his son (the wife's father) and after his death to his daughter-in-law (the wife's mother), and after their deaths "my trustees shall stand "possessed of my trust fund of £10,000 and the income thereof "in trust for all [his grandchildren who had already been named "in the will and who included the wife] who being sons attain "the age of twenty-five years or being daughters attain that age "or marry under that age and if more than one in equal shares "absolutely." The wife's mother died on May 24, 1935, and the wife's father died on January 21, 1951. In the events which happened the wife became entitled, under that trust, to approximately £4,347.

By the marriage settlement of the wife's parents, dated February 7, 1907, certain funds were settled on trust after the death of the survivor of them for all or any such one or more of the issue of the marriage as they should by deed jointly appoint and in default of and subject to any such appointment as the survivor should by deed or will or codicil appoint and in default of and subject to any such appointment on the trusts therein mentioned. The joint power of appointment was never exercised, and, by his will dated March 18, 1949, the wife's father appointed that the trustees of the settlement should from and after his death stand possessed of the funds on trust for his son John Maltby, his daughter Mary Isabel Manelski and his daughter Alice Brough Aylen in equal shares absolutely.

The wife and the husband took out a summons to ascertain whether (a) her share in the trust legacy of £10,000 bequeathed by the will of her grandfather, and (b) her share in the funds

settled by the settlement of February 7, 1907, or either of them, ought, by reason of clause 4 of the settlement of 1937, to be assigned to the trustees of the settlement of 1937, or whether the wife was entitled to retain them for her own benefit absolutely.

*T. K. Wigan* for the plaintiffs.

*J. V. Nesbitt* for the defendants, the trustees of the settlement of 1937.

*W. J. C. Tonge* for infant defendants.

The cases cited in argument are referred to in the judgment.

HARMAN J. The plaintiffs in this suit are husband and wife, and, on the occasion of their marriage in 1937, a settlement was made whereby the wife settled certain securities, then her own absolute property. The settlement also contained words which are common form, I think, although only one of the common forms used in that frequently dangerous clause known as an after-acquired property clause. The wife covenanted with the trustees "that there shall be duly vested in the trustees all real "and personal property exceeding in value from the same source "£200 to which the wife may afterwards during the marriage "become entitled in possession or reversion or have any power "of beneficial disposition over except by will." There follow some immaterial exceptions.

Now this may be read in two ways, either as catching only interests (whether in possession or reversion) in property which come to the wife during the marriage, or as including also interests which vest in the wife in possession during the marriage, even though a reversionary interest was vested in her before it. In the absence of authority I should incline to the narrower view. If before the marriage the wife already had a vested reversionary interest in some property which is intended to be brought into settlement it is natural to settle it there and then, as can easily be done. It may, however, well be desired to settle benefactions to or other acquisitions by the wife occurring during the marriage but unknown or uncertain by reason of their contingent nature at the date of the settlement, and a covenant is the convenient way of effecting this.

The facts here are that, at the time when this settlement was made, the wife was entitled, under her grandfather's will—he having died in 1937—to a vested interest in a trust legacy of £10,000, liable to be divested, it is true, if she did not survive her father, who was then living. She had to survive both her parents. Her mother was dead and her father still alive. I should have thought, unaided by authority, that that was not property to which she "may afterwards become entitled," but was property to which she was already entitled and which could have been, therefore, settled easily at the time; but it is said that I am constrained by authority to hold that it is the vesting in

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possession to which I have to look, and that the fact that her reversion was not caught did not prevent the property being caught when it fell into her possession, as happened on the death of the surviving parent, her father.

The matter, one need hardly say, is not without authority, and I have been referred to three cases which cover, I think, the ground. Kekewich J. had this matter before him in *In re Bland's Settlement*,[1] where the words were "should become entitled," but those words, I think, are of the same force as "should become "entitled in possession or reversion," because Shadwell V.-C. in *Blythe* v. *Granville*[2] said that the words "become entitled" mean "become entitled either in possession or in reversion." Kekewich J. there cites a decision of that very learned Vice-Chancellor, Wickens V.-C., in *In re Clinton's Trusts*.[3] The citation is this: "The expression 'become entitled to' in these and most "covenants of the sort applies, I conceive, only to an acquisition "of interest by the wife, and this may mean an acquisition of "property in which the wife had no interest at the time of "marriage, and which vests in her absolutely during the cover-"ture—or an acquisition of property which she was entitled to "in remainder at the time of marriage, and which vests in "possession during the coverture—or an acquisition of property "in which she had no interest at the time of the marriage, which "vests in her by way of future title during the coverture, but "does not vest in possession till it is determined." It goes on: "There can be no doubt that the first of these three classes is "within the covenant," that is to say, the case of property, of which she had no interest at the time of the marriage, which falls in during her marriage; "the difficulty," he goes on, "arises "with regard to the other two classes. Both of them cannot be "included in such a covenant, and the question is, which of them "is, prima facie, to be considered as so included."

That, I think, is a point on which, like Kekewich J., I must follow the Vice-Chancellor. One cannot have it both ways. Either the property must be property in which there was no interest of a vested kind at all at the time of the marriage and which falls in during the marriage, or it must be property which though vested in interest before only falls into possession during the marriage. As I say, I feel no doubt about which way I should for myself decide it. Kekewich J. in the case cited came to the conclusion that the property there in question, which was property in which the wife had a vested interest in reversion when she married, was not property which was caught by the settlement.

To a similar effect, as I understand it, is Eve J.'s judgment in *In re Williams' Settlement*.[4] The lady in question had only a contingent interest when she married, her fund falling in on the death of her brother under 21, and, that being so, when it vested

[1] [1905] 1 Ch. 4.
[2] (1842) 13 Sim. 190.
[3] (1871) 13 Eq. 295, 305.
[4] [1911] 1 Ch. 441.

in her, as it did on his death, that was a share which was caught by the covenant; but it seems, although it is not very clear, that if that had been a vested interest before marriage, merely liable to be divested by the brother surviving over a certain date, the result would have been different.

The other view was taken by Lawrence J. in *In re Crook's Settlement.*[5] There he held—I read from the headnote: "Notwithstanding that at the date of her marriage she was entitled to the property in reversion, yet, as she became entitled thereto in possession during the coverture, the property was, within the meaning of the covenant, property to which during the coverture the wife might become entitled in possession, and was therefore caught by the settlement." There, of course, the judge took the wider view, and of course he was perfectly entitled to do so; because, as I say, one can, by looking only at the words "entitled in possession," say that the vested interest when it falls into possession is exactly within the terms of the covenant; but if one looks at the words the other way, one finds "entitled to the property" not to apply except to interests coming into existence after the date of the coverture, whether it be a title in possession or in reversion; on that view previously vested interests in reversion are not caught.

Lawrence J., after hearing all the arguments, said that the cases were not easy to reconcile, and he felt himself free to follow his own view. If he was, so, I think, am I, and the view I follow is that that interest, having been a vested interest before coverture, was not caught by the after-acquired property clause.

This question is in two portions. The wife, at the time of her marriage, had another interest. That was an interest in a fund in default of appointment; but, in the event, she has never inherited under that interest. She has inherited a share in the fund by virtue of an appointment made after the marriage under the same settlement. That is an interest, it seems to me, which has been created in her since the marriage, and therefore it is plainly caught by the after-acquired property clause.

I therefore consider that the answers to the two parts of para. 1 of the summons are different; whereas the share in the trust legacy of £10,000 was not caught, the share under an appointment made under the settlement of 1907 was caught, and I propose so to hold.

*Declaration accordingly.*

Solicitors: *Bischoff & Co.; Park Nelson & Co., for Seldon, Ward & Nuttall, Bideford.*

J. L. D.

[5] [1923] 2 Ch. 339.

[COURT OF APPEAL.]

C. A.

1953
*May 20.*

Lord Goddard C.J., Birkett and Hodson L.JJ.

## *TUNSTALL *v.* TUNSTALL.

*Husband and Wife—House purchased for home—House and furniture bought in husband's name—Contribution to cost by wife—House and contents sold by husband—Money spent—Claim by wife to share of proceeds—Proceedings under Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *s.* 17, *not maintainable.*

By section 17 of the Married Women's Property Act, 1882, if any question arises between husband and wife as to the title to or possession of property, either party may make an application in a summary way to a judge of the High Court, who may make such order with respect to the property as he thinks fit.

A husband and wife, while living together, bought a house and furniture in the name of the husband, the wife contributing a certain amount to the cost. The parties later separated, and thereafter the house and its contents were sold by the husband, the house at a greatly increased price. The husband lived on the proceeds of the sale and paid for his wife's maintenance out of them, with the result that the sum in his hands was almost exhausted when the wife took out a summons under section 17 of the Married Women's Property Act, 1882, claiming that she was entitled to a share in the proceeds of the sale of the house and contents by reason of the amount contributed by her to their purchase. The master and, on appeal, the judge, directed that the sum received for the house and contents should be equally divided. The husband appealed:—

*Held*, that the proceedings under section 17 were misconceived, since that section was meant to deal in a summary way with questions relating to the title to or possession of property. In the present case there was no question as to the husband's title to, or right to possession of, the house, or as to his right to sell it, and there was no specific fund in existence on which any order of the court could operate. The order was, therefore, one which should never have been made, and must be discharged.

*Rimmer* v. *Rimmer* [1953] 1 Q.B. 63; [1952] 2 T.L.R. 767; [1952] 2 All E.R. 863 distinguished.

Appeal from Gorman J. sitting in chambers.

The appellant and the respondent, who were respectively husband and wife, were married in 1918 and separated some years ago. In 1927, while they were living together, they bought a house in the husband's name for £720, and also certain furniture and a small motor-car. In 1950, after the parties had separated, the house, furniture and car were sold by the husband, the house realizing £2,360, and the proceeds of the sale were retained by him. In 1952, in purported pursuance of section 17 of the Married Women's Property Act, 1882,[1] the wife took out a

[1] Married Women's Property Act, 1882, s. 17: "In any question between husband and wife as to the title to or possession of property, either party . . . may apply by summons or otherwise in a summary way to any judge of the High Court . . . and the judge . . . may make such order with respect to the property in dispute . . . as he thinks fit, . . ."

summons claiming that she was interested in the house, furniture and car to the extent of £355 which she had contributed to their cost.

Master Clayton made an order in the following terms: "It is "ordered that the respondent" (the husband) "and the applicant "do share equally in the proceeds of sale of the freehold dwelling-"house known as No. 2, Stanley Avenue, New Malden, in the "county of Surrey together with the contents thereof which "have been sold and in the proceeds of the sale of one Morgan "three-wheel motor-car. And it is further ordered that the "applicant's" (the wife's) "solicitor and client costs be taxed "by the taxing master in accordance with the rules set out in "Schedule III to the Legal Aid and Advice Act, 1949, and be "paid out of the total proceeds of sale of the afore-mentioned "property before such proceeds are equally divided as aforesaid."

On appeal by the husband, the master's order was affirmed by Gorman J., from whose decision the husband now appealed on the ground that, on the facts, the respondent was not entitled to a half-share in the proceeds of the sale.

During the appeal it was ascertained that the husband had been living on the proceeds of the sale, of which about £470 now remained; that he had paid his wife's maintenance out of them; and that he was now an old age pensioner.

*J. R. Ogilvie Jones* for the husband.
*W. Ewart James* for the wife.

The following case was cited in argument: *Rimmer* v. *Rimmer*.[2]

LORD GODDARD C.J. This is an appeal by a husband against an order, or what is alleged to be an order, made under section 17 of the Married Women's Property Act, 1882. [His Lordship stated the facts and continued:] It seems to this court that the proceedings were entirely misconceived, because section 17 of the Married Women's Property Act, 1882, is meant to deal in a summary way with questions as to the title to or possession of property. There was no question here as to the title to this house, or as to the possession of it. The house was undoubtedly in the husband's name and he was entitled to sell it. If, when he was about to sell the house, the wife had taken some proceedings and said that, with regard to the particular fund representing the proceeds of sale, "I want a share," it is possible that the proceedings taken might have been appropriate. But the husband, having had the money for two years, has been living on it. He is now an old age pensioner; he has, under an order made by justices, to contribute to his wife's upkeep, and apparently he has

[2] [1953] 1 Q.B. 63; [1952] 2 T.L.R. 767; [1952] 2 All E.R. 863.

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been using this money to do so. We are told that he has between £400 and £500 left.

To show how inappropriate was the order which has been made by the judge below one need only ask, how could it be enforced? If there were a sum of money which was in a bank, an order might have been made upon the bank in appropriate proceedings to prevent the money being paid out; or if the money had been in the hands of a solicitor he might have been called upon by the court to hold it. That would be one thing. But there is no means under section 17 of giving a money judgment; no judgment has to be given. On proceedings taken by originating summons, the court, I suppose, could make a declaration, but when a question as to the title to or possession of property arises the judge may make under section 17 such order with respect to the property in dispute, and as to the costs of and consequent on the application, as he thinks fit, or may direct such application to stand over from time to time, and any inquiry touching the matters in question to be made in such manner as he shall think fit.

If the application is in regard to chattels, or to stocks and shares (because they are specially mentioned in the section), the judge could, no doubt, make an order and say: "That piece of "property is to be handed over by the husband," or "these "shares standing at present in the husband's name in part or in "whole are to be transferred to the wife." That he could do. And no doubt if the husband refused to obey that order he could be attached. But I can see nothing in this section which gives the court power to give what is equivalent to a judgment for a sum of money. What the wife is saying here is: "It is fair "that I should have a share in the proceeds of sale of the house." The proceeds of sale have nearly gone. As the husband had, at any rate, the legal estate in the money in his hands, even if he had spent more than he did, he would not have been committing any crime. If he had spent it all there would be nothing on which the order of the court could operate. Nor is there anything in the present case on which an order of the court can operate so far as I can see. It is an order which cannot be implemented in any way. There is no provision in section 17 for an order under it being made a rule of court under which execution could issue. I should think it would be most unlikely that the court would enforce an order for the payment of money by way of attachment except in cases where a man was a trustee. The Court of Chancery on a four-day order could attach a man if he did not bring money into court when ordered to do so, but ordinarily a man is not sent to prison for failing to pay money except, indeed, under what I may call judgment summons procedure.

The wife's real remedy in this case might have been to have brought some action under section 12 of the Act, though I am far from desiring to encourage her to do so, because if she brought an action the court would have to proceed on strictly legal principles.

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This court feels that this order is entirely inappropriate and that these proceedings have been misconceived. On the other hand, the husband never took that point before the master or before the judge, nor did he raise it here; it was first taken by Hodson L.J. during the hearing before us.

We desire to say that in *Rimmer* v. *Rimmer* [1] the court was expressly concerned with a fund which was in existence. No question like that before us was raised there: there was a fund, and the court, in deciding how the parties were to share in it, divided it equally. I suppose that, because the court in *Rimmer* v. *Rimmer* [1] divided the fund equally, the judge and the master thought that in this case it was also right to divide it equally. What we are saying in this case is that, there being no fund, there is nothing upon which this order could operate and therefore it must be discharged. We shall not give the husband costs because he never took the point, which should have been taken before.

The appeal will be allowed and the order discharged because, in our opinion, it is one which ought never to have been made. The wife's costs will be taxed as between solicitor and client and paid out of the legal aid fund.

BIRKETT L.J. I agree.

HODSON L.J. I agree.

*Appeal allowed.*

Solicitors: *Gregsons; Hays, Roughton & Dunn, for T. W. Tilbrook, Kingston-on-Thames.*

P. B. D.

[1] [1953] 1 Q.B. 63; [1952] 2 T.L.R. 767; [1952] 2 All E.R. 863.

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[COURT OF APPEAL.]

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*May* 15.
Singleton, Jenkins and Morris L.JJ.

## * ADSETT *v.* K. AND L. STEELFOUNDERS AND ENGINEERS LD.

[1951 A. No. 1390.]

*Factory—Steel foundry—Injurious dust—Elimination—Combination of grid and extractor plant—Provision of masks—Pneumoconiosis contracted by workman—Whether "practicable measures" taken for protection of employees—Grinding of Metals (Miscellaneous Industries) Regulations*, 1925 (*S.R. & O.* 1925, *No.* 904), *reg.* 13—*Factories Act*, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 67), *s.* 47 (1).

By section 47 (1) of the Factories Act, 1937: "In every factory "in which . . . there is given off any dust . . . injurious . . . to "the persons employed . . . all practicable measures shall be taken

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"to protect the persons employed against inhalation of the dust "... and in particular, where the nature of the process makes it "practicable, exhaust appliances shall be provided. ..."

Between 1940 and 1944, when he was employed in the defendants' steel foundry, the plaintiff contracted pneumoconiosis as a result of inhaling dust in the foundry, and he claimed damages from the defendants on the ground of a breach of the statute. The defendants had in 1942 installed in their factory a combination of an extractor plant beneath a grating for the elimination of dust, which system was new to the steel industry and had admittedly resulted in improvement in the atmosphere of the foundry. The plaintiff claimed that he contracted the disease before 1942:—

*Held*, that the plaintiff was not entitled to recover since the obligations imposed by section 47 (1) depended upon the word "practicable," which meant that the measures to be taken must be possible in the light of current knowledge and invention. Where the owner of a factory has taken such measures for the protection of his workmen as are known to be possible at the material time, he has taken such measures as are practicable and is not in breach of section 47.

Decision of Parker J. [1953] 1 W.L.R. 137; [1953] 1 All E.R. 97 n. affirmed.

APPEAL from Parker J.

The plaintiff, in 1940, was directed by the Ministry of Labour to take up work in the defendants' steel foundry. From July in that year until October, 1944, except for a period of six months, he worked in and about a sandmill, preparing a sand mixture in a hopper and also shovelling sand through two-inch gratings on to a conveyor belt a few feet below. That was a dusty occupation, for a considerable amount of dust rose up through the grating. Masks were supplied by the defendants, but the plaintiff was not in the habit of wearing one at his work because of the inconvenience. From October, 1944, to September, 1945, the plaintiff was a foundry slinger, engaged in taking castings and moulds to gratings and grids where the castings were knocked out, a process which also caused a considerable amount of dust. In September, 1945, the plaintiff left the defendants' employment, but he returned in December, 1946, and until April, 1948, was employed in the shot blasting department.

In November, 1943, when a general X-ray of all the defendants' workers was taken, nothing abnormal was noticed in the X-ray of the plaintiff, but in 1948, after the plaintiff had left the defendants' employment, further X-rays were taken, and he was found to be suffering from pneumoconiosis, which, in the medical opinion, he had contracted in 1943. In August, 1945, he was certified by a pneumoconiosis board as suffering from that condition and was awarded a 40 per cent. disability pension.

In 1940, when the plaintiff commenced work in the factory, the current method of work had been for castings to be knocked out on the sandy floor and not over a grid or grating, which latter was a less dusty method. In 1942, however, the defendants (who were admittedly among the foremost employers in the steel industry to carry out research into methods of eliminating the

dust hazard, and had been the first to introduce grids or gratings) installed an extractor plant underneath the grid, which drew away the dust and admittedly effected a great improvement in the atmosphere. At the time when it was installed the extractor plant beneath the grid was an innovation.

The action was brought by the plaintiff for damages for personal injuries and physical harm. He alleged that the disease from which he was suffering was caused and aggravated by negligence and/or breach of statutory duty by the defendants in failing to take all practicable measures to safeguard him against the danger of contracting pneumoconiosis, as required by section 47 [1] of the Factories Act, 1937.

Parker J. dismissed the action. He held that the obligations imposed by section 47 (1) depended upon the meaning of the word "practicable"; that although that word imposed a stricter standard than "reasonably practicable," it meant that the measures to be taken must be possible in the light of current knowledge and invention, and the defendants could not be said to have been in breach of section 47 (1) or of their common law duty.

The plaintiff appealed.

*D. P. Croom-Johnson* for the plaintiff.
*P. M. O'Connor* for the defendants.

SINGLETON L.J. In my opinion this appeal must be dismissed. It raises a short and interesting point. Mr. Croom-Johnson, on behalf of the plaintiff, the appellant, has limited the appeal to one point, which was put under section 4, or section 47, of the Factories Act, 1937. It really arises wholly under section 47, and that is the only section of the Act which I propose to consider for the purposes of this judgment.

The plaintiff was employed by the defendants for a number of years. He is now about 53 years of age. From 1917 to 1920 he was in the army; from 1920 to 1924 he was a farm labourer; for four years after that he worked as a navvy. Then for two years, until 1930, he worked for a firm at Letchworth, the Ascot Motor Works. There he was a wheelwright's labourer. He also did sand blasting. For a number of years, from 1930 to 1940, he worked as a chimney sweep on his own account. In July, 1940, he was directed by the Minister of Labour to work in the defendant's foundry, making bombs, and he worked in that foundry for a good many years, with intervals. At one time after the war he returned to his occupation as a chimney sweep, but

[1] Factories Act, 1937, s. 47: "(1) "In every factory in which . . . there "is given off any dust . . . likely to "be injurious . . . to the persons em- "ployed . . . all practicable measures "shall be taken to protect the persons "employed against inhalation of the "dust . . . and in particular, where "the nature of the process makes it "practicable, exhaust appliances shall "be provided and maintained, as near "as possible to the point of origin of "the dust . . . so as to prevent it "entering the air of any workroom."

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the business had fallen away, and he returned to the defendants. It was discovered in 1948 that he was suffering from pneumoconiosis, an illness, or disease, of the chest which is often brought about by inhaling dust and the like, and his illness was said to be associated with the work which he had done for the defendants.

Questions of that nature were considered by the judge, and he came to the conclusion that the lung trouble from which the plaintiff suffered was due to his work with the defendants. The question then arose whether or not it could be said against the defendants that they were at fault, and it was claimed on behalf of the plaintiff that the defendants were at fault in two respects: (1) that they had failed in the duty which they owed him under the common law; that is, a duty to take reasonable care that workmen are not subjected to unnecessary risk; and (2) that the defendants were in breach of the duty which they owed to the plaintiff under section 47 of the Factories Act, 1937. The judge decided those points in favour of the defendants. He found that they were not at fault, and he gave his reasons for so finding. The plaintiff appeals to this court.

It is desirable that I should mention that the plaintiff's employment with the defendants was divided into four periods. The first of those periods ran from July, 1940, until October 22, 1944, and that is the only one which is relevant for the purposes of this appeal. The plaintiff's occupation during that time can be described in this way: he was working on a night shift, under black-out conditions, in and about the sand mill in the defendants' foundry. He had a twofold occupation. One was to shovel sand, which was tipped out of moulds, on to a grid or grating and he did that for two hours at a time. For the next two hours he took the place of another labourer in an adjoining building (the sand mill building), and there he was engaged in mixing in a hopper some of the dry sand that had been shovelled through the grating. There is no complaint as to dust in the second of those occupations, but in the first, that is, the shovelling of the sand, it is said that it was a very dusty occupation, and complaint is made as to what happened, or what did not happen there.

The shovelling operation was this: the sand having been tipped out on the grating—there were a number of gratings in the foundry—went through that 2-inch grating on to a conveyor belt which was several feet below the grating, and when the sand fell through on to the conveyor belt a considerable amount of dust rose through the grating. It was agreed by everybody that that was very dusty work. The plaintiff himself said that he complained about that work from time to time, though it rather appears, as Mr. O'Connor pointed out to us, that his complaints were mainly in relation to other work.

The defendants had installed that particular plant in 1938, and the use of a grating in a foundry of this kind was a new

departure. In the ordinary foundry the sand from the moulds is tipped upon the foundry floor, and it then has to be broken up and placed in vehicles or moulds, and taken to some other part of the foundry to be cleaned and re-used. The defendants, at some time, thought that a grid would be a good idea, and they installed grids accordingly. The sand was taken down, or fell, through the grid on to the conveyor belt and was carried away. Dust arose. So far as anyone knew, that could not be prevented. In the factory there were some fans in the walls which would cause some draught, and which would remove some of the dust which would otherwise collect in the factory. They were fans for the purpose of ventilation.

It was considered, when the grid system was installed, that it was an improvement on the old system, because a good deal of the dust and the sand would go down through the grid. A witness, a consulting engineer of some experience, who was called on behalf of the plaintiff, said that it was the only system of the kind that he had seen, and he gave evidence in November or December, 1952. From 1938 onwards the defendants had this grid system. The plaintiff's expert described it as an improvement. It was an improvement, because it meant that the greater part of the dust, and most of the sand, would go quickly down through the grid and would not appear again up above, though there would always be some dust coming up. A question which was put to him in cross-examination would appear to show that there were not very many grid systems in operation even at the time of the hearing of the case. The defendants certainly had gone ahead in that respect.

In November, 1943, there was a mass radiography of the men employed in the foundry to see if anyone's lungs were affected. The radio picture of the plaintiff was inspected by the doctors at the hospital in November, 1943, and it was not found that there was any affection whatever of his lungs. There is now. It was found in 1948 that his lungs were affected. He was ordered not to go on with this class of work, and he is now a road sweeper, earning less wages than he did before. When the result of the mass radiography of 1943 in regard to the plaintiff was inspected by three doctors who gave evidence at the trial, they found, what had not been found in the hospital in the year 1943, that there was some sign of affection then. That was no fault of the defendants. It is not always easy for experienced doctors or radiographers to see precisely what is shown by such a picture. Something was overlooked, and for a number of years afterwards the plaintiff continued to work in a dusty atmosphere. When the presence of the disease was found the plaintiff blamed his work with the defendants; he blamed the dusty conditions entailed by the work he did for the defendants; and he made allegations not only with regard to the first period which I have mentioned, but with regard to other periods when he was working for them. I need not consider any of the later periods in view

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of the way in which this case has been put before the court. The plaintiff's case was that the defendants had failed in their duty under section 47 (1) of the Factories Act, 1937.

[His Lordship read the section, and continued:] The interesting part of this case, on its facts, is that by January, 1942, the defendants had installed a dust extractor of a novel kind, in that it was placed under the grid so as to take the dust away as far as possible. That had been ordered, or planned, by May, 1941, and it was supplied in January, 1942, so that it was in operation for most of the three years before the end of what I have described as the plaintiff's first period of work with the defendants. What makes the case unusual is that this way of treating dust was first found out by the defendants. It is now said: "You ought to have done it earlier, and if you had done "it by July, 1940, when I, the plaintiff, went to work there, I "should not have been suffering from this trouble." The question for consideration is whether it is shown on these facts that the defendants are in breach of their duty under the section.

Let me say this further. One of the complaints of the plaintiff on another part of the case was that there had not been provision of gas masks, something to cover the mouths and the nostrils of the men working in that dusty place. The judge found that there were plenty of masks, and proper masks, provided, but that it was difficult to make the men wear them at all times; indeed, the judge said (and Mr. Croom-Johnson accepts it) that these defendants had been in the forefront of the fight towards having a clean and a proper factory; they had adopted every means—apart from the one which I mentioned a moment ago—known to mankind, to keep their factory fit for men to work in. The evidence shows that they had tests of one kind and another to see how they compared with other places, and they had, indeed, a very high reputation. I suppose that it might be said that even if the place was dusty, so as to affect the plaintiff, if he had worn the mask provided for him, or the different masks provided, he might not have suffered as he did; and I suppose that it might be said in one sense that it is a little uncertain when he contracted this unfortunate illness. He worked for the defendants from July, 1940; in January, 1942, they had this new dust extractor below the grid. It is said that the natural assumption is that he contracted the disease some time between July, 1940, and January, 1942, though it was not discovered until a good many years later.

The question for decision, and the only question, arises under section 47, under which, in a factory of this kind, "all prac-"ticable measures shall be taken to protect the persons "employed against inhalation of the dust . . . and to prevent its "accumulating in any workroom, and in particular, where the "nature of the process makes it practicable, exhaust appliances "shall be provided and maintained. . . ." In each of those limbs the word "practicable" appears, and discussion on the

meaning of that word took place before Parker J. as it has done in this court. The judge said that the real question was what did "practicable" mean? Mr. Croom-Johnson referred to Webster's Dictionary, where "practicable" is defined as: "Possible to be accomplished with known means or known "resources." Lord Goddard in *Lee* v. *Nursery Furnishings Ld.*,[1] adopted a definition in the Oxford Dictionary: "Capable "of being carried out in action" or "feasible."

The complaint is as to the period from July, 1940, when the plaintiff became employed until the installation of the extractor, in January, 1942. The impression gained from one passage in the judge's judgment is that because of complaints by the plaintiff and another man the extractor was installed within a fortnight of their complaints. I think it is clear that that does not accurately state the position. The defendants had been in the forefront of the campaign to have a good factory; no one had thought of an extractor below the grid before this time; it has worked well. The ordinary dust extractor, of which each of us has heard in one case or another, is something which you set close to the place where the dust arises and the dust is drawn off. I think it is conceded that that sort of thing would have been almost impossible and, if not impossible, certainly impracticable in the defendants' foundry. There were a number of these grids, and if there had been extractors over each place where sand had to be emptied, the work of the factory could not have been carried on. It would have been impracticable. But, submitted Mr. Croom-Johnson, it was clearly practicable to have a dust extractor of this kind; that is, one below the grid, before it was put there; it would have been practicable to put it there when the grid system was installed in 1938, and if it was practicable, and it was not done, the defendants were in breach of their statutory obligation.

I do not find myself able to accept that submission. It seems to me that you must have regard to the position which existed at that time. When the plaintiff commenced his work with the defendants it was by reason of his having been sent there during the war. Before the war and during the war the defendants did all they could to have a place fit for their men to work in. I realize that that is not the test under section 47 of the Act; the question is, had they taken all practicable measures; but if no one in science, or no one in the engineering world, or no one who has had charge of a big factory, knows of a system by which one can combine a grid and dust extractor, with the dust extractor under the grid, until these defendants found that way and decided to try it, is it to be said that that which they discovered by their experimenting was practicable long before they found it? There has not been a word of evidence to show that anyone knew of any such system before, though dust extractors by themselves were

[1] (1945) 61 T.L.R. 263; [1945] 1 All E.R. 387.

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well known. The plaintiff's expert said that the grid system was an improvement; it was the only one of the kind he had seen; he said that the addition of the dust extractor below it was new to him; he had never seen it before; these defendants were in the forefront in that regard, too. They, through the instrumentality of someone who is now dead and who could not be called as a witness, had installed this kind of device which is of particular benefit in their foundry, and may prove a benefit in others, though, as far as I can find from the evidence, it has not been adopted generally. It would appear to be rather hard on the defendants if, in those circumstances, they were responsible for not finding out sooner something which, for the good of the community, they found out in the year 1941. When they did find it out it took some little time for the drawings to be prepared and for the machinery to be supplied.

I go back to the question which was put earlier: what were the measures which, in the year 1940 or 1941, it was practicable for the defendants to take? The case for the plaintiff is that they might have done something of which no one had ever thought. It is argued that it was practicable for them to do it because they might, and ought to, have thought of it earlier. I do not think that that is the right test. In deciding whether all practicable measures were taken one must have regard to the state of knowledge at the time, and particularly to the knowledge of scientific people. It is easy to be wise after the event, but I find it impossible to say, on my view of this section, that it was shown that the defendants were in breach of the duty imposed on them by the section. In my opinion, this appeal should be dismissed.

JENKINS L.J. I agree, and do not desire to add anything.

MORRIS L.J. I agree.

*Appeal dismissed.*

Solicitors: *W. H. Thompson; Clifford-Turner & Co.*

A. W. G.

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[QUEEN'S BENCH DIVISION.]

1953
*May* 18.
Slade J.

## * PRACTICE NOTE (PAYMENT OUT).

*Practice—Payment out of court—Application—At what stage permissible—Judge's discretion—R.S.C., Ord.* 22, *rr.* 2 (1), 3.

DURING the hearing of an action, an application having been made on behalf of the plaintiff, after the conclusion of the evidence and the final speeches by counsel, to take money out of court,

[Reported by Miss P. STANLEY, Barrister-at-Law.]

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Slade J.

SLADE J. said: With commendable frankness, counsel for the plaintiff accepted that his client's attitude had been inspired by hearing me indicate that I was minded to reject her evidence. Counsel for the defendants countered, or intimated that he proposed to counter, that application by an application for leave to reduce the amount in court.

My jurisdiction is contained in R.S.C., Ord. 22, r. 3,[1] and it is clear that I have jurisdiction to accede to the plaintiff's application; it is equally clear from the wording of the rule itself and from the judgment of Goddard L.J. in *Cumper* v. *Pothecary* [2] that I have a complete discretion to grant or to refuse the application; that discretion must, of course, be exercised judicially.

I have no doubt that I ought to exercise it in this case by refusing the application. It is obvious that the plaintiff thinks that if I were to accede to the application she is likely to recover more by accepting the amount in court than she is likely to recover as a result of my judgment. It is not only a question of costs, but of the amount to be recovered, and I think that it would be unfair to the defendants to allow her to adopt an attitude which really, in colloquial parlance, means "Heads I win; tails "I do not lose."

If I were to accede to an application of this kind, it might encourage a plaintiff not to take the money out of court under rule 2 of Ord. 22,[1] not to make an application for leave to take it out at the commencement of the trial, or even in the course of the evidence, but to wait until the closing speeches, and then if the judge should indicate that he was not impressed by the plaintiff's evidence, to say, at the eleventh hour and fifty-ninth minute: "Now is the time to make my application."

I have no doubt whatever that in the exercise of my judicial discretion I ought to refuse the application.

[1] R.S.C., Ord. 22, r. 2 (1): "Where "money is paid into court under r. 1 "the plaintiff may within fourteen "days of the receipt of the notice of "payment into court, or where more "than one payment into court has "been made, within fourteen days of "the receipt of the notice of the last "payment into court, accept the whole "sum or any one or more of the "specified sums in satisfaction of the "claim or in satisfaction of the cause "or causes of action to which the "specified sum or sums relate. . . ."

R. 3: "If the whole of the money "in court is not taken out under r. 2, "the money remaining in court shall "not be paid out except in satisfac-"tion of the claim or specified cause "or causes of action in respect of "which it was paid in and in pur-"suance of an order of the court or "a judge, which may be made at any "time before, at or after trial."

[2] [1941] 2 K.B. 58, 65–71; 57 T.L.R. 503, 505, 506; [1941] 2 All E.R. 516, 519–23.

[QUEEN'S BENCH DIVISION.]

1953
*Apr.* 29, 30;
*May* 1, 4.

McNair J.

# * HAZELL, WATSON & VINEY LD. *v.* MALVERMI.

[1951 H. No. 4277.]

*Landlord and Tenant—Rent restriction—Change of identity of dwelling-house—Rateable value in* 1939 *exceeding* £100—*Subsequent bomb damage — Rateable value reduced to* £96 — *House not protected — Ascertainment of rateable value — Rent and Mortgage Interest Restrictions Act,* 1939 (2 *&* 3 *Geo.* 6, *c.* 71), *s.* 3 (1).

A dwelling-house, which on April 6, 1939, had a rateable value of £147, suffered bomb damage, the most serious result of which was the cracking of two party walls, one of which eventually had to be pulled down and rebuilt. In 1950 the rateable value, after certain changes, was assessed at £96. On a claim by the landlords for possession, the tenant contended that there had been a change of identity in the premises since 1939, and that as the first assessment after that change was less than £100 the premises were protected by virtue of section 3 (1) of the Rent and Mortgage Interest Restrictions Act, 1939:—

*Held*, that for there to be a change of identity for the purposes of the Rent Acts it was not sufficient that the premises had been seriously damaged; the facts must be such that the house ceased to be the same house as that with which it was being compared. On the facts the damage was not sufficient to change the identity of the premises since April 6, 1939, and the rateable value at that date being over £100 the premises were not protected by the Rent Acts.

*Per curiam*: In ascertaining the rateable value of premises for the purpose of the Rent Acts, the court is confined to looking at the value as shown in the valuation list and is not at liberty to speculate whether that valuation was right.

ACTION.

The plaintiff landlords, Hazell, Watson & Viney Ld., claimed against the tenant, Luigi Malvermi, possession of premises at 54 Long Acre, London, held by the tenant under a written agreement dated May 14, 1943, which was determined by notice to quit dated June 22, 1951, expiring on September 29, 1951.

The premises consisted of a ground floor and basement, which were fitted up as a café and kitchen, with three floors above. By a lease in 1928 the premises were let for 14 years on terms which permitted the use of the three upper floors for living accommodation.

In 1931 the lease was assigned for the unexpired residue of the term to the tenant who occupied the upper floors. In 1940 the premises suffered bomb damage, and in 1942, the lease of 1928 having expired by effluxion of time, the tenant held over on the terms of the original lease. In 1943 negotiations were opened between the then landlords and the tenant for a new lease, and an offer was made for a lease for one year and thereafter quarterly "on the same terms as were contained in the former lease." By clause 10 of a draft lease, which was sent by the then landlords' solicitors to the tenant's solicitors, the tenant covenanted

"not to use the premises other than and except as a café and "dining room only," and completion took place in May, 1943, without amendment to this clause. In the same month a condition survey was carried out, when reference was made to the cracking of two party walls, cracked plaster, broken and bulging ceilings and broken windows and window sashes.

The tenant continued in occupation of the whole of the premises, using the first floor for living accommodation, and the landlord accepted rent with knowledge of this occupation. In 1947, the present landlords, who by this time had acquired the freehold in the property knowing that the tenant was living on the premises, attempted unsuccessfully to persuade him to leave. In the same year the party wall of the premises, which had been cracked as a result of enemy action, was pulled down and rebuilt nine months later. On April 6, 1939—the appointed day under the Rent and Mortgage Interest Restrictions Act, 1939—the rateable value of the premises was £147. Owing to the falling off of trade in the area, that figure was reduced during the war to £117, but was restored to its original figure in 1948. In 1950, by an alteration of the valuation list relating to the premises, the rateable value was reduced to £96, the description of the premises being "house and café as affected by war damage."

In resisting the landlords' claim for possession the tenant contended: (1) that on the true construction of the tenancy agreement the premises were let as a separate dwelling-house within section 12 (2) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920; (2) that if clause 10 of the agreement had the result that the premises were not so let, then the landlords, by the acceptance of rent with knowledge that part of the premises was being used for living accommodation, had assented to such user so as, in effect, to convert the tenancy into a new contract for the letting of a separate dwelling-house by virtue of section 3 (2) of the Rent and Mortgage Interest Restrictions Act, 1939; (3) that if the answers to (1) and (2) were in the negative, then the agreement should be rectified so as to contain no prohibition against the tenant occupying the premises as a dwelling-house; (4) that, either by reason of the landlords' acceptance of the tenant's user of the premises as living accommodation, or by the agreement being rectified, the agreement was to be treated as a letting of a separate dwelling-house which by virtue of the bomb damage had changed its identity since April 6, 1939, and that when it was first assessed after that date the rateable value was less than £100, so that the Rent Acts applied by section 3 (1) of the Act of 1939.

*Michael Hoare* for the landlords.
*Roy Wilson Q.C.* and *S. N. Bernstein* for the tenant.

The following cases were referred to in argument: *Crane* v.

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*Hegeman-Harris Co. Inc.*[1]; *Wolfe* v. *Hogan*[2]; *Eyre* v. *Haynes*[3]; *Reg.* v. *Sidmouth Rent Tribunal, Ex parte Sellek*[4]; *Langford Property Co. Ltd.* v. *Batten*[5]; *Langford Property Co. Ltd.* v. *Sommerfeld*[6]; *Mitchell* v. *Barnes*[7]; *Morleys (Birmingham) Ltd.* v. *Slater*[8]; *Kitchen's Trustee* v. *Madders*[9]; *Court* v. *Robinson.*[10]

McNAIR J. stated the facts and held (1) that, on its true construction, the lease did not permit any part of the premises to be used as a dwelling-house, but (2) that the landlords had assented to such use, and (3) that the negotiations for the lease having been dealt with through professional advisers, the claim for rectification had not been made out. He continued: I approach the fourth question on the basis that the tenancy agreement has, by the landlords' action, become a tenancy agreement for a dwelling-house. That being the factual position, it must be considered whether there had been such a change of identity in the premises that it can be said that the appropriate date for the purposes of section 3 (1) of the Act of 1939 is not April 6, 1939, but some later date.

I have been referred to a number of cases on this question of change of identity of a house, by reason either of structural change or of damage. The question sometimes arises in connexion with the apportionment of the standard rent, which is not quite the same problem as I have to consider here, although it may well be that the principles are the same. The only case to which I have been referred where the critical question has been the date of the first assessment after the change of identity is *Eyre* v. *Haynes*,[1] where the Court of Appeal (Scott, MacKinnon and Tucker L.JJ.) dismissed the appeal from the county court judge who had held that, on the facts before him, the premises which had been damaged by enemy action had not changed their identity. It appears that the house was before the war rated at £113 per annum, and was therefore outside the Act of 1939. But on March 8, 1943, the tenant made a new agreement with the landlord at a reduced rent, and in August of that year the rateable value was reduced to £76 per annum, which, if it had been the appropriate rateable value for the purposes of the Rent Acts, would have made the Acts applicable to that tenancy. But the Court of Appeal refused to disturb the finding of fact by the judge that the damage was not enough to prevent the house remaining the same house as before the damage.

I need not go through the cases in detail to which I have been referred, such as *Reg.* v. *Sidmouth Rent Tribunal; Ex parte*

[1] [1939] 4 All E.R. 68.
[2] [1949] 2 K.B. 194; [1949] 1 All E.R. 570.
[3] (1946) 62 T.L.R. 63; [1946] 1 All E.R. 225.
[4] [1951] 1 K.B. 778; [1951] 1 T.L.R. 408; [1951] 1 All E.R. 107.
[5] [1951] A.C. 223; 66 T.L.R. (Pt. 2) 958; [1950] 2 All E.R. 1079.
[6] [1948] W.N. 287.
[7] [1950] 1 K.B. 448; 65 T.L.R. 734; [1949] 2 All E.R. 719.
[8] [1950] 1 K.B. 506; 66 T.L.R. (Pt. 1) 483; [1950] 1 All E.R. 331.
[9] [1950] Ch. 134; [1949] 2 All E.R. 1079.
[10] [1951] 2 K.B. 60; [1951] 1 All E.R. 209.
[1] (1946) 62 T.L.R. 63; [1946] 1 All E.R. 225.

*Sellek*,[2] *Langford Property Co. Ld.* v. *Batten*,[3] and *Langford Property Co. Ld.* v. *Sommerfeld*,[4] those being cases where the primary question at least was the apportionment of the standard rent. But it is clear that the principle to be applied is this: that it is not sufficient that there has been serious damage to a house; the facts must be such that it can be said that in substance the house has ceased to be the same house as that with which it is being compared. Identity may be changed, of course, although the four walls and the roof still stand, by reason of conversion of the interior of the premises into flats or matters of that kind. Again, identity may be changed by the addition of some new structure to the house, such as a garage. But I have been referred to no case in which it has been held that the mere fact that the premises have become damaged by enemy action, even though seriously damaged, is sufficient in itself to cause this notional change of identity. The description of the premises given in the survey of May, 1943, does not, to my mind, indicate anything approaching a change of identity. The most serious damage there referred to is the cracking of two party walls close to the front wall on the third floor in the front room. In the other rooms the plaster is cracked, the ceilings are bulging and broken, and there are a few instances of broken window sashes and three or four panes of glass missing. If it is to be said that every house in London which received damage of that nature by enemy action during the war changed its identity or ceased to be the same house as it was before, that would be a conclusion to which, in my judgment, it would be quite unreasonable to come.

I am satisfied that the effect of the damage to this building, which was undoubtedly substantial, was sufficient, at any rate for the time being, to make the second and third floors, until they were repaired, unusable and uninhabitable by any reasonable standards, though I am not saying that their state was not such that many people in May, 1943, might have been glad to have the shelter afforded by them. The fact that the upper floors were not used was primarily because the tenant did not desire to use them, although he had a perfect right to do so. Accordingly, the conclusion to which I have come is that the tenant has not established that there was any change of identity.

That strictly renders it irrelevant for me to consider the question of the change in the rateable value, but, if it be material, it is sufficient for me to say that, first, as a matter of law, I think that when the court has to find the rateable value of the house for the purposes of these Acts, it is confined to looking at the value as shown in the valuation list, and it is not at liberty to speculate whether that valuation was right. Parliament has made the value as shown in the valuation list the criterion. Secondly, it is clear that the first assessment of these premises after the

[2] [1951] 1 K.B. 778; [1951] 1 T.L.R. 408; [1951] 1 All E.R. 107.

[3] [1951] A.C. 223; 66 T.L.R. (Pt. 2) 958; [1950] 2 All E.R. 1079.

[4] [1948] W.N. 287.

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war, or after the new tenancy was created in May, 1943, was the assessment in August, 1948, when the rateable value was restored to the same figure as it was before the war, and that, though it is true that the first assessment after the war which took account of the war-damaged condition was that made in May, 1950, that is not to say that the assessment made in August, 1948, was not an assessment of the rateable value of the building at that time even though account was not taken at that time of its physical condition. Accordingly, if it had been proved that there had been a change of identity, and if it had been necessary to consider the date of the first assessment after that change of identity, I would have been forced to the conclusion that the relevant assessment was that of August, 1948.

In my judgment, the landlords are entitled to possession.

*Judgment for the landlords.*

Solicitors: *Denton, Hall & Burgin; Stanley S. Levene.*

J. D. P.

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[QUEEN'S BENCH DIVISION.]

1953
*May* 12, 13.

McNAIR J.

## * LONDON CEMETERY CO. LD. *v.* CUNDEY.

[1951 L. No. 2234.]

*Cemetery—Company—Exclusive right of burial only—Family grave plot with tree—Neighbouring gravestones damaged by fall of tree—Question of liability—Whether implied term to maintain tree—* 6 *&* 7 *Will.* 4, *c. cxxxvi* [*London Cemetery Act,* 1836], *ss.* 10, 11, 12, 14, 16, 17, 43, 44, 89—*Regulations made under that Act in* 1881, *regs.* 11 *and* 12.

The plaintiffs, a company incorporated under a private Act (6 & 7 Will. 4, c. cxxxvi [the London Cemetery Act of 1836 [1]]), under

[1] 6 & 7 Will. 4, c. cxxxvi [the London Cemetery Act of 1836], s. 10: "... it shall be lawful for the said "company and they are hereby autho- "rized and empowered ... to sell and "dispose of ... under such regula- "tions and restrictions, and subject to "such conditions, as the said company "shall think proper to require, the "exclusive right of burial or inter- "ment, either in perpetuity or for a "limited period ..."

S. 16: "... it shall be lawful for "the said company to take down and "remove any monuments ... grave- "stones, and other erections which "shall have been erected or built con- "trary to the terms and conditions "upon which permission to erect or "construct the same was granted, or "in case such terms and conditions "shall not have been complied with, "and also to enter upon and resume "possession of any grave or vault "or other burial place in which the "interest of the purchaser of the "exclusive right of sepulture therein "shall have ceased or determined. "..."

S. 17: "... the said company "shall, by and out of the moneys to "be received by virtue of this Act,

[Reported by Miss P. STANLEY, Barrister-at-Law.]

and by virtue of which they were the owners of a cemetery at Highgate, were empowered by section 10 of the Act to sell the exclusive right of burial either in perpetuity or for a limited period subject to such conditions as they might think proper to require. By section 44 of the Act it was not lawful for the company to sell or dispose of any land consecrated or set apart or used for the burial of the dead.

In 1950 an elm tree, standing on the plot of land which included the defendants' family grave in the cemetery, fell to the ground damaging neighbouring gravestones on the plaintiffs' land. The defendants, who were the executors and residuary devisees and legatees of their mother, in whom was vested at the date of her death in 1931 certain rights in the family grave, had been warned by the company in 1949 that the elm tree had died. In an action by the company to be indemnified for the expenses it had been put to and might be put to in the future in repairing the gravestones:—

*Held*, first, that the defendants had only acquired such rights as under sections 10 and 44 of the Act the plaintiffs were empowered to sell, namely, a right of burial in perpetuity; and that neither possession in law nor occupation passed from the company to the beneficiaries of the grant so as to impose on them, or their successors, the duties of possessors or occupiers of land.

*Rex* v. *St. Mary Abbot's, Kensington* (1840) 12 A. & E. 824 followed.

*Held*, secondly, that in determining what terms should be implied in a transaction of this nature the test to be applied was the same as that applicable to ordinary contractual relations such as the sale of goods or the charter of a ship—whether the implied term (in this case, that the grave owners should maintain the tree) was necessary to give such business efficacy to the transaction as both parties must have intended. In this case, however, under section 17 of the Act liability for keeping the place in proper repair fell upon the company, and there was nothing which of necessity required that position to be altered.

Dictum of Scrutton L.J. in *In re Comptoir Commercial Anversois & Power, Son & Co.* [1920] 1 K.B. 868, 899; 36 T.L.R. 101, applied.

*Held*, lastly, that since no interest or estate in the land passed to the grantee, no covenant imposing a positive burden on the grantee could pass in law to the assignees of the grantee because it would not be a covenant in any way running with the land, but a mere personal covenant.

ACTION.

The plaintiffs, London Cemetery Co. Ld., were a company incorporated under a private Act, 6 & 7 Will. 4, c. cxxxvi (the London Cemetery Act, 1836). Under and by virtue of that Act, they were the owners of, and had developed, a cemetery at Highgate. The defendants were the executors and residuary devisees and legatees of their mother, Mabel Cundey, in whom

"keep the said cemeteries respectively ". . . and the several buildings "thereon and therein . . . and all "other parts of the same, in thorough "and complete repair."

S. 44: "Provided always . . . that "it shall not be lawful for the said "company, under the authority of the "provisions herein-before contained, "to sell or dispose of any land which "shall have been consecrated or set "apart or used for the burial of the "dead."

Regulations made pursuant to s. 89 of the Act in 1881, reg. 12: "Every "monument, gravestone, or other "erection, shall be maintained in good "order and condition by the owner "thereof, otherwise the right of burial "shall be forfeited."

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was vested at the date of her death in 1931 certain rights in the Cundey family grave at Highgate Cemetery. On the plot of land which included the Cundey family grave, there was an elm tree which, in November, 1950, fell on and damaged some memorial monuments and gravestones on a nearby plot.

The plaintiffs claimed that the defendants were under an obligation to maintain the elm tree in good order and condition and to take reasonable steps to ensure that it would not cause damage to the cemetery or to monuments and graves therein. They alleged that the obligation arose, firstly, as a result of a term to be implied in the original grant in 1882 of the rights in the burial plot to the predecessors in title of the defendants from the fact that an amending grant, made in 1885, expressly mentioned the elm tree as part of the grant, and further that the term should be implied from the fact that in 1924, and again in 1935, the elm was lopped at the expense of the defendants or their predecessors in title; and secondly and alternatively, as a matter of duty apart from contract.

The defendants denied any such alleged implied term or duty resting upon them, and in particular they alleged that the plaintiffs under their statutory powers were debarred from creating in their favour any right or title in their land from which the alleged term or duty could have arisen, and were limited to conferring solely a right of burial or sepulture in perpetuity.

By a receipt dated June 13, 1882, Samuel Cundey was granted the rights to "a reserve brick vault" together with extra ground to the vault amounting to 347 square feet for the cost of £455 19s. 0d. No conveyance was in fact executed as was contemplated by section 11 of the Act, but in accordance with the practice, existing at any rate from 1890, the grant was entered in the plaintiffs' grave register kept under section 19 of the Act. In 1883 Samuel Cundey died, and his widow, Eliza Cundey, on March 8, 1884, executed an assignment following closely the statutory assignment set out in section 12 of the Act, assigning to herself and her three children "the exclusive right of burial "or interment in all that brick vault and its appurtenances . . . "which was granted to the late Samuel Cundey in perpetuity . . . "subject to the same conditions as I held the same immediately "before the execution hereof."

On March 27, 1885, Eliza Cundey, Samuel's widow, to increase the size of the plot and to secure greater privacy and the amenity value contributed by an elm tree nearby, applied to the company for the assignment of a further portion of land. That was granted to her for £132 6s. 0d., the new grant being entered in the register book—no actual conveyance being executed—as "extra ground" to the original vault. In 1907 Eliza Cundey died, leaving surviving her Howard Cundey, one of the three assignees in 1885. On May 27, 1909, Howard Cundey himself executed an assignment, in similar terms to the previous one, to himself and his wife Mabel Cundey.

In March, 1924, on the instructions of Howard, and at his expense, the plaintiff company lopped the elm tree. In 1927 Howard, and in 1931 Mabel, died. Probate of her will was granted to the defendants. In 1935 the elm tree was again lopped on the instructions and at the expense of the first defendant. On March 28, 1949, it having been noticed that the elm tree had died, the secretary of the company notified the first defendant; no action was taken on the letter. On November 3, 1950, the elm fell, causing considerable damage to memorials on the neighbouring plots but not damaging the Cundey grave itself. The plaintiff company claimed reimbursement from the defendants.

*H. A. P. Fisher* for the plaintiff company.
*J. C. Leonard* for the defendants.

The following cases were cited in argument: *Lyttleton Times Co. Ld.* v. *Warners Ld.*[2]; *In re Comptoir Commercial Anversois & Power, Son & Co.*[3]; *Austerberry* v. *Corporation of Oldham*[4]; *Ingram* v. *Morecraft*[5]; *Rex* v. *St. Mary Abbot's, Kensington*[6]; *Taylor* v. *Whitehead*[7]; *Hoskins-Abrahall* v. *Paignton Urban Council*[8]; *Moreland* v. *Richardson*[9]; *Ashby* v. *Harris*[10]; *Bryan* v. *Whistler*[11]; *McGough* v. *Lancaster Burial Board.*[12]

MCNAIR J., having stated the facts and referred to sections 10, 11, 12, 14, 16, 17, 43, 44 and 89 of the private Act, 6 & 7 Will. 4, c. cxxxvi, and to regulations 11 and 12 made pursuant to the Act, continued: Counsel for the plaintiffs, in the course of his argument, which I found extremely helpful and clear, was constrained, as I think quite rightly, to admit that it was impossible for him to succeed under the heading of duty, since on the authority of *Rex* v. *St. Mary Abbot's, Kensington*[1] he was precluded, in spite of section 16 of the Act, from arguing that any property in the land or right or possession in the land comprised in the plot had passed to the grave owners or their successors so as to impose on them the duties of possessors or occupiers of land. But he submitted that the relationship of the parties to the original transaction in 1885 was such that there must necessarily be implied the obligation on the beneficaries of the right to burial (whom I will refer to as "the grave owners") to maintain the tree. The argument ran thus: it was the common intention of the parties, as evidenced by the receipt given in 1885 and the entry in the register at that date, that the grave owners should

[2] [1907] A.C. 476; 23 T.L.R. 751.
[3] [1920] 1 K.B. 868; 36 T.L.R. 101.
[4] (1885) 29 Ch.D. 750; 1 T.L.R. 473.
[5] (1863) 33 Beav. 49.
[6] (1840) 12 A. & E. 824.
[7] (1781) 2 Doug.K.B. 745.
[8] [1929] 1 Ch. 375; 45 T.L.R. 161.
[9] (1856) 22 Beav. 596.
[10] (1868) L.R. 3 C.P. 523.
[11] (1828) 8 B. & C. 288.
[12] (1888) 21 Q.B.D. 323; 4 T.L.R. 679.
[1] 12 A. & E. 824.

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continue to have the benefit of this tree, which seems to have provided the real reason for the payment of the money for rights over this extra piece of ground. The argument continued that it would be unreasonable to hold that the liability for the maintenance of this tree rested on neither party, and, therefore, it must have been intended to be transferred to the grave owners, who were to have the benefit from the continued existence of that tree. Counsel, while admitting that no true easement was created in favour of the grave owners, there being no servient tenement, argued, on the analogy of the cases relating to easements, that an implied obligation to maintain the tree must rest upon the grantee.

In support of that contention two cases were cited. In *Ingram* v. *Morecraft* [2] the view was expressed, I think obiter, that where a right of way was granted, it was for the dominant tenement to do all that was necessary for making the right of way available. Sir John Romilly M.R. said in his judgment [3]: "If I grant a man "a right to lay pipes over my land, it follows that he must keep "them watertight, for otherwise the escape of water is a "trespass." In *Taylor* v. *Whitehead*,[4] Lord Mansfield, in considering a similar right of way, expressed the principle in this way [5]: "I entirely agree with my brother Walker, that, by "common law, he who has the use of a thing ought to repair it." From those two cases it was argued that, since the grave owners have the use of this plot, and it is for their benefit, the obligation is on them to repair it. I do not find those authorities particularly helpful, firstly, because I think that any argument by analogy from such a technical branch of law as the law relating to easements is unreliable, and secondly, I do not find that those authorities establish that the owner of the servient tenement would have a right of action against the owner of the easement. They merely said that the owner of the easement had not got a right of action against the owner of the servient tenement.

I think at this stage that it is right that I should express my view as to what is the nature of the right conveyed by these documents or the transactions which they evidence. It is clear, I think, that in equity (there being no legal conveyance) the main right, if not indeed the only right, conveyed is a right of burial in perpetuity. The company have not power under section 44 of the Act to part with any estate or interest in the land. They can only grant under the other provisions of this statute quite limited rights of burial in perpetuity. How limited this right is is shown by cases such as *McGough* v. *Lancaster Burial Board*,[6] where the Court of Appeal held, under a different but not dissimilar statute relating to a burial board, that the grantee only acquired the rights of exclusive

[2] 33 Beav. 49.
[3] Ibid. 51.
[4] 2 Doug.K.B. 745.
[5] Ibid. 749.
[6] 21 Q.B.D. 323.

right of burial, and that such rights did not include a right to place a glass shade and wire covering on the grave. Similarly, in *Hoskins-Abrahall* v. *Paignton Urban Council*,[7] where the Court of Appeal had to consider whether the holder of an exclusive right of burial in a cemetery under an Act incorporating the Cemeteries Clauses Act, 1847, had a right to enter the vault there used for the purpose of performing certain ceremonial rights, the court held that the grantee had no freehold interest in the space or the vault, and no right to use them for such purposes or to open or enter the vault for the purpose of depositing articles therein without the consent of the local authority, who was in that case the burial authority. Greer L.J. said[8]: "For my part I cannot "find in the statute any power to grant any other right except "those which are included in the grant, an exclusive right of "burial and a right to erect a tombstone including therein a right "from time to time to see to the repair of the tombstone." And I think it was in the judgment in *McGough's* case[9] that it was stated by Bowen L.J.[10] that the right of the owner of the grave to go on to the land to inspect the grave for the purpose of seeing whether it was in a good state of repair was only a licence and was not an interest in the land.

It seems to me that the question as to what terms should be implied in a transaction such as this has to be tested by the same tests as are applicable under ordinary common law principles to other contractual relationships, such as the sale of goods or the charter of a ship: Is the term, i.e., that the grave owner should maintain the tree, necessary to give such business efficacy to this transaction as both parties must have intended? The test is stated in the very familiar passage in the judgment of Scrutton L.J. in *In re Comptoir Commercial Anversois and Power, Son & Co.*[11]: "The court . . . ought not to imply a term merely because "it would be a reasonable term to include if the parties had "thought about the matter, or because one party, if he had "thought about the matter, would not have made the contract "unless the term was included; it must be such a necessary term "that both parties must have intended that it should be a term "of the contract, and have only not expressed it because its "necessity was so obvious that it was taken for granted."

I see no reason why the enjoyment by the grave owner of the amenity provided by this tree might not equally well have been achieved by leaving the obligation to maintain the tree in good order and condition upon the company, where it is laid by statute. I am in no way satisfied that if in 1885 the officious bystander had raised the question "Who is to be responsible in law for "the safety of this tree?" that both parties, the plaintiffs and Mrs. Eliza Cundey, would immediately have said: "Oh, of "course, clearly that is Mrs. Eliza Cundey's liability." If one

[7] [1929] 1 Ch. 375.
[8] Ibid. 387.
[9] (1840) 12 A. & E. 824.
[10] 21 Q.B.D. 323, 328.
[11] [1920] 1 K.B. 868, 899.

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speculates, I think that it is extremely likely that if they had had the matter in mind they would have said: "Well, that liability "will rest where it rests under statute." Under section 17 of the statute the liability to keep the place in proper repair falls upon the company, and there is nothing in these circumstances, as I see it, which of necessity requires that that position should be altered.

The argument, as I understood it, in favour of transferring the liability from the company to the grave owner, was that as under regulation 12 of the regulations the liability for maintaining the monuments and gravestones and other erections in good order and condition is in terms imposed upon the owner, it would be reasonable or necessary that the same provision should be made as regards the maintenance of the trees. That submission does not appeal to me; indeed, I feel that that argument rather cuts the other way, because here there is an express provision placing upon the owner certain obligations for maintenance in good order and condition in terms which are not wide enough to cover the maintenance in good order and condition of a physical object like a tree. Furthermore, I think that it is relevant, in considering whether this term is to be implied, to consider whether a term to the like effect provided for by express terms in the contract would have been effective to bind the defendants in this action. Once it is admitted or established that what passed to the grantee under the statute was not an interest in the land or any estate in the land, then it would seem to me, on well-settled principles, that no covenant of this nature imposing the positive burden on the grantee could pass in law to the assignees of the grantee, because it would not be a covenant in any way running with the land, but would be a mere personal covenant, the burden of which can only be passed to subsequent assignees in invitum, within very narrow limits. That is an additional reason for excluding this implied term.

Again, it seems to me that if the plaintiffs are right in this case, and that, against their will, obligations of this nature may be imposed upon the heirs-at-law and successors in title of the original grantee of such a right, the grant may be in the true sense a hereditas damnosa, and an executor or a residuary legatee may find himself burdened with liabilities of a quite indefinite nature, from which, so far as I can see, he is unable under the statute to disembarrass himself.

For those reasons, I am satisfied that it would be wrong for the court to imply into this transaction the implied term for which the plaintiffs contend.

That conclusion makes it unnecessary for me to express any view upon the defences raised under sections 40 and 52 of the Law of Property Act or section 4 of the Statute of Frauds. Both these points will be open to the defendants if the case should go elsewhere. I think, however, that I should say, as regards damages, that if liability had been established, I should

have found that the damages were as claimed in the statement of claim, either on the ground that the ownership in the neighbouring graves which were damaged rests under the statute in the cemetery company, or if not, on the ground that the cemetery company, as persons in possession or occupation, have sufficient proprietary interest to maintain an action against the defendants for damage to those gravestones and memorials.

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*Judgment for the defendants.*

Solicitors: *Baker, Dodsworth & Co.; Hyman Isaacs, Lewis & Mills.*

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[COURT OF APPEAL.]

## * GETREIDE-IMPORT-GESELLSCHAFT m.b.h. *v.* CONTIMAR S.A. COMPANIA INDUSTRIAL COMERCIAL y MARITIMA.

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*May* 7, 8.

Singleton, Jenkins and Morris L.JJ.

*Arbitration—Contract—Appeal from award—Notice to be given within fourteen days of award—Notice deemed to be received not later than twenty-four hours after posting—Letter incorrectly addressed—Delivery out of time—Whether notice to be deemed to have been received within time.*

*Jurisdiction—Obtaining of an award a condition precedent to right to sue in respect of claim arising out of contract—Action for declaration that award valid and conclusive—Action in substance to enforce award—Right of appeal from award in issue—Jurisdiction of court—Arbitration Act,* 1950 (14 *Geo.* 6, *c.* 27), *s.* 25 (4).

The plaintiffs contracted to buy, and the defendants to sell, about 14,500 tons of River Plate wheat by a contract incorporating the terms of Form No. 41 (Rye Terms) of the London Corn Trade Association Ltd., which provided that all disputes arising out of the contract should be referred to arbitration in England, and that should any party be dissatisfied with an award a right of appeal should lie to the Committee of Appeal of the Association, provided that within fourteen days of the date of the award notice that an appeal had been claimed was given by the appellant to the other party, "Notices under this rule to be given in writing, and "sent by post to . . . the place where the . . . company to "whom they are addressed is carrying on . . . business, and shall "be deemed to have been received not later than twenty-four hours "after the same are so sent." The contract also contained a clause whereby the parties expressly agreed that the obtaining of an award "shall be a condition precedent to the right of either "contracting party to sue the other in respect of any claim "arising out of this contract. . . ."

A dispute which arose over the performance of the contract was referred to arbitration, and on July 30, 1952, an award was made in favour of the plaintiffs. On August 12, 1952, the defendants, by letter, notified the plaintiffs of the appeal, but by inadvertence the letter, though addressed to the plaintiffs in the town where they carried on business, bore the name of the street and the number therein where another company, bearing a

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similar name, carried on business. That other company received the letter and forwarded it to the plaintiffs, but it did not reach the plaintiffs until after the expiry of fourteen days from the date of the award.

On December 12, 1952, Sellers J., in an action brought by the plaintiffs, in substance to enforce the award, granted a declaration that the award was valid and conclusive and that the defendants had no right to prosecute an appeal to the appeals committee of the association. On appeal by the defendants:—

*Held*, that the deeming clause for receipt within twenty-four hours did not cover a notice posted to a wrong or misleading address, and therefore condition (*c*) of rule 11 of the contract, which required notice that an appeal had been claimed to be given in writing by the appellant direct to the other party within fourteen days, had not been complied with, and no appeal could be pursued. Moreover, although a notification sent by the secretary of the London Corn Trade Association that an appeal had been entered had reached the plaintiffs in time, it was not a good notice under condition (*c*), neither the association nor its secretary being the agent of the defendants. The award was therefore final and conclusive:—

*Held*, further, that the dispute in issue was not one arising out of the contract, but one arising out of the award, and therefore the jurisdiction of the courts was not ousted by the condition precedent clause.

Decision of Sellers J. [1953] 1 W.L.R. 207 affirmed.

APPEAL from Sellers J.[1]

The plaintiffs were a trading corporation incorporated under the laws of Germany, with headquarters at Duisberg, Germany, and a branch establishment at Niedenau 59, Frankfurt am Main. By an agreement in writing entered into on November 17, 1950, they agreed to buy and the defendants, a company carrying on business in Buenos Aires, agreed to sell, a quantity of River Plate wheat. The contract was expressed to incorporate and be subject to the London Corn Trade Association Ld. contract No. 41 (Rye Terms) which contained provisions for arbitration in London and provided, inter alia, as follows: "Buyer and seller agree that for "the purpose of proceedings either legal or by arbitration, this "contract shall be deemed to have been made in England, and to "be performed there, . . . and the courts of England or arbitrators "appointed in England . . . shall . . . have exclusive jurisdiction "over all disputes which may arise under this contract. Such "disputes shall be settled according to the law of England. . . . "Any party to this contract . . . shall, for the purposes of pro-"ceedings at law or in arbitration, be considered as ordinarily "resident or carrying on business at the office of the London "Corn Trade Association Ld. . . . The service of proceedings "upon any such party by leaving the same at the office of the "London Corn Trade Association Ld. together with the posting "of a copy of such proceedings to his address abroad . . . shall "be deemed good service. . . ."

[1] [1953] 1 W.L.R. 207.

The contract further provided: "All disputes . . . arising out "of this contract, including any question of law appearing in the "proceedings . . . shall be referred to arbitration, according to "the arbitration rule endorsed hereon. . . . Neither buyer, seller ". . . nor any . . . person claiming under either of them, shall "bring any action against the other of them in respect of any "such dispute until such dispute has been settled by arbitrators "or by the Committee of Appeal . . . and it is expressly agreed "that the obtaining of an award from either tribunal . . . shall "be a condition precedent to the right of either contracting party "to sue the other in respect of any claim arising out of this "contract. . . . The arbitration to be held in London."

By rule 11 of the contract: "Arbitration. All disputes from "time to time arising out of this contract shall be referred to "two arbitrators . . . or to an umpire to be appointed by the "arbitrators . . . if they disagree. . . . Appeal. In case any "party to an award shall be dissatisfied with the award a right "of appeal shall lie to the Committee of Appeal . . . provided "the following conditions are complied with: (*a*) The costs of "the award . . . have been paid by one of the parties thereto. . . . "(*b*) Notice claiming appeal is given to the secretary of the "Association within fourteen consecutive days from the date of "the award. . . . (*c*) Within the said fourteen consecutive days, "notice that the appeal has been claimed is given by the appel-"lant direct to his seller or buyer, as the case may be. . . . "Notices under this rule to be given in writing, and sent by post "to, or left at the place where the person, firm or company to "whom they are addressed is carrying on or (by reason of the "provisions of the contract) is to be considered as carrying on "business, and shall be deemed to have been received not later "than twenty-four hours after the same are so sent or left."

A claim by the plaintiffs against the defendants arising out of the performance of the contract was submitted to arbitration in accordance with the terms of the contract. The arbitrators, disagreeing, appointed an umpire, who on July 30, 1952, awarded, on a finding that the defendants were in default, that they should pay to the plaintiffs $(U.S.)195,750. On August 11, 1952, the defendants' agents notified the secretary of the London Corn Trade Association by letter that they had received instructions to give notice of appeal against the umpire's award. On August 11, 1952, the secretary of the association wrote to the plaintiffs at their Duisberg address notifying them of the defendants' appeal, and the defendants received that letter on August 13.

On August 12, 1952, the defendants wrote to the plaintiffs giving notice that on August 11 they had given notice of appeal against the award to the secretary of the London Corn Trade Association. The letter was addressed to the plaintiffs by name at Friedrich-Ebert Strasse 27, Frankfurt am Main, and was posted in Paris on August 12 in an envelope similarly addressed. That was not the address of the plaintiffs' branch office in Frankfurt,

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but was the address of another company with a similar name. That other company received the letter on August 14, and forwarded it by post to the plaintiffs' branch office at Niedenau 59, Frankfurt, where it was received on August 15. On the same day it was forwarded to the plaintiffs' main office at Duisberg, where it was received on August 16.

The plaintiffs contended that the dispatch of the letter of August 12 did not constitute a compliance with condition (*c*) of the conditions of appeal contained in the contract, in that it was not sent to them at the office of the London Corn Trade Association; alternatively, that it was not addressed to them at their place of business, nor was it received by them within fourteen days of the date of the award. They therefore by the present action claimed declarations that the award of the umpire was valid, final and conclusive; that the defendants had no right to prosecute an appeal from the award; and that the appeal committee of the London Corn Trade Association had no jurisdiction to hear or entertain an appeal. They further claimed an injunction restraining the defendants from prosecuting an appeal.

The defendants contended that the notice of August 12 must be deemed to have been received twenty-four hours after the time of posting and therefore the conditions of the contract had been complied with; alternatively, that the secretary of the association, in notifying the plaintiffs of the appeal, must be taken to be the defendants' agent; and that the matters in issue in the action were disputes arising out of the contract and therefore the plaintiffs were precluded by the condition precedent clause in the contract from maintaining the action.

On December 12, 1952, Sellers J. granted a declaration that the award was valid, final and conclusive and that the defendants had in the circumstances no right to prosecute an appeal to London Corn Trade Association Appeal Committee.

The defendants appealed.

*Eustace Roskill Q.C.* and *Andrew Bateson* for the defendants.
*T. G. Roche* for the plaintiffs.

Singleton L.J., having stated the facts, continued: Three points raised by Mr. Roskill, on behalf of the defendants, fall for consideration. The first is that the letter of August 12, 1952, written by the defendants to the plaintiffs, but wrongly addressed, was a good notice within the meaning of the rule of form contract No. 41, which deals with notices of appeal. The form of contract No. 41 is not an easy document with which to deal. On the face of the document there is a reference to arbitration, which appears under the side note "Brokerage," and there is reference to proceedings. On the back of the form, under "Conditions and Rules," rule 11 relates to arbitration. It is a long rule. Part of the rule is concerned with appeals, and the concluding words deal with notices. Under "Appeal"

there is this provision: "In case any party to an award shall be "dissatisfied with the award a right of appeal shall lie to the "Committee of Appeal elected for that purpose in accordance "with the rules and regulations of the London Corn Trade "Association Ld., in force at the date of the contract, provided" conditions (*a*), (*b*), (*c*) and (*d*) are complied with. The parties have agreed that there shall be a right of appeal if those four conditions are complied with and not otherwise. Conditions (*a*), (*b*) and (*d*) were complied with by the defendants. It is said that there was no compliance with (*c*) and that therefore there is no right of appeal given to the defendants.

Condition (*c*) reads: "Within the said fourteen consecutive "days, notice that the appeal has been claimed is given by the "appellant direct to his seller or buyer, as the case may be." The concluding words of rule 11 are: "Notices under this rule "to be given in writing, and sent by post to, or left at the place "where the person, firm or company to whom they are addressed "is carrying on or (by reason of the provisions of the contract) "is to be considered as carrying on business, and shall be deemed "to have been received not later than twenty-four hours after "the same are so sent or left."

The fourteen days expired on August 13—I think at midnight, August 13–14; so that the letter of August 12, the one which was addressed to the wrong address, was in time, and it would have been a good notice under the rule if it had been addressed to the proper address. Mr. Roskill submitted that it ought to be so regarded. He said that it was sent to the plaintiffs; it was sent direct to them; it was sent by post; and he submitted it was sent to the place where the company to whom it was addressed carried on business by reason of the fact that "Frankfurt" appeared on the envelope and on the letter. The question which arises, then, is, can it be said that that document was sent by post to the place where the plaintiffs were carrying on business? It seems to me that the answer to that problem must be "No": it was sent, and it was addressed, to a place in Frankfurt at which another company altogether carried on business; it was not sent to the place at which the plaintiffs carried on business, unfortunate though it is.

Sellers J., in considering this point, was inclined to think that if the letter had been addressed to "Frankfurt" merely, without stating any address, it would have been a sufficient compliance with the rule. That may be so. The judge did not express any final opinion as to that. A number of circumstances would have to be considered: (a) the size of the plaintiffs' business at Frankfurt, and (b) the size of Frankfurt. In many cases it might be quite sufficient to send the letter to a well-known business house addressed to the town. It would not be so in every case. It depends on a number of circumstances. This letter was addressed to the wrong address, and, though I regret to have to say it, the point raised by Mr. Roskill, that

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this letter of August 12 was a good notice of appeal under the rule, fails.

It is then submitted that if the letter dated August 12 was not a good notice, still it is open to the defendants to say that the letter of August 11, addressed by the secretary of the association to the plaintiffs, was a good notice, and it is claimed that the defendants can rest their case on that as an alternative. That letters informs the plaintiffs that the secretary had received from the defendants notice of appeal: "Please note that Messrs. "Contimar, S.A.C. Industrial, Comercial y Maritima, Buenos "Aires, have this day appealed against an award dated July "30, 1952, respecting above." It is said that that is quite sufficient communication for all practical purposes; the plaintiffs knew as from August 12 that there was to be an appeal. There can be no doubt as to that. The submission made by Mr. Roskill is that the letter written by the secretary of the association was written as agent for the defendants, and that therefore it is a good notice under the rule. The answer to that appears to me to be: the secretary of the association was not the agent of the defendants; he was not purporting to act as such; nor did anyone ever think that he was acting in that capacity; and I cannot see that the defendants can be heard to say that for this purpose—the purpose of giving notice under the rule—the secretary of the association must be treated as the agent of the defendants. The only reason for so saying is that unfortunately the other notice was out of order; there is no other reason. The association was not agent for the defendants at all: the passing on of the information was an act of courtesy on the part of the association and of its secretary. That point fails.

Another point of some interest arises on this part of the case. On the face of form No. 41 there appear these words: "Any "party to this contract residing or carrying on business else-"where than in England or Wales, shall, for the purposes of "proceedings at law or in arbitration, be considered as ordinarily "resident or carrying on business at the office of the London "Corn Trade Association Ld., and if in Scotland, he shall be "held to have prorogated jurisdiction against himself to the "English courts, or if in Northern Ireland to have submitted to "the jurisdiction, and to be bound by the decision of the English "courts." The plaintiffs are a German company residing or carrying on business elsewhere than in England or Wales. So by that clause they are to be considered, for the purposes of proceeding at law or in arbitration, as ordinarily resident or carrying on business at the office of the London Corn Trade Association Ld.

To return to the back of the form, there are the words: "Notices under this rule"—rule 11—"to be given in writing, "and sent by post to, or left at the place where the person, firm "or company to whom they are addressed is carrying on or (by "reason of the provisions of the contract) is to be considered as

"carrying on business, and shall be deemed to have been "received not later than twenty-four hours after the same are "so sent or left."

Mr. Roche, on behalf of the plaintiffs, submitted that as the plaintiffs were a company carrying on business elsewhere than in England, they must be considered as carrying on business at the office of the London Corn Trade Association; therefore they fell within the words in brackets on the back of the form "by "reason of the provisions of the contract," and thus the only place of service on them was the office of the association. That point was considered by Sellers J. and he reached the view that on the provisions there was in such a case an alternative, and that service could be either at the place at which the foreign company was in fact carrying on business or at the office of the London Corn Trade Association. I am bound to say that I think that that is the sensible way to look at it. I am not wholly satisfied that it is the true way; but I do not think that it is necessary for the court to resolve that question. These matters as to notices and service of proceedings, whether legal or by arbitration, are very involved; they are unnecessarily complicated. If I thought that it would help anyone if I expressed the view that I have formed on that question, I would do so. I do not think that it would. There is another provision altogether as to service on the face of the document which follows the part I read: "The service of proceedings upon any such party "by leaving the same at the office of the London Corn Trade "Association Ld., together with the posting of a copy of such "proceedings to his address abroad, or in Scotland or Northern "Ireland, shall be deemed good service, any rule of law or "equity to the contrary notwithstanding."

It may be that a notice of appeal is not a proceeding within those words. On the other hand, it may be. This form of contract is of importance. It must be satisfying to every lawyer, and I should think to most of those engaged in commerce in this country, to know that the company from Buenos Aires and the company from Duisburg, who enter into contractual relationship, are ready to do so upon this form of contract with arbitration in London. It is a matter of value to lawyers and to others in this country. Everyone likes to think that foreign nations are ready and willing to submit their contracts to the decision of our courts upon such a form of contract. I believe that it would be to the advantage of everyone if the provisions as to notice, and as to service, upon this document were made much clearer than they are. It needs really more than cutting out some of them. I imagine that pieces have crept in here and there from time to time. It could be made simple and it could avoid some of these questions that have arisen, but I do not think that this court ought to express a view upon the interpretation of that document in a case in which I regard the document itself as confusing. It is unnecessary for the purposes of this case.

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The form ought to be corrected or altered in the interests of everyone.

Mr. Roskill raised a further point, which is more complicated than those with which I have dealt so far. I will try to express it shortly. The form provides under the marginal note of "Brokerage" or immediately following: "Buyer and seller "agree that, for the purpose of proceedings, either legal or by "arbitration, this contract shall be deemed to have been made "in England, and to be performed there, any correspondence in "reference to the offer, the acceptance, the place of payment or "otherwise notwithstanding, and the courts of England or "arbitrators appointed in England, as the case may be, shall, "except for the purpose of enforcing any award made in pur-"suance of the arbitration clause hereof, have exclusive "jurisdiction over all disputes which may arise under this "contract. Such disputes shall be settled according to the law "of England whatever the domicile, residence, or place of "business of the parties to this contract may be or become." And later: "Neither buyer, seller, trustee in bankruptcy, nor "any other person claiming under either of them, shall bring any "action against the other of them in respect of any such dispute "until such dispute has been settled by arbitrators, or by the "Committee of Appeal, as the case may be, and it is expressly "agreed that the obtaining an award from either tribunal, as "the case may be, shall be a condition precedent to the right "of either contracting party to sue the other in respect of any "claim arising out of this contract."

It was under those provisions that the dispute arising out of the contract was referred to arbitration and the umpire awarded the amount which I have stated in favour of the plaintiffs, the buyers. The defendants desired to appeal against that award. When the question as to their notice or notices arose, the plaintiffs issued a writ claiming relief. The submission of Mr. Roskill was that that which had arisen under the notice was a dispute arising under and out of the contract, and that therefore that dispute must be referred to arbitration. He submitted that this action must fail by reason of the words that an award should be a condition precedent to the right of either party to sue the other in respect of any claim arising out of this contract. On the other hand, it was submitted that the question whether the notice of appeal was in order or not, or whether there was a good notice of appeal, was not a question arising out of the contract but was a question arising out of the award, which was something different.

One way to look at the point which is raised is this: it might be said that if this point was to be taken, the proper time to take it, or a proper time, was at an earlier stage by an application to stay this action. If that step had been taken, it would have been the duty of the court to consider whether or not the dispute which has now arisen was a dispute arising out

of the contract or not, and before the action could, or would, be stayed, it would have to be shown that the dispute was one which the parties had agreed should be referred to arbitration. Indeed, that is the point which arises now.

The answer put forward by Mr. Roche is that it is not a matter for arbitration at all: it is a matter which goes to jurisdiction. At first it was thought by Sellers J. that Mr. Roskill's point was that the appeal tribunal should consider this question of jurisdiction. Sellers J.'s judgment dealt with that submission; he pointed out that the appeal tribunal could not give itself jurisdiction; that the question of jurisdiction was one for the court. Mr. Roskill made it clear at some stage, and he certainly made it clear to this court, that what he was saying was that the dispute as to the notice was a dispute to be referred to arbitration by a fresh notice, that new arbitrators should be appointed. They probably would not agree, another umpire would be appointed, and quite likely there would be another notice of appeal. In the meantime, the first appeal would be awaiting the determination of that question. So that upon Mr. Roskill's final submission upon this part of the case, the point of law whether either of the notices was good or not would have to be decided by arbitration first; an appeal would lie to the appeal tribunal; then I suppose there would be an application for a case to be stated, and that issue might come to this court not quite as directly as it has come.

I cannot think that that is right. If this court is bound to say that that is what should happen, it is reducing the whole thing to absurdity. That is my view, and I feel that this court ought to avoid coming to such a conclusion unless by the terms of the contract we are forced to do so.

We were referred to several authorities. The most useful passage is probably to be found in *Attorney-General for Manitoba* v. *Kelly*,[1] where Lord Parmoor, in giving the opinion of the Board, said: "It would be impossible to allow an umpire to "arrogate to himself jurisdiction over a question which, on the "true construction of the submission, was not referred to him. "An umpire cannot widen the area of his jurisdiction by holding, "contrary to the fact, that the matter which he affects to decide "is within the submission of the parties. In the present "instance there has been a difference of opinion as to the extent "of the jurisdiction which has been conferred by the submission "upon the umpire. The majority of the Court of Appeal have "adopted a narrower construction than Curran J. and Cameron "J.A." Apart from that, it seems to me that when one looks at the words of the document, this dispute upon the question of notice of appeal is not, and ought not to be regarded as, a dispute arising out of the contract. I think that the way to look at it is

[1] [1922] 1 A.C. 268, 276; 38 T.L.R. 281.

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that it is a dispute which goes to jurisdiction, for it is a dispute arising upon the award and not out of the contract. For those reasons I feel that that point of Mr. Roskill's fails.

Those are the three points which he raised. There were others raised by Mr. Roche in reply. I do not propose to go into them. I do not think that it is helpful to go into matters which are not strictly relevant for our decision. This is not an easy case. It affects a considerable amount of money. I said earlier, and I repeat, that I cannot help feeling some regret at having to state the decision at which I have arrived, for by the merest accident the defendants are, upon my view, barred from the right of appeal. I suppose someone looked in the telephone book for the address of the plaintiff company at Frankfurt; the other company's name was surprisingly like the plaintiff's name, and the wrong address was put on. In the result, the German company is entitled to say that upon the contract between the parties the award which it obtained from the umpire is final and conclusive; for I do not think that it would be right to do that which Mr. Roskill suggested we should do, *viz.*, order that another arbitration should determine whether in fact this award is final and conclusive. I agree with the judgment of Sellers J., and all that this court can properly do is to say that the appeal must be dismissed.

JENKINS L.J. I agree. It seems plain that the plaintiffs in fact received notice of the defendants' intended appeal within the stipulated period of fourteen consecutive days from July 30, 1952, the date of the award. That being so, I would gladly have held, had I felt it open to us to do so, that, whatever deficiencies there may have been in the notice given to the plaintiffs in point of form, nevertheless the appeal should be considered competent, because the real substance and intention of the provisions as to notice had been carried out. To my regret, I find it impossible to regard that attractive method of dealing with the matter as open to the court. The parties have chosen to contract by reference to the London Corn Trade Association Ltd., form 41. That form includes an arbitration clause and provides that "the award in writing, on an official "form, of the two arbitrators or their umpire (subject only to "the right of appeal hereinafter mentioned) shall be conclusive "and binding." It then proceeds to give a right of appeal upon certain conditions, in these terms: "In case any party to an "award shall be dissatisfied with the award a right of appeal "shall lie to the Committee of Appeal elected for that purpose "in accordance with the rules and regulations of the London "Corn Trade Association Ltd. in force at the date of the contract, "provided the following conditions are complied with—." The award is thus final and binding subject only to a right of appeal, the existence of which is made to depend on the fulfilment of the conditions stated.

In those circumstances, it seems to me that the conditions must be strictly complied with in order to secure the right of appeal. Mr. Roskill, notwithstanding the many difficulties in his way, has sought to show that, by one road or another, condition (*c*), to the effect that "within the said fourteen consecutive days, notice that the appeal has been claimed is given by "the appellant direct to his seller or buyer, as the case may be," has in fact been sufficiently complied with. He relies, first of all, on the letter of August 12, 1952, addressed to the plaintiffs at Frankfurt, but with a wrong street and number, and he says that that was a good service of the notice upon the plaintiffs. I cannot accept that argument. It seems to me that the requirement as to notices at the end of the rules on the back of the form—"Notices under this rule to be given in writing, and sent "by post to, or left at the place where the person, firm or "company to whom they are addressed is carrying on or (by "reason of the provisions of the contract) is to be considered as "carrying on business, and shall be deemed to have been "received not later than twenty-four hours after the same are "so sent or left"—plainly demands a notice properly addressed to the party concerned at that which is in fact his place of business. The letter of August 12 did not comply with that requirement; it was addressed to the address of an entirely different company, and in the result it did not in fact reach the plaintiffs until after the period of fourteen consecutive days had run out. It seems to me quite impossible to those circumstances to hold that to have been a good notice.

Nor, to my mind, is it necessary to consider what degree of particularity in an address is sufficient for this purpose. Each case must depend upon its own particular facts, and, as the judge was inclined to think, and as my Lord has said might be possible in some cases, it may be that if the party to be given notice was sufficiently well known in, for example, Frankfurt, a letter addressed to that party simply at Frankfurt, without further particularity, might on the facts be a sufficient description or designation of his business address to enable him to be found by the notice in the ordinary course of post. But instances of that sort must, in my view, depend on evidence in each particular case. There would have to be evidence to the effect that the party concerned was so well known in the town in question that he would, barring accidents, surely be found in the ordinary course of post merely by addressing to the town. There is no evidence of that sort in the present case, and if there were, it would carry the defendants no further, for in this case it was not a question of an address which might or might not be sufficient; it was a question of an address which was manifestly wrong; the letter was addressed to the wrong place.

Nor can I accept Mr. Roskill's argument based on the provision to the effect that notices sent by post to, or left at, the place where the person, firm or company to whom they are addressed

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is carrying on or (by reason of the provisions of the contract) is to be considered as carrying on business, "shall be deemed to "have been received not later than twenty-four hours after the "same are so sent or left." If a letter is addressed to the wrong address when put in the post, in my view it is impossible for the sender to contend that he has complied with the provisions as to notices, because one of those provisions says that a notice sent by post shall be deemed to have been received not later than twenty-four hours after the same is posted. Provisions of that kind are not uncommon, and it is plain to my mind that they are designed to cover miscarriage in the post or delay in delivery of a letter properly addressed; they are not intended to make good deficiencies in the address. Accordingly, I agree with my Lord that the letter of August 12, 1952, cannot be relied on as a sufficient compliance with condition (*c*).

Nor, in my view, can the letter sent by the secretary of the London Corn Trade Association be so regarded. As my Lord has pointed out, the secretary was not in fact the agent of the defendants to send a notice. He did not purport to send it as agent for the defendants. It was sent by the secretary of his own motion as an independent measure which he took in his capacity as secretary of the London Corn Trade Association. It is no doubt true that this notice did have the result of bringing to the knowledge of the plaintiffs at Duisberg the fact that the defendants intended to appeal, but, in the face of the two distinct conditions about notices, that is to say, (*b*) the one requiring notice of appeal to be given to the secretary of the Association within fourteen consecutive days from the date of the award, and (*c*) the one requiring notice to be given by the appellant direct to his seller or buyer within the same period, I cannot hold that a notice indirectly given by the secretary, after receipt by him of notice of appeal, under condition (*b*), can be regarded as satisfying the separate requirements of condition (*c*), which in terms demands a notice sent by the appellant direct to his seller or buyer.

Accordingly, in my opinion, upon the true construction of these conditions and in the events which have happened, the conditions have not been fulfilled within the prescribed period of fourteen consecutive days, with the result that, the possibility of appeal having gone, the award has become conclusive and binding upon all parties without qualification.

Mr. Roskill also made a submission by way of objection to the jurisdiction on the strength of this provision in the arbitration clause on the face of the document: "Neither buyer, seller, "trustee in bankruptcy, nor any other person claiming under "either of them, shall bring any action against the other of them "in respect of any such dispute until such dispute has been "settled by arbitrators, or by the Committee of Appeal, as the "case may be, and it is expressly agreed that the obtaining an "award from either tribunal, as the case may be, shall be a

"condition precedent to the right of either party to sue the other "in respect of any claim arising out of this contract." As to this submission, I would say that, speaking for myself, I have grave doubt whether it ought to be entertained at all by this court, having regard to the course the argument has taken before us and in the court below. Mr. Roskill says that in a case of this sort, where there is what is known as a "*Scott* v. *Avery*" clause, the party relying on the submission by way of objection to the jurisdiction is entitled to take his objection at the hearing as a submission in bar, and is not obliged to move before taking any other step in the proceedings, under what is now, I think, section 4 of the Arbitration Act, 1950.

That may be so. Nevertheless, there is a time at which the submission in bar should be made, and in my view the submission should be made before the party making it engages upon argument designed to obtain a decision of the court in his favour on the very point which he says the court has no jurisdiction to determine. The course the matter took here and before the judge was that Mr. Roskill argued the point and he submitted and invited the court to hold that the right of appeal was still open because the conditions had been duly complied with. And then he said (in effect): "If I am wrong in that, I say that "there is no jurisdiction, because this very matter that I have "been arguing before the court is not one for the court to enter-"tain at all: it should be referred to a further arbitration."

If there is to be a submission by way of objection to the jurisdiction, in my view, that method of taking it is fraught with the gravest inconvenience; for observe the result. The judge, having heard all the arguments, held that the right of appeal was not open because the conditions had not been complied with. This court, again after full argument, comes to the same conclusion and confirms the judge's decision. In the face of these concurrent decisions of both courts, what useful purpose would be served by sending the matter back to arbitration for the arbitrators to decide whether the conditions have been fulfilled? The arbitrators at first instance, and the arbitrators on appeal, would be constrained to hold that the conditions had not been fulfilled, because they would be faced by a decision of the Court of Appeal to that effect. Moreover, the court on any case stated would be bound so to hold at first instance, and higher, until ultimately the dispute reached the House of Lords. To allow this objection at this stage in the proceedings, in view of the course the proceedings have taken, would be a matter of great inconvenience to the plaintiffs and embarrassment to the arbitrators, and would cause much unnecessary delay and expense. For my part, I would on these grounds alone be most reluctant to allow it.

As to the merits of the objection, in my view the question whether the conditions precedent to the right of appeal have been fulfilled is not a dispute under the contract or arising

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out of the contract within the meaning of the arbitration clause. In my view, the provision imposing these conditions is a provision stating the conditions upon which alone the parties were prepared to submit a matter already the subject of an award to further arbitration by way of appeal; and in my view it is clear that the question whether conditions such as those, which form the foundation of the arbitrators' jurisdiction, have been fulfilled, cannot itself be a question within the scope of the arbitrators' authority, for it is only if the conditions are in fact fulfilled that the arbitrators have any jurisdiction at all.

I think that that view of the matter is supported by a passage in the speech of Lord Parker of Waddington in *Produce Brokers Co. Ld.* v. *Olympia Oil and Cake Co. Ld.*,[2] and also by the passage to which my Lord has already referred from the advice in the Privy Council case, *Att.-Gen. for Manitoba* v. *Kelly*.[3] Indeed, I think that Mr. Roskill conceded that he could not maintain that the Appeal Committee would have jurisdiction to determine whether the conditions had been fulfilled or not; but he said that this was nevertheless a dispute under the contract, within the original submission, if I may so describe it, to the arbitrators at first instance; and he said that inasmuch as the matter went not to their own jurisdiction but to the jurisdiction of the Appeal Committee, those arbitrators could take it into consideration.

In my view, that way of putting the case must also fail. The arbitrators at first instance have made an award. Unless the conditions giving the dissatisfied party a right of appeal have been fulfilled, that award is final and binding. If the award is final and binding because the conditions on which the right of appeal depends have in fact not been fulfilled, it seems to me plain that no arbitrators at first instance can have any locus standi in the matter or any jurisdiction to say that an award which in fact has become final and binding is still open to appeal. Nor does it seem to me possible to hold that arbitrators at first instance would have jurisdiction to make an appeal competent by holding that the conditions have been fulfilled when in fact they have not.

To put the matter in another way, these provisions for arbitration, as I view them, have two stages: there is a stage at first instance and there is an appeal stage. The arbitrators at first instance, to whom the dispute is referred, decide the dispute and make their award. They then, as it seems to me, are functi officio so far as that award is concerned, and any question arising thereafter as to the competence of any appeal from that award is outside their sphere of jurisdiction. The question whether the dissatisfied party has complied with the conditions entitling him to appeal arises at the second, or appellate, stage of arbitration. The provisions as to appeal are in the nature of a further

[2] [1916] 1 A.C. 314, 327; 32 T.L.R. 115.

[3] [1922] 1 A.C. 268.

or supplementary submission, and the parties have agreed to it upon certain conditions, those conditions being the ones to which I have already referred in regard to notices, and so on. It was agreed by the parties that if those conditions were fulfilled, but not otherwise, there was to be a further reference to arbitration by way of appeal from the original arbitration, and in my view that submission was only made on condition that the requirements I have mentioned should in fact have been fulfilled. The question whether the conditions have in fact been fulfilled is, to my mind, a matter wholly outside the scope of either submission, that is to say, wholly outside the scope of the submission to the arbitration at first instance and wholly outside the scope of the submission to arbitration by way of appeal. Like my Lord, I find it unnecessary to consider the other points which were taken by Mr. Roche, and, for the reasons my Lord has given and those I have endeavoured to express, I agree that this appeal fails and should be dismissed.

MORRIS L.J. I am in agreement with the judgments which have been delivered by my Lords, and I only add a few words because of the importance of the case to the parties. They are foreign companies and have agreed that their disputes should be subject to the arbitrament of the British courts. I regret the result at which we feel compelled to arrive, but the parties have contracted in the terms of the contract which is before us, and it is our duty to give effect to what is, in our view, the proper construction of the terms of the contract.

In regard to the first part of Mr. Roskill's argument, it does not seem to me that the letter of August 12 meets the requirements of the words: "Notices . . . to be given in writing, and "sent by post to . . . the place where the . . . company to whom "they are addressed is carrying on . . . business." The plaintiffs were not carrying on business at the place to which the letter was addressed. Nor, in my judgment, do the concluding words avail Mr. Roskill: "and shall be deemed to have been received "not later than twenty-four hours after the same are so sent." Those words have reference to notices complying with the terms of the early part of the clause, and the word "so" gives point, in my judgment, to this view. In spite of Mr. Roskill's valiant effort, I do not feel that he succeeds either in regard to his first and main contention, or in regard to his contention based upon the letter written by the secretary of the London Corn Trade Association. I cannot regard that letter as having been written by the secretary as agent for the defendants. The letter does not purport to have been written as an agent, or on behalf, of the defendants, and, furthermore, there was nothing that I can find by way of ratification.

The further point taken by Mr. Roskill is to the effect that he has a complete answer to the action because of the provisions of the arbitration clause which includes a "*Scott* v. *Avery*" clause.

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The position was that there was an award, and, after the notices to which consideration has been given, were sent, a date was fixed for the hearing of the appeal. It was fixed for October 14. Then the plaintiffs wrote and asked if that date would be vacated, but the defendants were unwilling to agree. The result was that this action was commenced by writ dated September 22. After the issue of the writ the appeal committee agreed that pending the decision of the court no hearing of the appeal would take place.

I find myself in full agreement with the observations which Jenkins L.J. has just made in regard to the curious position which now arises. If Mr. Roskill were right in regard to this point, the result would be that this action would fail. There would then have to be an arbitration to determine matters which were argued fully before Sellers J., and in regard to which he gave his decision, and which have now been fully argued on appeal in this court, and in regard to which all members of this court have given their opinions, concurring with those reached by Sellers J. The result would, therefore, be strange indeed, for there would have to be an arbitration, the result of which would be a foregone conclusion. The arbitrators and umpire would be obliged to follow the decisions given by the courts. But, however strange, unreal and unprofitable would be the arbitration proceedings, if Mr. Roskill's argument is correct, I suppose effect would have to be given to it and an arbitration would have to take place. I do not, however, find myself able to agree with his argument.

The important words in this connexion are these: "All "disputes from time to time arising out of this contract, "including any question of law appearing in the proceedings . . . "shall be referred to arbitration"; and then further on: "Neither buyer, seller, trustee in bankruptcy, nor any other "person claiming under either of them, shall bring any action "against the other of them in respect of any such dispute until "such dispute has been settled by arbitrators, or by the Com-"mittee of Appeal, as the case may be." I think the words "such dispute" there must refer to the words which have gone earlier, "disputes from time to time arising out of the contract." Then the words go on: "and it is expressly agreed that the "obtaining an award from either tribunal, as the case may be, "shall be a condition precedent to the right of either contracting "party to sue the other in respect of any claim arising out of "this contract."

So the question arises, are the plaintiffs suing in respect of a claim arising out of the contract? In my judgment, they are not. The plaintiffs did have a claim arising out of a contract. They said that there was non-fulfilment of the contract. They had an award. Now the defendants are seeking to upset that award by an appeal without complying with the conditions for an appeal. In my judgment, the matters now raised are not

matters properly to be described as a claim arising out of the contract, nor as a dispute arising out of the contract. The dispute would never have arisen but for the contract, but the real dispute between the parties was determined and an award was made. The present dispute is once removed from the contract. It is a dispute in respect of facts arising subsequent to an award. It is true that the contract must be looked at because it is necessary to see what were the provisions as to appeal; but the plaintiffs are taking steps to prevent an appeal which is not in order. They are preserving or defending an award which they have, and which was made in respect of a dispute arising out of the contract. In so doing they are not suing in respect of a claim arising out of the contract. They are taking steps to repel an unauthorized attack upon their award.

I consider that this appeal must fail.

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*Appeal dismissed.*
*Leave to appeal to House of Lords.*

Solicitors: *Thomas Cooper & Co.; Richards, Butler & Co.*

A. W. G.

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[CHANCERY DIVISION.]

## * INLAND REVENUE COMMISSIONERS *v.* NICOLSON.

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*Apr.* 30; *May* 1.
Upjohn J.

*Revenue—Income tax—"Seven-year covenant"—Claim for exemption from payment of tax—Conditions to be satisfied—Finance Act*, 1938 (1 & 2 *Geo.* 6, *c.* 46), *s.* 38 (1).

By a deed dated March 27, 1943, P. N., defined therein as the settlor, executed a declaration of trust in favour of herself and one B. as trustees of the "F. B. Memorial Fund," which was a fund formed for exclusively charitable objects. Clause 3 of the deed provided: "The settlor hereby covenants with the trustees that so "long as the settlor lives she the settlor will pay to the trustees the "monthly sum of £350 without any deduction except for income "tax to accrue as from" April 6, 1942, "and to be paid as to the "amount thereof accrued down to the date hereof on the execution "of these presents and as to the sums hereafter to accrue on the "last day of every month. . . . Provided always that the settlor "shall have power exercisable by deed at any time or times after "the expiration of seven years from the date hereof to revoke wholly "or partially the foregoing covenant." Down to and including February 28, 1950, the settlor deducted tax from the sums payable under the covenant contained in the deed, and the trustees, as charitable trustees, recovered the tax under section 37 of the Income Tax Act, 1918.

On February 28, 1950, shortly before the power of revocation became exercisable on March 28, 1950, the settlor executed a supplemental deed to the declaration of trust of March 27, 1943, in these terms: "Notwithstanding anything in the said declaration of trust

[Reported by J. A. GRIFFITHS, Esq., Barrister-at-Law.]

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"to the contrary the power of revocation given to the settlor by the "said declaration of trust shall not be exercisable by her until after "the expiration of" March 27, 1953, "and (so far only as may "be necessary to give full effect to the terms of this declaration "hereinbefore contained) the settlor hereby in exercise of every "statutory or other power enabling her in this behalf releases this "said power of revocation to this intent that the same shall not be "exercisable except as aforesaid."

The question therefore arose whether in respect of payments falling due on and after March 31, 1950, the income, having regard to section 38 of the Finance Act, 1938,[1] was to be deemed to be the income of the settlor, or whether it was to remain the income of the charity trustees. The Special Commissioners held that it remained the income of the trustees. On appeal:—

*Held*, that payments falling due on and after March 31, 1950, must be deemed to be the income of the settlor, and that they did not come within the proviso of section 38 (1) of the Finance Act, 1938. For the proviso to apply, there must be found in the settlement, whether constituted in one document or in two or more documents so as to form a compound settlement, (a) an obligation to pay; (b) a power to revoke; (c) a suspension of that power to revoke for at least six years from the first payment. If the only settlement was the settlement of 1943, then for the relevant period the power to revoke was no longer suspended. If the relevant settlement was the settlement of 1943, coupled with the deed of 1950, then the first payment thereunder fell due on March 31, 1950, and the proviso was not satisfied because the power of revocation came into operation in 1953, within six years of the first payment due under the compound settlement.

*Taylor* v. *Inland Revenue Commissioners* [1946] 1 All E.R. 488n.; 27 T.C. 93 (C.A.) applied.

CASE STATED.

The Crown appealed from a decision of the Commissioners for the Special Purposes of the Income Tax Acts reversing a decision of the Commissioners of Inland Revenue in respect of a claim for exemption from income tax under the provisions of section 37 of the Income Tax Act, 1918.

[1] Finance Act, 1938, s. 38 (1): "If and so long as the terms of any "settlement are such that—(*a*) any "person has or may have power, "whether immediately or in the "future, and whether with or with-"out the consent of any other person, "to revoke or otherwise determine "the settlement or any provision "thereof and, in the event of the "exercise of the power, the settlor or "the wife or husband of the settlor "will or may cease to be liable to "make any annual payments payable "by virtue or in consequence of any "provision of the settlement; or (*b*) ". . . [then] . . . any sums payable "by the settlor or the wife or husband "of the settlor by virtue or in conse-"quence of that provision of the "settlement in any year of assess-"ment shall be treated as the income "of the settlor for that year and not "as the income of any other person: "Provided that, where any such "power as is referred to in para-"graph (*a*) of this subsection cannot "be exercised within the period of "six years from the time when the "first of the annual payments so "referred to becomes payable, and "the like annual payments are pay-"able in each year throughout that "period, the said paragraph (*a*) shall "not apply so long as the said power "cannot be exercised. . . ."

S. 41 (4) (*b*): "The expression "'settlement' includes any disposi-"tion, trust, covenant, agreement or "arrangement, and the expression "'settlor' in relation to a settlement "means any person by whom the "settlement was made."

The following facts were admitted or proved at the hearing before the Special Commissioners.

On March 27, 1943, Patience Mourylan Badenach Nicolson ("the settlor"), wife of Arthur Badenach Nicolson, executed a declaration of trust in favour of herself and Reuben Charles Bartlett as trustees ("the trustees") with the intention of setting up a charitable trust to be known as "The Frank Butler "Memorial Fund." This deed, after reciting, inter alia, the settlor's interest in certain property and funds, and her desire that the income thereof should be dedicated to charitable purposes, vested the property therein specified in the trustees for the purpose of the charitable trusts created by clause 2 of the deed.

By clause 3 the settlor covenanted with the trustees "that "so long as the settlor lives she the settlor will pay to the "trustees the monthly sum of three hundred and fifty pounds "without any deduction except for income tax, such sum to "accrue as from the sixth day of April one thousand nine hundred "and forty-two and to be paid as to the amount thereof accrued "down to the date hereof on the execution of these presents and "as to the sums hereafter to accrue on the last day of every "month. . . . Provided always that the settlor shall have power "exercisable by deed at any time or times after the expiration "of seven years from the date hereof to revoke wholly or partially "the foregoing covenant."

The monthly sums of £350 provided for in the covenant contained in clause 3 of the deed were duly paid to the trustees, and prior to March 31, 1950, the Commissioners of Inland Revenue had allowed claims for repayment of income tax under section 37 (1) of the Income Tax Act, 1918, in respect of the tax deducted therefrom.

On February 28, 1950, the settlor executed a deed supplemental to the declaration of trust of March 27, 1943, which provided "that notwithstanding anything in the said declaration "of trust to the contrary the power of revocation given to the "settlor by the said declaration of trust shall not be exercisable "by her until after the expiration of the twenty-seventh day of "March one thousand nine hundred and fifty-three and (so far "only as may be necessary to give full effect to the terms of "this declaration hereinbefore contained) the settlor hereby in "exercise of every statutory or other power enabling her in this "behalf releases this said power of revocation to this intent that "the same shall not be exercisable except as aforesaid."

A claim by the trustees to repayment of income tax deducted from the monthly sum of £350 paid to and received by them on March 31, 1950, was refused on the ground that the Commissioners of Inland Revenue were not satisfied that the payment in question ranked, for income tax purposes, as income of the Frank Butler Memorial Fund so as to entitle it to the relief claimed.

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The trustees appealed.

The Crown contended that the deed of release of February 28, 1950, constituted, together with the deed of settlement, a new or notional settlement within the meaning of section 41 (4) (*b*) of the Finance Act, 1938, commencing on February 28, 1950, and that this new settlement, being revocable at any time after the expiration of three years, did not fall within the exemption conferred by the proviso to section 38 (1) of the Act.

The Special Commissioners rejected this contention, and held that the deed of settlement entered into by Mrs. Nicolson on March 27, 1943, fulfilled completely the requirements of the proviso to section 38 (1) so long as the power of revocation remained unexercisable as therein provided.

The Crown appealed.

*Heyworth Talbot Q.C.*, *J. H. Stamp* and *Sir Reginald Hills* for the Crown.

*Frederick Grant Q.C.* and *G. Tribe* for the trustees.

The case cited in argument is referred to in the judgment.

UPJOHN J. This appeal by the Commissioners of Inland Revenue against a decision of the Special Commissioners raises a point on section 38 of the Finance Act, 1938, a familiar section which has given rise to the execution by many persons of documents frequently referred to among lawyers as "seven-year "covenants."

[His Lordship referred to the relevant provisions of sections 38 (1) and 41 of the Finance Act, 1938, and continued:] In this case, by a deed dated March 27, 1943, a Mrs. Patience Nicolson, who is defined as the settlor, executed a declaration of trust in favour of herself and one Bartlett (the respondents to this appeal) as trustees with the intention of setting up a charitable trust to be known as the "Frank Butler Memorial Fund." That memorial fund is undoubtedly a fund formed for exclusively charitable objects. That is not in dispute. [His Lordship read clause 3 and the proviso, and continued:] No difficulty arises down to and including the last payment before the power of revocation became exercisable, that is to say, the payment due on February 28, 1950. Down to that date inclusive the settlor deducted tax from the payments and the respondents, as charitable trustees, were able to recover payments of that tax under section 37 of the Income Tax Act, 1918.

However, shortly before the power of revocation became exercisable on March 28, 1950, that is, on February 28 of that year, the settlor executed a supplemental deed to the declaration of trust of March 27, 1943. [His Lordship read the supplemental deed, and continued:] The effect of that was that the operation of the power of revocation was postponed for a further three years.

The whole question which arises is whether in respect of payments falling due on and after March 31, 1950, the income, having regard to section 38 of the Act of 1938, is to be deemed to be the income of the settlor, or whether it is to remain the income of the charity trustees. The Special Commissioners took the latter view.

The construction of this section is not without authority. It was considered in *Taylor* v. *Inland Revenue Commissioners*.[1] The facts in that case were somewhat complicated, but may be summarized thus: By a deed dated December 30, 1939, the settlor covenanted to pay certain sums additional to those which he was already under covenant to pay by virtue of two earlier deeds. The covenant contained in that deed was revocable at any time after 1942. Therefore, there was this distinction between that case and the present case, that the deed of 1939 never satisfied the provisions of section 38, whereas, undoubtedly, the original deed in the present case did so. Then, in 1940, the period of irrevocability, if I may so call it, was extended by a deed dated April 1, 1940, for a period which, owing obviously to some slip, failed by some three weeks to exceed six years from the date when the first payment after April 1, 1940, fell due. There is no doubt that the commissioners, and I think Macnaghten J., proceeded on the footing that the relevant settlement was the deed of December 30, 1939, and that that settlement did not include the subsequent deed of April 1, 1940. A different view, however, was taken in the Court of Appeal, where Cohen L.J. delivered the leading judgment, with which Lord Greene M.R. and Somervell L.J. concurred.

The argument before them proceeded on the footing that the deeds of December, 1939, and of April 1, 1940, constituted one settlement; and, as the power of revocation in that settlement was exercisable within six years of the date of the first payment under that compound settlement, the proviso to section 38 was not satisfied. Cohen L.J. said[2]: "Having regard to the "references in the proviso back to the earlier part of the sub-"section, and to the use of the present tense, the proviso must, "in my opinion, be construed to read as follows: 'Provided "'that, where any power to revoke or otherwise determine the "'settlement contained in such settlement cannot under any "'provision of such settlement be exercised within the period "'of six years from the time when the first of the annual "'payments due under such settlement becomes payable, the "'said paragraph (*a*) shall not apply so long as the said power "'cannot be exercised.' It is plain that the power to revoke "and the obligation to pay must be contained in the same settle-"ment, and the use of the present tense, in my opinion, involves "that the restriction on the exercise of the power to revoke "should also be present in the same settlement. Having regard

[1] [1945] 1 All E.R. 698 (K.B.); [1946] 1 All E.R. 488n.; 27 T.C. 93.

[2] 27 T.C. 93, 101.

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Upjohn J.

" to the definition of ' settlement ' in section 41, the settlement " may be a single document or may be comprised in two or more " documents, but it must be the same settlement throughout."

That is a very valuable guide on the principles to be applied in construing the section, and, in particular, the proviso. Indeed, it seems to me that that part of the judgment which I have just quoted is binding upon me.

I say no more about the decision of the Special Commissioners in this case, other than that they appear wholly to have misapprehended the effect of the judgment of the Court of Appeal in *Taylor's* case.[3] In my judgment, what was said by Cohen L.J. is quite plain. There must be found in the settlement, whether it be constituted in one document or in two or more documents so as to form a compound settlement, three things. There must be first an obligation to pay; secondly, a power to revoke; and, thirdly, a suspension of that power to revoke for at least six years from the first payment. It seems to me plain that the Lord Justice, when he used the words " so long as the said " power cannot be exercised," intended to refer to a minimum period of six years from the date of the first payment under the compound settlement and to indicate that it is not sufficient merely to be able to point to a restriction during the relevant year of assessment. That seems to me plain from the next sentence in the passage I have quoted. If that be true, then it is clear that the claim of the Crown in the present case succeeds.

If the only settlement is the settlement of 1943, then for the relevant period the power to revoke is no longer suspended. If the relevant settlement be the settlement of 1943, coupled with the deed of 1950, then the first payment thereunder fell due on March 31, 1950. Again the proviso was not satisfied because the power of revocation comes into operation in the year 1953, within six years of the first payment due under the compound settlement.

Mr. Grant, for the taxpayers, has reserved the right to challenge the passage I have quoted from the judgment of Cohen L.J., because he submits that it is wrong and not in accordance with the true construction of the proviso to say that the suspension of the power to revoke must be in the same settlement as the power of revocation. But he frankly admitted that he could not argue that point before me.

He submitted also that, even if the Lord Justice was right, it was sufficient to show that the original restriction was for six years and it was sufficient to point to an existing restriction during the relevant year of assessment. That seems to me inconsistent with the judgment of Cohen L.J.

Accordingly, the appeal must be allowed.

*Appeal allowed.*

Solicitors: *Solicitor of Inland Revenue; R. C. Bartlett & Co.*

[3] 27 T.C. 93, 99.

[COURT OF APPEAL.]

## * PETER DUMENIL & CO. LD. *v.* JAMES RUDDIN LD.

C. A.

1953
*May* 19.

Singleton, Jenkins and Morris L.JJ.

*Contract—Sale of goods—Repudiation—Anticipatory breach—Innocent misrepresentation by agent—Mistake—No repudiation by principal.*

The plaintiffs bought 140 cases of Gaythorn brand rabbits from the defendants for £682 10s. The goods were held in a cold store to be collected by the plaintiffs on the presentation of a delivery order. The plaintiffs presented an order for 25 cases but were erroneously informed by an employee at the cold store, the agent of the defendants, that no Gaythorn rabbits were available in the store and therefore the demand was not met. The plaintiffs sued the defendants for the return of the purchase price, alleging repudiation of the contract by the defendants.

On appeal from Parker J., who held that there had been repudiation by the defendants through an anticipatory breach of contract by their agents, the cold stores:—

*Held*, that the defendants were in breach of their contract by the failure to deliver the 25 cases when demanded by the plaintiffs, but that in the circumstances of the case the plaintiffs were not entitled to assume, as a result of the innocent misrepresentation of fact made by the defendants' agent under a genuinely mistaken belief, that the defendants had evinced an intention not to carry out their contract, and that there had been no anticipatory breach of the contract by the defendants.

*James Shaffer* v. *Findlay Durham and Brodie* [1953] 1 W.L.R. 106 and cases cited therein referred to.

Appeal allowed in part, and decision of Parker J. varied.

APPEAL from Parker J.

On January 4, 1952, the plaintiffs, Peter Dumenil & Co. Ld., poulterers, bought from the defendants, James Ruddin Ld., 140 cases of Gaythorn brand Australian rabbits, ex the *Orion*. The plaintiffs paid the purchase price of £682 10s., and the defendants gave to the plaintiffs a transfer No. 1224, which was a delivery order, entitling them to collect the goods from the Crown Wharf Cold Stores. On March 13, 1952, the plaintiffs sent the delivery order to the cold stores stating that they proposed to collect 25 cases of Gaythorn rabbits on March 14. When the plaintiffs' carter called at the cold stores on the following day he was informed by a warehouseman that no Gaythorn rabbits were available. He was offered G.P.L. rabbits but, after a telephone conversation with the plaintiffs, he refused to accept any but Gaythorn rabbits. Later that day, Dumenil, the plaintiffs' managing director, was informed by the superintendent of the cold stores on the telephone that no Gaythorn rabbits were held in the Crown Wharf Cold Stores to the defendants' account or to any other account; he said that they had no rabbits whatever of that brand in their store. On March 19, Dumenil, on behalf of the plaintiffs, wrote to the defendants stating that there being no

[Reported by MRS. E. M. WELLWOOD, Barrister-at-Law.]

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Gaythorn rabbits available the plaintiffs had been compelled to return the money paid to them by a client to whom they had in turn sold the rabbits, and that he accordingly returned the transfer issued by the defendants and requested the defendants' cheque for the outstanding amount.

On April 24, 1952, the plaintiffs brought proceedings against the defendants for the return of the purchase price paid under the contract, alleging that the cold stores, on behalf of the defendants, had failed to deliver any of the 140 cases of Gaythorn rabbits on demand; that therefore the defendants had wrongfully repudiated their agreement with the plaintiffs, and that the consideration for the payment of the purchase price had wholly failed.

The defendants denied that the cold stores had refused delivery or that they were the agents of the defendants, and they denied the alleged repudiation or failure of consideration.

It appeared that the Gaythorn rabbits were actually in the Crown Wharf Cold Stores when the plaintiffs made their demand.

Parker J. held that the defendants had repudiated the contract and gave judgment for the plaintiffs. The defendants appealed.

*A. W. Roskill Q.C.* and *N. McKinnon* for the defendants.
*Claude Duveen Q.C.* and *A. L. Figgis* for the plaintiffs.

The following cases were cited in argument: *James Shaffer Ld.* v. *Findlay Durham & Brodie*[1]; *Pattison* v. *Robinson*[2]; *Thöl* v. *Hinton.*[3]

SINGLETON L.J. This appeal raises an interesting point of law. It was said that it is really a question of fact, but I think that there is a little more in it than that. The plaintiffs and the defendants are poulterers. At the beginning of 1952 the defendants, James Ruddin Ld., had a number of cases of Australian skinned rabbits, Gaythorn brand, ex the *Orion*, and they agreed to sell 140 cases to the plaintiffs, Peter Dumenil & Co. Ld. The price was fixed and the amount was paid.

When the contract was made the defendants gave to the plaintiffs a document in the nature of a delivery order, No. 1224, dated January 4, 1952. It was addressed to the Crown Wharf Cold Stores, Park Street, S.E.1, and it read: "Please deliver to "Messrs. Peter Dumenil & Co. Ld., 1 St. John's Lane, E.C.1, "140 cases of Australian skinned rabbits, Gaythorn brand." The plaintiffs paid the price, and it seems to have been thought by Mr. Dumenil that thereafter he was the owner of the cases of rabbits, and that the property in those cases had passed to his company. In fact, that was not so, as Parker J. pointed out.

[1] [1953] 1 W.L.R. 106.
(1816) 5 M. & S. 105.
[3] (1855) 4 W.R. 26.

Nothing was done by the plaintiffs in regard to the rabbits until March 13, when they wrote to the Crown Wharf Cold Stores: "Dear Sirs, We enclose herewith transfer No. 1224 "issued by Messrs. James Ruddin in respect of 140 cases of "Australian skinned rabbits, Gaythorn brand, which they have "transferred to our account. We propose to withdraw 25 cases of "these rabbits tomorrow morning, Friday 14th instant, and we "should be pleased if you would have these available for us at "10 o'clock. Should this not be convenient, perhaps you will be "kind enough to 'phone us at the above address before 8.30 a.m."

A delivery order is an order given by the seller on a bailee who holds possession as agent of the seller. A delivery order, properly so called, is, until it is acted upon, a mere "promise "to deliver," and the delivery is not complete until the bailee attorns to the buyer, and thus becomes the latter's agent as custodian of the goods.

When the letter of March 13, 1952, was written by the plaintiffs the Crown Wharf Cold Stores were still in possession of the goods, which had been deposited with them some considerable time beforehand. The plaintiffs' carter on March 14 took with him a delivery note, which referred to the document No. 1224, and asked for delivery of 25 cases of Australian skinned rabbits, Gaythorn, ex Ruddins, but he did not receive the cases of rabbits. There was a misunderstanding between him and someone at the warehouse. Someone told him that they had no Gaythorn rabbits, and Gaythorn was struck out in red from the delivery note he had taken with him, and he was offered some cases of rabbits marked "G.P.L." That was the finding of Parker J., who said that Glenn, the warehouseman, had used words to the effect: "I do not know anything about Gaythorn; you can have "G.P.L.s." In fact, the carter knew something about cases of rabbits. The managing director of his company, Dumenil, was asked in cross-examination: "Would your carman, the man "you sent, know the markings of Gaythorn cases? (A.) Yes, "he would." The carter himself, Harley, was asked in the course of his evidence-in-chief as to Gaythorn rabbits: "How "were they marked?" and he answered: "On the side they are "marked in black letters 'Gaythorn Packers Ld.,' and on the "end in a diamond shaped outline they are marked 'G.P.L.'" The carter was told that there were no Gaythorn rabbits there, but that he could have G.P.L.s. He accordingly telephoned his company's headquarters to ask what he should do, and he was told that the company was only taking Gaythorn rabbits. He was assured again that there were no Gaythorn rabbits, so he left. The delivery order was handed back to him, with the letter to which it was attached, and the delivery note which had been altered in red.

Thereupon Dumenil telephoned to the cold stores, and spoke to the superintendent. [His Lordship referred to the evidence of Dumenil regarding his conversation on March 14

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with the superintendent of the cold stores, which was accepted by Parker J., and read the letter of March 19 written by Dumenil to the plaintiffs. His Lordship continued: ] The plaintiff company had in fact sold 25 cases. They had not sold the others, and it is plain that they could not have sold them at the contract price, because there had been a fall, according to the finding of the judge, of about 25 per cent. in the price of skinned rabbits of this class. So that it was not a bad thing, in a sense, for the plaintiffs to be rid of their contract if they could be. They wanted their money back. On April 24, 1952, they commenced an action claiming their money back. The statement of claim was not delivered until February 11, 1953, and it showed that the "claim is for £682 10s. 0d. moneys payable by the defendants "to the plaintiffs for moneys received by the defendants for the "use of the plaintiffs. Alternatively (2) damages for breach of "contract."

Particulars were given, and the way the matter was pleaded with regard to March 13, 14 was as follows: "On March 13, 1952, "the plaintiffs sent the said delivery order to the said stores and "on March 14, 1952, demanded from the said stores 25 of the "said cases. The said stores, on behalf of the defendants, "refused to deliver any of the said cases to the plaintiffs whereby "the defendants wrongfully repudiated the said agreement and "the consideration for the payment of the said £682 10s. 0d. "has wholly failed."

Mr. Roskill, on behalf of the defendants, has pointed out to this court that the points of claim do not raise in so many words a case of anticipatory breach of contract. I am inclined to think that the pleader meant to cover that by the particulars which I have just read. The defendants took up the position that there was no breach by them at all, and they pleaded: "The said "stores did not refuse as alleged nor were they the agents of "the defendants in the alleged or any respect. The alleged "repudiation and the alleged failure of consideration are denied "and traversed."

The surprising thing about this case is that at the time when the demand was made on March 14, 1952, there were in the Crown Wharf Cold Stores 140 cases of Australian skinned rabbits, Gaythorn brand, ex the *Orion*. The warehouseman did not look at the cases properly. If he had done so, he would have seen Gaythorn upon them, but he had them in his book as G.P.L., and he told the carter from the plaintiff company: "I can give "you G.P.L.'s, but we have no Gaythorn." In fact, he had both, because they are one and the same thing, but he did not seem to know that, and it did not enter the head of the carter that they might be the same. They were not examined. The carter went away empty-handed. Dumenil telephoned to the warehouse, and the warehouseman said that they had not any Gaythorn rabbits. The mistake was that of the warehouseman, and the warehouseman was at that time the agent of the

defendants, to deliver, when proper demand was made. Thus, the mistake of the warehouseman led to this trouble; but the defendants failed to understand why, when the mistake took place, someone from the plaintiffs did not slip across and see them, or why Dumenil did not telephone the defendants. I do not know why he did not do that. A suggestion was made by Mr. Roskill that he did not want to do it; that he was very glad to be out of the contract. That may well be so, but it was not suggested to Dumenil himself when he was in the witness-box. The price of Gaythorn rabbits had dropped from 1s. 8d. to 1s. 3d. a lb. No telephone message was sent, and nothing was done until the letter of March 19. When explanations were given it was clear that the rabbits were at the cold stores still in their cases ready to be delivered. There had been a demand, or a request, for 25 cases only out of the 140 cases. The plaintiff company did not mind being out of the contract in the slightest in view of the fall in price, and the case which they set up, and which was argued before Parker J., was that there had been a breach by the defendants through their agents; that that breach entitled them to call the whole of the contract off, or entitled them to have their money returned as money paid on a consideration which had failed.

Parker J. was quite satisfied that there had been a mistake, and that the mistake was the mistake of the agents. What resulted from that? We were told by Mr. Roskill that before the judge the case was not put as a case of an anticipatory breach of contract, and Parker J. did not have the authorities upon that branch of the law before him. In the course of his judgment, Parker J. said: "It is said, with some force: 'Why did not Mr. "'Dumenil write at once to the superintendent of the cold stores "'and demand an explanation?' Each case, as it seems to me, "must depend upon its own facts. But on the facts in this case, "I do not think it could possibly be said that the plaintiffs were "not justified in treating what Mr. Harley was shown and told "on March 14 as an anticipatory breach. Mr. Harley was, in "effect, being told, first of all by the deletion of '(Gaythorn)' "in the document, that the matter did not concern Gaythorns. "And he was told by Mr. Glenn, 'I do not know anything about "'Gaythorns.' Having been told that, it seems to me that he "was perfectly justified in telephoning Mr. Dumenil and getting "instructions, without in effect demanding to see the 25 cases "which it was proposed to tender, and making certain that they "were not Gaythorns. I am also satisfied that Mr. Dumenil did "have a conversation with some responsible official of the Crown "Wharf Cold Stores, who, at any rate, conveyed to him— "whether it was intended to be conveyed to him or not—as Mr. "Glenn had conveyed to Mr. Harley, that they really knew "something about Gaythorns. I think, having had that con- "versation with the person he understood to be the superin- "tendent, he was abundantly justified in telling his sub-buyer

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"that the goods were not available, and in claiming from the "defendants the return of the money."

I agree with the judge that Dumenil was justified in telling the sub-buyer that the 25 cases were not available; there is no doubt as to that. The goods ought to have been handed over on March 14. They were not, through this mistake, and for that breach of contract it seems to me that the defendants are responsible to the plaintiffs in damages, for the one who was entrusted by the defendants with the duty of handing over those goods did not hand them over when he ought to have done so. But that consideration does not dispose of this action. It has been argued in this court on the basis that the judge found, as I think he did, that there was an anticipatory breach by the defendants through their agent, and that thereupon the plaintiffs were entitled to consider the contract was repudiated and to treat it as rescinded. Whether that is the right attitude may be questioned in a case such as this, but the question which we have to determine is one of law, and it is this: if there is a contract for the sale of 140 cases of Australian skinned rabbits which are in a particular store, and the plaintiffs, on a particular day, ask for delivery of 25 cases and are told by the warehouseman that they cannot have that delivery, and they are told further that there are no Gaythorn rabbits there, does that entitle them to say as of right that the contract has gone, that the defendants have repudiated it and have evinced an intention no longer to be bound by the contract? Are they entitled, in the circumstances, to treat the contract as rescinded and to recover the price which they paid?

This question has been considered many times, but I am not sure that it has ever had to be considered in circumstances when the repudiation by the defendants was a repudiation by the warehouseman who was their agent, and when it arose purely out of a mistake. The slightest inquiry from the defendants themselves would have shown the mistake. The cases could have been delivered the same day, or the next morning, if there had been an inquiry from the plaintiffs to the defendants, but no inquiry was made.

In this court recently we had to consider a question of a somewhat similar nature in *James Shaffer Ld.* v. *Findlay Durham & Brodie*.[1] In that case the authorities, or some of them, are conveniently summarized, so that it is not necessary, for the purposes of this judgment, to refer to a number of different reports. None of those cases was cited to Parker J., which is a matter for regret, though it may be that the reason for there having been no such citation before him was that counsel on neither side regarded this case as one of anticipatory breach.

In *Heyman* v. *Darwins Ld.*[2] Lord Wright said: "But perhaps "the commonest application of the word 'repudiation' is to what

[1] [1953] 1 W.L.R. 106.

[2] [1942] A.C. 356, 379; 58 T.L.R. 169; [1942] 1 All E.R. 337.

" is often called the anticipatory breach of a contract where the " party by words or conduct evinces an intention no longer to " be bound and the other party accepts the repudiation and " rescinds the contract. In such a case, if the repudiation is " wrongful and the rescission is rightful, the contract is ended " by the rescission but only as far as concerns future performance. " It remains alive for the awarding of damages either for " previous breaches or for the breach which constitutes the " repudiation. That is only a particular form of contract-breaking " and would generally under an ordinary arbitration clause involve " a dispute under the contract like any other breach of contract. " There is no difference, for instance, for this purpose between a " refusal to take further instalments under a contract for the " sale of goods by instalments and a refusal to take the entire " contract quantity where the tender is to be a single delivery. " I need scarcely add that one party to a contract cannot put an " end to it. To produce that effect there must be rescission. " An anticipatory breach does not necessarily involve an actual " intention to break the contract. Intention is to be judged by " the party's conduct. The difference between repudiating a " contract and repudiating liability under it must not be over- " looked. It is thus necessary in every case in which the word " repudiation is used to be clear in what sense it is being used."

In *Freeth* v. *Burr*,[3] Lord Coleridge C.J. said: " But I think " it may be taken that the fair result of them "—that is, of the cases—" is as I have stated, viz. that the true question is whether " the acts and conduct of the party evince an intention no longer " to be bound by the contract."

Mr. Duveen and Mr. Figgis, who followed him, submitted that the defendant company was responsible for the acts and for the conduct of its agents—that the agents said: " We have no " Gaythorn rabbits; we cannot deliver any Gaythorn rabbits; we " have not any in store "; and it was submitted that the agents acting for and on behalf of the defendants in declining to deliver rabbits were thereby, and by their words and conduct, evincing an intention no longer to be bound, and it was added that the plaintiffs accepted that repudiation and rescinded the contract, and that they were entitled to have their money back.

Whether an agent can evince an intention of this kind on behalf of the principal must depend upon the agent's authority. If an agent says: " I have no such goods for my principal," he is at least refusing to deliver. The superintendent said, according to Mr. Dumenil, that he had no such goods in at that time. The plaintiffs had bought 140 cases; they only wanted delivery on March 14 of 25 cases. The contention is that by that which was said and that which was done on March 14 the defendants showed to the plaintiffs that they, the defendants, no longer intended to be bound by the contract. I do not think that it

[3] (1874) L.R. 9 C.P. 208, 213.

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was necessary under this contract that the 140 cases should have remained in the same warehouse all the time. The obligation of the defendants was to give delivery when it was called for on reasonable notice. They were under an obligation, on proper notice to the Crown Wharf Cold Stores to see that the cold stores gave delivery of the required number of cases ex the *Orion*.

If the agent makes a mistake which can be corrected, and that mistake is one which leads the agent to think: "We have "none of those goods," does the agent's conduct show on behalf of the principal an intention not to be further bound by the contract? That is a matter which must depend on the circumstances in each particular case. I do not think that it did in this case. I agree that there was a breach of contract in regard to the 25 cases which ought to have been delivered on March 14, 1952. There was no request for delivery of any more, and I am unable to see that the fact that there was a failure to deliver the 25, coupled with the warehouseman's statement "We have "none," is sufficient to enable the plaintiffs to say that the defendants evinced an intention no longer to be bound by the contract. There was a mistake which, if there had been a word spoken by the plaintiffs on the Friday afternoon or the Saturday morning, to the defendants' salesman, or if there had been a call at the office or a telephone message, would have been put right at once, and it would have been made clear that G.P.L. and Gaythorn were one and the same, a fact which was not realized by the warehouseman or by the carter.

I much regret that the authorities on this part of the case were not before Parker J. He gave his judgment in favour of the plaintiffs, holding that there was on the part of the defendants an anticipatory breach which entitled the plaintiffs to treat the contract as rescinded. I do not agree to that extent. I think that there was a breach as to the 25 cases, and as the plaintiffs had paid for those cases they are entitled to recover against the defendants damages in respect of the non-delivery of those cases, which should be, it seems to me at the moment, based on 1s. 3d. a lb. as against 1s. 8d. cost price; but apart from that, I do not think that the plaintiffs are entitled to succeed. Therefore, in my view, this appeal should be allowed in part.

JENKINS L.J. I agree. [His Lordship stated the facts and continued:] The question in the case is whether the belief induced in the minds of the plaintiffs by what was said to their carter and to Dumenil by the representatives of the Crown Wharf Cold Stores supports their claim to be entitled to consider the whole contract repudiated by the defendants, and repudiated by way of anticipatory breach.

That, I think, resolves itself into this question: whether, on the facts as represented to them by the servants of the Crown Wharf Cold Stores, the plaintiffs were entitled to infer that, in

the words of Lord Coleridge C.J. in *Freeth* v. *Burr*,[3] the defendants thereby evinced "an intention no longer to be bound by "the contract"; and one must bear in mind also that, as appears from the citation in *James Shaffer Ltd.* v. *Findlay Durham & Brodie*,[4] from the judgment of Atkin L.J. in the *Spettabile* case[5]: "They"—that is to say, the various judicial definitions of "repudiation"—"all come to the same thing, and they all "amount at any rate to this, that it must be shown that the "party to the contract made quite plain his own intention not to "perform the contract."

In the present case the defendants' agents, the Crown Wharf Cold Stores, had by their servants made an innocent misrepresentation of fact which the plaintiffs were entitled to believe, and did believe, and that state of facts, if true, meant that there were no rabbits in the cold stores to answer the plaintiffs' demand under the contract, and therefore, I think, clearly meant that the defendants were in breach of their contract at that date. But can it be said that the plaintiffs were entitled to draw the inference from that believed state of facts that the defendants had evinced an intention not to carry out their contract, or made it quite plain that their intention was not to carry out their contract?

In my view, one cannot attribute that effect to the state of facts as represented to the plaintiffs. No doubt those believed facts, that is to say, the believed absence from the cold stores of any Australian skinned rabbits of the appropriate brand, suggested that the defendants might be intending not to carry out their contract; but I cannot think that it goes any further than this: the plaintiffs might reasonably say to themselves: "This looks "as though the defendants have repudiated, or are intending to "repudiate, the contract, unless there is some other explanation." It seems to me that one must make that reservation—"unless "there is some other explanation." I think that it is impossible to say that there might not have been some other explanation. Possibly the defendants, still intending to honour their contract in every respect, might have removed the 140 cases of rabbits to some other store where they would be just as easily available. Perhaps the defendants might have made some other mistake. Mistakes do happen, as the actual facts in this case show; and, for example, the defendants might perhaps have deposited the 140 cases in one cold store and inadvertently given the address of another. In reality, there was, indeed, a simple explanation, which was that the servants of the Crown Wharf Cold Stores had made a mistake, and that, in truth, there were all the time at this store 140 cases of rabbits of the appropriate brand.

If it is right to say that the most the plaintiffs could properly infer was an intention on the part of the defendants to repudiate

[3] (1874) L.R. 9 C.P. 208, 213.
[4] [1953] 1 W.L.R. 106, 117.
[5] (1919) 121 L.T. 628.

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the contract unless there was some other explanation of the apparent absence from the cold stores of any rabbits of the appropriate brand, then it behoved them, before they jumped to the conclusion of repudiation, to take the simple and reasonable step, which any business man would take, of going to the defendants and saying: "What has happened about our rabbits? We are "told by the Crown Wharf Cold Stores that none of them are "there." As soon as they said that the whole matter would have been explained at once.

Accordingly, I agree with my Lord that this appeal should be allowed save as regards any relief to which the plaintiffs may be entitled in respect of the 25 cases, delivery of which was actually demanded and not made on March 14, 1952.

MORRIS L.J. I am in entire agreement with the two judgments which have been delivered. I think that it is of assistance in approaching the matters which arise in this appeal to endeavour to state what was the promise made by the defendants. It seems to me that what they promised the plaintiffs was that in consideration of the payment by the plaintiffs of a sum of money the defendants undertook that if within a reasonable period, or from time to time within such a period, the plaintiffs made demand on the Crown Wharf Cold Stores, the plaintiffs would receive Australian skinned rabbits, Gaythorn brand, ex the ship *Orion* to a total of 140 cases. On March 14 there was a demand for 25 cases. The position at that date in fact was that there were at the Crown Wharf Cold Stores 140 cases of Australian skinned rabbits, Gaythorn brand; but the stores erroneously said that though they had rabbits belonging to James Ruddin Ld., those rabbits were not in fact Gaythorn brand. Later in the day that was repeated by the superintendent of the Crown Wharf Cold Stores.

In those circumstances, it seems to me that as the plaintiffs made a proper demand for 25 cases the defendants were in breach of contract, because in the result the plaintiffs were not able to obtain the 25 cases. When the plaintiffs were told by the Crown Wharf Cold Stores that there were no rabbits which satisfied the contract in the store, it must have come to them as rather a shock and a surprise. The plaintiffs had paid a sum of nearly £700, and then on the first occasion when they demanded rabbits in accordance with the contract they were told: "There are not "any rabbits to satisfy the contract here." It seems to me that the plaintiffs must have thought that there was some mistake, or misapprehension on someone's part, and that there was some misunderstanding which might quite readily be dispelled.

The plaintiffs and the defendants carry on business in premises near together. The evidence of Dumenil was that he saw the salesman of the defendants almost daily. In cross-examination, Dumenil was asked: "And did you on "March 7"—that was just a week before the demand for the

25 cases—" approach Mr. Clegg, who was a salesman in the " defendant company, and invite him to purchase back these " rabbits, showing a profit to the defendant company, in order " to help you out? (A.) I did approach him, as I met him " daily, and I said that I would be willing to sell them back " should they wish to take them. I could not speak for the " date, but it was some time before this. (Q.) It was about a " week before this incident between your carman and Crown " Wharf, was it not? (A.) Possibly a week or two, yes."

So here the position was that the plaintiffs, having made this contract, being entitled to demand 140 cases, found that by reason of the turn of the market price it would suit them to make new arrangements, and Dumenil, who was seeing Clegg daily, put the proposition to him. A week later there was a demand for 25 cases, and then the plaintiffs were told that there were no Gaythorn rabbits at the store. I cannot but feel that the plaintiffs must have thought that there would be some simple explanation if they sought it. They could so easily, as a matter of business, have made a call at the defendants' premises, which were close; they could have made an inquiry over the telephone, and the whole difficulty would have been resolved. The defendants could then at once have telephoned the Crown Wharf Cold Stores. The misapprehension under which the store laboured, which possibly arose from the fact that it was not until March that a demand for the first of these cases was made, could easily have been removed and everything would have been made straight.

The appropriate question to ask in these circumstances is whether the defendants made plain an intention not to perform the contract. It seems to me that the indications were that the defendants were proposing to perform the contract. There was nothing to suggest that the defendants were not proposing to perform the contract, except this rather surprising statement due to a misapprehension, made by the Crown Wharf Cold Stores. A reasonable thing for the plaintiffs to have done would have been to seek an explanation, which could so readily have been forthcoming.

In those circumstances, while I think that there was a breach in regard to the failure to bring it about that the plaintiffs secured 25 cases, I do not think that there was any further failure on the part of the defendants, or that this evinced an intention not further to perform their contract.

*Appeal allowed in part.*
*Judgment for the plaintiffs for £93 15s. 0d.*

Solicitors: *Botterell & Roche, for Weightman, Pedder & Co.; Bennett, Hobson & Co.*

[QUEEN'S BENCH DIVISION.]

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*Apr.* 28.

Lord Goddard C.J., Lynskey and Parker JJ.

# * SIMMONDS *v.* NEWELL. DEFIANT CYCLE CO. LD. *v.* SAME. MACNAY *v.* SAME.

*Statutory Instrument—Sale of Steel in excess of scheduled prices—Absence of certificate exempting from printing—No steps taken to bring instrument to notice of public—Conviction quashed—Iron and Steel Prices Order,* 1951 (*S.I.* 1951, *No.* 252), *as amended by No.* 2 *Order,* 1951 (*S.I.* 1951, *No.* 1423)—*Statutory Instruments Act,* 1946 (9 *&* 10 *Geo.* 6, *c.* 36), *s.* 3 (2)—*Statutory Instruments Regulations,* 1947 (*S.I.* 1948, *No.* 1), *reg.* 7.

Where it was established as a fact that no certificate had been issued under regulation 7 of the Statutory Instruments Regulations, 1947,[1] exempting the deposited schedules to the Iron and Steel Prices Order, 1951, as amended, from being printed, and the Crown admitted that it had not discharged the onus of proving under section 3 (2) of the Statutory Instruments Act, 1946,[2] that

[Reported by Miss P. STANLEY, Barrister-at-Law.]

[1] Statutory Instruments Regulations, 1947, reg. 7: "If the responsible authority considers that the printing and sale in accordance with the requirements of subsection (1) of section 2 of the principal Act of any schedule or other document which is identified by or referred to in a statutory instrument and would, but for the provisions of this regulation, be required to be included in the instrument as so printed and sold, is unnecessary or undesirable having regard to the nature or bulk of the document and to any other steps taken or to be taken for bringing its substance to the notice of the public, he may, on sending it to the King's printer of Acts of Parliament, certify accordingly; and any instrument so certified shall, unless the Reference Committee otherwise direct under these regulations, be exempt from the requirements aforesaid so far as concerns the document specified in the certificate."

[2] Statutory Instruments Act, 1946, s. 3 (1): "Regulations made for the purposes of this Act shall make provision for the publication by His Majesty's Stationery Office of lists showing the date upon which every statutory instrument printed and sold by the King's printer of Acts of Parliament was first issued by that office; and in any legal proceedings a copy of any list so published purporting to bear the imprint of the King's printer shall be received in evidence as a true copy, and an entry therein shall be conclusive evidence of the date on which any statutory instrument was first issued by His Majesty's Stationery Office."

S. 3 (2): "In any proceedings against any person for an offence consisting of a contravention of any such statutory instrument, it shall be a defence to prove that the instrument had not been issued by His Majesty's Stationery Office at the date of the alleged contravention unless it is proved that at that date reasonable steps had been taken for the purpose of bringing the purport of the instrument to the notice of the public, or of persons likely to be affected by it, or of the person charged."

S. 8 (1): "The Treasury may, with the concurrence of the Lord Chancellor and the Speaker of the House of Commons, by statutory instrument make regulations for the purposes of this Act, and such regulations may, in particular:— (*a*) provide for the different treatment of instruments which are of the nature of a public Act, . . . ; (*c*) provide with respect to any classes or descriptions of statutory instrument that they shall be exempt, either altogether or to such extent as may be determined by or under the regulations, from the requirement of being printed and of being sold by the King's printer of Acts of Parliament, or from either of those requirements; . . ."

at the date of an alleged contravention of the order by the appellants—by selling steel at prices in excess of those specified in the deposited schedules—reasonable steps had been taken to bring the purport of the instrument to the notice of the public, the conviction of the appellants must be quashed.

CASES STATED by Middlesex justices.

Informations were preferred by Leonard Newell, the respondent, an executive officer of the Ministry of Supply, against the appellants MacNay and Simmonds, directors of the appellant company, under the Iron and Steel Prices Order, 1951, as amended by the Iron and Steel Prices (No. 2) Order, 1951, and regulation 55AB of the Defence (General) Regulations, 1939, for that they on divers dates between May 18, 1951, and August 30, 1951, sold to several companies steel of a class mentioned in the schedule to the Iron and Steel Prices Order, 1951 (as amended), at a price which was in excess of the scheduled maximum price.

The following facts were proved or admitted before the justices. The appellants were the Defiant Cycle Co., Ltd., dealers and merchants in steel, and two of its directors. Acting in that capacity, the directors made the sales alleged at prices above those laid down as maximum prices in the schedules. On the publication of the Iron and Steel Prices Order, 1951, the Iron and Steel Prices (No. 2) Order, 1951, and the Iron and Steel Prices (No. 3) Order, 1951, the Minister of Supply had distributed among each of the nine to twelve regional offices of the Ministry of Supply in the United Kingdom one copy of the deposited schedules referred to in the Statutory Instruments respectively, and the original signed deposited schedules were retained by him and available for inspection by the public at Steel House, London. None of the deposited schedules was in fact printed by the King's Printer. Mrs. Silverston, an assistant secretary in the Ministry of Supply, decided, having regard to regulation 7 of the Statutory Instruments Regulations, 1947,[1] that the printing and sale of the deposited schedules referred to in each of the Statutory Instruments was not necessary. She so decided, first, owing to the bulk of the deposited schedules, secondly, since she knew that they would be at Steel House, and thirdly, that trade associations would be distributing trade copies of the deposited schedules most in demand. When Mrs. Silverston sent out the copies of the Statutory Instruments she sent a letter which included the words, "The documents identified in this instrument as deposited "schedules have been certified under regulation 7 to be exempted "from printing and sale as part of the copies of the instru- "ment. . . ." But for this letter the Ministry of Supply did not give a certificate in writing in respect of the Iron and Steel Prices Order (as amended).

On behalf of the appellants it was contended, inter alia, (1) that the Statutory Instruments were of no force and effect or validity on the ground that inasmuch as the deposited schedules which formed part of the Statutory Instruments had

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not been printed, and the Minister of Supply had failed to issue his certificate pursuant to regulation 7 of the Statutory Instruments Regulations, 1947, exempting the deposited schedules from being printed the Statutory Instruments had not been issued or published within the Statutory Instruments Act, 1946; (2) that the Minister of Supply had not proved that at the date when he purported to issue the Statutory Instruments he had taken reasonable steps for the purpose of bringing the purport of the Statutory Instruments to the notice of the public or of persons likely to be affected thereby or of the persons charged.

On behalf of the respondent it was contended, inter alia, (1) that each of the Statutory Instruments had been duly issued by Her Majesty's Stationery Office at the respective dates of the appellant's contraventions thereof; and (2) that Mrs. Silverston's letter was or included a certificate for the purposes of regulation 7 of the Statutory Instruments Regulations, 1947.

The justices were of the opinion that the Iron and Steel Prices Order, 1951 (as amended), were validly made and of full force and effect for the period covered by the informations; that even if the orders were not so valid, they were validated by the Price Control and other Orders (Indemnity) Act, 1951; and that the letter Mrs. Silverston sent was a sufficient compliance with regulation 7 of the Statutory Instruments Regulations, 1947.

The appellants appealed against conviction.

*Viscount Hailsham Q.C.* and *J. Burge* for the appellants.

*Sir Reginald Manningham-Buller Q.C., S.-G.*, and *J. P. Ashworth*, for the respondent.

LORD GODDARD C.J. stated the facts and continued: I am glad that we have not to construe as the point to be decided the material parts of the Iron and Steel Prices Order, for I confess that I cannot understand the opening words of the schedule; but no doubt people in the trade can understand them. The point which we have to decide really arises under the Statutory Instruments Act of 1946, and the way the matter becomes material is this: the scheme of the Prices Order of 1951 is to set out in a schedule some prices which are said to be "basis prices per ton "for the representative-basis-pricing specification." It refers in the body of the order to the deposited schedules, and apparently the price at which any particular sort of iron or steel can be sold is to be found in the deposited schedules. "'Deposited schedule'" in paragraph 6 (1) of the order, "means any one of the 97 "deposited price schedules for any class of iron or steel mentioned "in the schedule to this order lodged with the Minister of Supply "and certified to be a deposited schedule accepted for the "purpose of this order by the endorsement 'Iron and Steel "'Prices Order, 1951','" and then there comes the rest of the endorsement which is to be "signed (with the date of signing)

" by an Under-Secretary or a Principal Assistant Secretary in " the Ministry of Supply."

There are 97 deposited price schedules; 95 deposited price schedules in the Iron and Steel Prices (No. 2) Order. No doubt, printing these would be a very great burden, and would make one of these orders very bulky; accordingly, it appears that the Statutory Instruments Act, 1946, has dealt with this possibility or probability and makes it unnecessary to print them. The material section with regard to exemption from printing is section 8 of that Act. [His Lordship read sections 8 [3] and 3 (2) of the Statutory Instruments Act, 1946, and regulation 7 of the Statutory Instruments Regulations, 1947, and continued:] This case can be determined on a comparatively short point, for no certificate was ever given by the responsible authority exempting the printing of these deposited schedules to this order, and accordingly we have to consider what the result would be if, no certificate having been given, the schedules have not been printed.

On the first point, whether a certificate was given by the responsible authority dispensing with the printing of these schedules, the only document that was proved at the trial and relied on as a certificate was a letter which included these words: " I am directed by the Minister of Supply to inform you that " he has made a Statutory Instrument, of which one copy is " annexed hereto, entitled . . . and to request you to number " it in accordance with regulation 3 of the Statutory Instruments " Regulations, 1947, and to be good enough to insert the number; " (i) in all the copies of the instrument contained in this folder, " and (ii) at (a) of paragraph 3 of the letter to the Stationery " Office below. This instrument has been certified to be a general " instrument under regulation 4 of the Statutory Instruments " Regulations, 1947, and I am to request you to treat it accord- " ingly. The documents identified in this instrument as deposited " schedules have been certified under regulation 7 to be exempted " from printing and sale as part of the copies of the instruments; " but subject thereto, copies of this instrument are to be printed " and sold by the King's printer of Acts of Parliament. I am " to request you to be good enough to complete and sign part 1 " of the receipt sheet contained in this folder." The letter is addressed to the editor of Statutory Instruments at the Stationery Office.

It can hardly be contended, and it has only been faintly argued by the Solicitor-General, that that letter is a certificate. It is a letter which says that there is a certificate, but the certificate was never produced. There is no question to my mind that the Crown tried to rely on that document as a certificate of itself, and clearly it is not a certificate. We have, therefore, no difficulty in holding that no certificate under regulation 7 was ever issued.

What is the effect of that? That is a point which it seemed to the court might deserve a very careful argument and very full consideration, but the Solicitor-General has accepted the position

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that the result is that if no certificate has been given exempting the King's printer from printing the whole of the order, while it does not affect the validity of the order itself, it does throw upon the Crown the burden of proving that at the date of the commission of the offence reasonable steps had been taken for the purpose of bringing the purport of the instrument to the notice of the public or of persons likely to be affected by it or the person charged. The Solicitor-General agrees that if this matter is not contained in the instrument, in order that people may know whether they are committing offences or not, it must be shown that proper steps have been taken to bring it to the notice of people in the trade that these prices exist. That is certainly a very reasonable attitude for the Solicitor-General to take up, because it is not desirable, in criminal matters, that people should be prosecuted for breaches of orders unless the orders can fairly be said to be known to the public.

It is clear from the case stated that there never was evidence before the justices that the steps that the section requires to be proved by the prosecution had ever been taken and that the defendants were therefore entitled to rely on that as a defence. The reason why no evidence was given on that point was because at the hearing the Crown were relying on the letter, to which I have referred, as a certificate exempting them from the necessity of proving these facts. But the case stated does not indicate that there was any evidence before the justices at all that these steps had been taken. The justices had before them the evidence of Mrs. Silverston, who as an assistant secretary, " whose duties " included the making of arrangements for the printing of Statu- " tory Instruments made by the Minister, decided having regard " to the provisions of regulation 7 of the Statutory Instruments " Regulations, 1947, that the printing and sale of the said " deposited schedules referred to in each of the said Statutory " Instruments numbered," so-and-so, " was unnecessary." In so deciding, Mrs. Silverston had regard primarily to the bulk of the deposited schedules, secondly to the fact that copies thereof were to be made available for inspection at Steel House, and " thirdly, to the fact (of which she was aware) that Trade " Associations would be distributing to the trade copies of the " deposited schedules or at least of such parts thereof as related " to types of iron and steel most in demand." No doubt she may have thought that those things were to be done, and her anticipation may have been correct. It may be that she knew enough to be satisfied that in due course these things would be done, but that does not discharge the burden which the statute places upon the Crown in the event, as the Solicitor-General has admitted, of there being no certificate exempting the King's printer from printing part of the order. It is clear that there was no evidence before the justices to that effect.

It is true that one contention of the defendants before the justices, namely, that the Minister of Supply had not proved

that at the date when he purported to issue the Statutory Instruments he had taken reasonable steps for the purpose of bringing the purport of the Statutory Instruments to the notice of the public, is not correct because that is a wrong date; but we are not concerned with the contentions that are set up. Very often the court hearing a special case does not have regard to the contentions before the justices at all, because we take the view that what may have been contended in the court below does not interest us; what interests us are the facts found by the justices and the contentions addressed to us. We see that the contention was not accurate but, on the other hand, we have looked at the contentions of the Crown, and the Crown never contended that they had given any evidence as to the steps that had been taken. It is clear that they did not give any evidence on that point. Therefore, it seems to me that the defendants were entitled to rely on the fact that this evidence had not been given and, accordingly, the justices ought to have dismissed the informations.

LYNSKEY J. I agree. I only desire to add that in section 2 of the Statutory Instruments Act of 1946, there is an obligation that except in cases required by the Act, there must be a printing of all Statutory Instruments. Section 3 is concerned with the making of regulations for the publication by His Majesty's Stationery Office of these instruments, giving the dates and numbers and year of their issue: [His Lordship then referred to section 3 (2) and continued:] When the case came before the justices, the contention of the Crown was that this particular instrument had in fact been published by His Majesty's Stationery Office in so far as the parts required to be published were in fact published, and in so far as the deposited schedules were concerned, that they were exempted from being printed, and therefore that subsection (2) would not apply. They relied on the provisions of the Statutory Instruments Regulations, 1947, regulation 7, and sought to prove their case by producing the letter which was written by Mrs. Silverston to the editor of Statutory Instruments, and suggested before the justices that that letter amounted to a certificate within the provisions of regulation 7 of the regulations as certifying that under regulation 7 the deposited schedules should be exempted from printing.

The case for the defence was that this letter did not amount to a certificate, that in fact the giving of such certificate had not been proved, and that therefore there was no exemption from the provisions of section 2 of the Act which required those deposited schedules to be printed with the order. On that point, whether the letter did amount to a certificate—and on the question that there was no proper printing of the order with the deposited schedules so as to entitle the defendants to raise a defence under section 3 (2), the justices accepted the contentions of the Crown and found against the defendants.

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I agree with my Lord that this letter does not amount to a certificate, and no certificate, therefore, has been proved to have been given by the responsible authority, the Minister. The result is that on the Solicitor-General's admission—and I am not deciding the point but am accepting his admission— section 3 (2) applies and gives a defence to the appellants on the charges made against them. They have proved, the letter not being a certificate, that the order was not printed in full, as it ought to have been, at the time when these offences were committed. In those circumstances, that fact having been proved, the defence arises. No attempt was made, because of the contentions put forward by the Crown, to prove that "reasonable steps had been taken "for the purpose of bringing the purport of the instrument to "the notice of the public, or of persons likely to be affected by "it, or of the person charged." There is no finding by the justices that they had done so, and it would be rather remarkable, in view of the contentions put before them, if they had ever really addressed their minds to those questions having regard to the fact that they accepted the argument of the Crown on the first contention, that section 3 (2) could not apply because of the certificate of exemption from printing which had been granted by the letter.

The result is that there was no certificate, and there should have been printing; that no printing had been done at the time of the commission of these offences; and there was no evidence upon which the justices could even be asked to find that the Crown had discharged the burden imposed on it under section 3 (2). I agree that these appeals must be allowed.

Parker J. I also agree, and would only add this: when Lord Hailsham opened this case for the appellants, he submitted that the effect of a contravention of section 2 of the Statutory Instruments Act, 1946, in not causing to be printed a Statutory Instrument which was required to be printed, was that the Statutory Instrument was wholly invalid. He also contended that the effect of section 3 (2) was that in every case, whether a Statutory Instrument was required to be printed or not, it was a defence to the subject if it had not been proved that reasonable steps had been taken for bringing the purport of the instrument to the notice of the public. Those matters clearly raise very important questions of principle but, as this case has developed, it becomes quite unnecessary to determine either of those two questions. Once it appears that there has been no valid certificate exempting the deposited schedules from being printed, it is conceded that section 3 (2) comes into operation. As my Lords have said, it is quite clear that no evidence was given and, accordingly, there was no finding by the justices whether at the date of the alleged contraventions the reasonable steps laid down in section 3 (2) had been carried out.

For these reasons I agree that these convictions should be quashed.

*Appeals allowed.*

Solicitors: *Lucien Fior; Treasury Solicitor.*

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[CHANCERY DIVISION.]

## *JENNINGS (INSPECTOR OF TAXES) *v.* MIDDLESBROUGH CORPORATION.

1953 *Apr.* 29, 30; *May* 20.

Upjohn J.

*Revenue—Income tax—Method of assessment—Town hall—Profits from use of hall for dances and roller skating—Income Tax Act,* 1918 (8 & 9 *Geo.* 5, *c.* 40), *Sch. A; Sch. D, Cases I, VI.*

A corporation used their town hall (in addition to the municipal purposes for which it was built) for meetings, dances and roller skating, making a charge for admission, which included lighting, heating and seating accommodation and the provision of a band. Refreshments could also be purchased and roller skates could be hired:—

*Held* that, in assessments to income tax, there must be no apportionment of the profits of the trade carried on at the town hall between the activities referable to the provision of chattels and services, for example, chairs, bands for dancing and music for skating on the one hand, and the activity referable to the exploitation of the corporation's right of property in the town hall on the other hand; but that, in computing the profits of such trade in each year, the corporation were entitled to deduct the amount of the Sch. A assessment.

*Coman* v. *Governors of the Rotunda Hospital, Dublin* [1921] 1 A.C. 1; 36 T.L.R. 646; 7 T.C. 517 applied; *Sywell Aerodrome Ld.* v. *Croft* [1942] 1 K.B. 317; [1942] 1 All E.R. 110; 24 T.C. 126 explained.

CASE STATED by Special Commissioners.

The Crown appealed, by way of case stated, from a decision of the Special Commissioners for the purposes of the Income Tax Acts who directed that an apportionment be made of profits accruing to the Middlesbrough Corporation in respect of certain activities carried on by them in their town hall, the relevant years of assessment being from 1938–1939 to 1946–1947 inclusive.

The case stated set out the following facts.

The town hall was built in 1887, principally for the holding of municipal functions and the discharge of municipal business and, when not required for those purposes, it was let to various societies for meetings and for school speech days, police socials and political parties. At the end of 1924, it was also used for

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recreational purposes for young people, *e.g.*, dances, and these dances were continued throughout the revelant period (with the exception of a short period during 1938 and 1939). There was also a crypt in the building which was, from 1933 onwards, used for roller skating.

The town hall was assessed to income tax under Sch. A as one unit of the block of buildings, by relation to the poor rate. The corporation were also assessed to income tax under Sch. D. in respect of profits arising from activities carried on in the town hall in the years indicated above.

It was contended on behalf of the corporation that: (a) the profits arising to it from the town hall in relation to lettings, dancing and roller skating, fell to be apportioned between those referable to the exploitation of its right of property in the hall on the one hand, and those referable to the provision of chattels and services on the other hand; (b) the amount of such profits apportionable to the exploitation of its right of property in the hall was covered by the Sch. A assessment on the hall, and could not be included in any assessment under Sch. D; (c) the Sch. D assessments under appeal should therefore include only the amount of the said profits apportioned to the provision of chattels and services, and the said assessments should be reduced accordingly.

The following cases were referred to: *Coman* v. *Governors of the Rotunda Hospital, Dublin* [1]; *Fry* v. *Salisbury House Estate* [2]; *Shop Investments Ld.* v. *Sweet* [3]; *Sywell Aerodrome Ld.* v. *Croft*.[4]

It was contended on behalf of the Crown that: (a) the corporation's activities in relation to the lettings of the town hall and its use for dancing and roller skating constituted a trade or adventure or concern in the nature of a trade, the whole of the profits whereof were chargeable to income tax under Case I of Sch. D, subject only to the allowance of the annual value of the hall prescribed by rule 5 of Cases I and II; (b) no such segregation or apportionment of profits as claimed on behalf of the corporation fell to be made.

The Commissioners gave their decision in writing in the following terms: "We find on the evidence that the corporation's "activities in relation to (a) the lettings and services therewith, "(b) dancing and (c) roller skating are all conducted regularly, "systematically and on commercial principles and constitute the "carrying on of a concern in the nature of trade, the profits of "which (subject as hereinafter mentioned) are assessable to "income tax under Case I of Sch. D.

[1] [1921] 1 A.C. 1; 36 T.L.R. 646; 7 T.C. 517.

[2] [1930] A.C. 432; 46 T.L.R. 336, 358; 15 T.C. 266.

[3] (1940) 56 T.L.R. 482; [1940] 1 All E.R. 533; 23 T.C. 38.

[4] [1942] 1 K.B. 317; [1942] 1 All E.R. 110; 24 T.C. 126.

"As regards (a) we think the case is indistinguishable on the "facts from *Coman* v. *Governors of the Rotunda Hospital*,[5] and "if the lettings and services therewith were the sole activity it "would, in our opinion, clearly follow from the judgment of the "Master of the Rolls in *Sywell Aerodrome* v. *Croft*[6] that (as "the corporation claims) the profits would fall to be aggregated "and apportioned between Schedules A and D, notwithstanding "that, viewed in isolation, this activity would (in our opinion) "itself constitute a concern in the nature of trade.

"The questions are whether this is affected by the existence "of the additional activities (b) and (c) and whether or not the "profits of those respective additional activities also fall to be "similarly aggregated and apportioned.

"It was given in evidence that the activities in relation to "(b) differ very little from those which would be found in an "ordinary palais de danse, and we are content to assume that "the same is true of (c). Nevertheless on the facts of this case "we do not think that in relation to (b) and (c) the corporation "can be regarded as being in precisely the same position as the "proprietor of an ordinary commercial dance hall or roller skating "rink, constructed and used exclusively for those respective "purposes. We clearly cannot regard (a) as something purely "incidental to (b) and (c). Nor, on the other hand, do we regard "the corporation as carrying on two quite separate concerns, "viz., (1) letting the hall and providing services in connexion "with the lettings, and (2) dance hall and roller skating rink "proprietors. We think the true view of the evidence is that "the corporation exploits its right of property in the hall in three "ways, namely (i) letting it to third parties, who make their own "arrangements as to what persons shall be permitted or invited "to enter it on any particular occasion, (ii) admitting the public "for dancing, and (iii) admitting the public for roller skating, and "that the corporation also provides the appropriate chattels and "services for each of these three purposes. More chattels and "services are required and provided for (ii) and (iii) than for (i), "but we think that the differences are differences of degree and "not of principle.

"On the authority of the reasoning of the Master of the Rolls "in *Sywell Aerodrome* v. *Croft*[7] we hold that the profits under "all three heads must be segregated between those referable to "the exploitation of the corporation's right of property in the "hall, on the one hand, and those referable to the provision of "chattels and services, on the other hand. The former will be "covered by the Sch. A assessments upon the hall, and must "accordingly be excluded from the assessments under Sch. D.

"Having heard no argument as to the precise way in which "the aggregation should be made, we leave this to be agreed

[5] [1921] 1 A.C. 1.
[6] [1942] 1 K.B. 317.
[7] [1942] 1 K.B. 317.

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" between the parties, or (failing agreement) to be determined by " us at a further hearing of the appeal.

" The parties having failed to agree the figures, the appeal " came before us again on September 25 and 26, 1951."

After considering evidence on behalf of the corporation and of the Crown as to the basis of apportionment, which should be adopted, the Commissioners came to the conclusion that, on the facts of the case, the basis which might be expected to give results approximating most closely to the probable realities of the situation, so far as they were capable of being ascertained, was that contended for by the corporation.

The Crown appealed.

*Cyril King Q.C.* and *Sir Reginald Hills* for the Crown.

*Frederick Grant Q.C.* and *N. E. Mustoe Q.C.* (*R. A. Watson* with them) for the corporation.

*Cur. adv. vult.*

May 20. UPJOHN J. This is an appeal by the Crown from a decision of the Special Commissioners of Income Tax who directed that an apportionment be made of profits accruing to the respondent corporation in respect of certain activities carried on by them in their town hall, the relevant years of assessment being from 1938/1939 to 1946/1947 inclusive. The law was then altered in the Finance Act, 1948, and the point which I have to decide cannot, I understand, arise for the future.

The case stated sets out the facts in great detail but I can summarize them very shortly.

In the year 1887 the corporation created a fine town hall in the then fashionable neo-Gothic style. The hall is a large one and contains a hall capable of seating some 1,600 persons and under it a crypt. The hall is not used for meetings of the town council or for the purpose of transacting its day-to-day business, for there are separate council offices; but the primary object of building the hall was to use it for civic functions, though in practice it is not so used very often. During the relevant years of assessment it was used perhaps some six times in the year for elections, A.R.P. meetings or mayors' receptions, or occasionally even a Hallé concert. During that period the corporation, no doubt with the laudable purpose of saving the ratepayers' money and providing amenities for them and their children, were accustomed to organize and run public dances some three times a week, making a small charge of 1s. 6d. per person on Tuesdays and Thursdays and 3s. on Saturdays. For this a band was provided by the corporation and, of course, lighting, heating, sitting out accommodation and so on. In addition, refreshments and cloak room accommodation were available at small extra charges. In the crypt the corporation twice a week, that is on Mondays and Wednesdays, provided roller skating facilities, the charge for admission being 1s. 6d. per person, which covered

lighting, heating and music from gramophone records. Refreshments, cloak room accommodation and the hire of roller skates were available at small additional charges. Furthermore, the corporation made the practice of licensing the use of the hall to various societies, charitable and religious, to hold meetings. It was also used for such purposes as school speech days, police social parties and meetings of political bodies. Fees were charged for this to such bodies requiring the use of the hall according to a scale. The fees so paid included provision of chairs and heating, but stewards and cloak room attendants and lighting when required were available at slight additional charges.

As a result of those activities the Special Commissioners have held as a fact, and there was no dispute about that before me, that the corporation were during the relevant years of assessment carrying on upon their property, the town hall, a concern in the nature of trade which is assessable to income tax under Case I of Sch. D.

The question I have to consider is whether the profits of such trade ought to be apportioned between the activities referable to the provision of chattels and services, for example, chairs for meetings, bands for dancing, roller skates and music for skating on the one hand, and the activity referable to the exploitation of the corporation's right of property in the town hall on the other hand. The Special Commissioners conceiving themselves bound by some observations of the late Master of the Rolls in *Croft* v. *Sywell Aerodrome Ltd.*,[1] have held that an apportionment must be made. The whole question is whether that is right. The Special Commissioners have prepared a supplemental case stated making an apportionment, but I am not concerned with the detailed figures; and the Crown, although not agreeing with the accuracy of the figures, felt they could not properly challenge them before me.

The Crown's case is a perfectly simple one. They submit that the corporation, who are admittedly in occupation of the town hall, are assessable to tax on the profits of the whole of their activities. They submit that there is no room for making any apportionment, for that matter is dealt with by rule 5 of the rules applicable to Cases I and II of Sch. D, which is in these terms: " 5.—(1) The computation of tax shall be made exclusive " of the annual value of lands, tenements, hereditaments, or " heritages occupied for the purpose of the trade or profession " and separately assessed and charged under Sch. A." I need not read the next paragraph, and then subsection (2) says: " (2) Where, in estimating the amount of annual profits or gains " arising or accruing from any trade, profession, employment, or " vocation and chargeable to tax under this Schedule, any sum " is deducted on account of the annual value of the lands, " tenements, hereditaments and heritages used for the purpose

[1] [1942] 1 K.B. 317.

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"of such trade, profession, employment, or vocation, the sum "so deducted shall not exceed the amount of the assessment of "the lands, tenements, hereditaments and heritages for the "purpose of tax under Sch. A as reduced for the purpose "of collection."

They submit that the scheme of the Act is this, that where a subject remains in occupation of his property and carries on trade thereon he is, of course, exercising his beneficial rights in the property and to that extent he is exercising rights on which he is being taxed under Sch. A. Therefore, when one comes to compute the profits of the activities carried on on such property it is not fair that the subject should be taxed again, and so provision is made by rule 5 to deduct the Sch. A tax. That submission is supported by *Coman* v. *Governors of the Rotunda Hospital, Dublin.*[2] That case was very similar to the present case, and on the facts the Commissioners found, and in my judgment found correctly, that the *Rotunda* case[2] was indistinguishable from the present. That case depended on the Income Tax Act, 1842, but it is agreed that the relevant provisions were the same as in the Income Tax Act, 1918. The headnote was as follows: "The Governors of a hospital let out certain rooms "contiguous to the hospital for entertainments for periods "varying from one night to six months at charges which included "the use of heating and seating and applied the profits arising "from these lettings to the general support of the hospital:— "*Held*, that these profits were assessable to income tax under "Sch. D as being profits arising from a concern in the nature of "trade within Case I, and were not within any of the exemptions "conferred by the Income Tax Acts by reason of their being "applied to charitable purposes or otherwise. Decision of the "Court of Appeal in Ireland reversed."

The question arose incidentally as to whether the assessment was properly made under Case I or Case VI. As the headnote shows, the majority of their Lordships held that it was Case I; but it was not a vital matter, for there was no suggestion of an apportionment in that case, and so there was no material difference in an assessment under either case. That is an important matter to consider when I come to consider the respondents' argument. Lord Cave said this[3]: "It is pointed "out, however, on behalf of the respondents that by virtue of the "regulations contained in the Act of 1842 (which by section 5 "of the Act of 1853 are incorporated in that Act so far as "consistent with its provisions), and particularly of Rule 1 in "section 100, any profits liable to assessment under Sch. A are "expressly excluded from Sch. D; and it is argued that the "profits from the Rotunda Rooms fall within that category. "Accordingly, the first question to be determined is whether "these profits are assessable under Sch. A. It is contended that

[2] [1921] 1 A.C. 1. [3] Ibid. 22.

" they are so assessable in one of two ways—namely, either (1) " as being profits of lands, tenements, hereditaments or heritages " and so falling within the general description of property com- " prised in Sch. A and within Rule 1 in section 60 of the Act of " 1842, or (2) as being profits of a concern of the like nature " with ironworks, gasworks and the other undertakings specified " under the third heading of Rule 3 in the same section. With " regard to the former of these contentions, I am unable to see " how the profits in question can be said to be derived from the " Rotunda Rooms alone. They result, not from the letting of " bare rooms, but from the whole venture consisting of the equip- " ment and disposal of the rooms with their fixtures and furniture, " and the provision of the services of heating, lighting and attend- " ance. They may perhaps be described as profits of a trade or " concern in the nature of trade, that is to say, of the business " of providing and letting rooms for entertainments, and so as " falling under Case I in section 100, Sch. D; but if not then " they fall under Case VI as profits or gains not falling under " any of the earlier rules. In some respects they resemble profits " derived from letting furnished houses or apartments, which are " regularly assessed under Sch. D. It is no doubt true that a " substantial part of the profits in question arises from the " occupation and use of the tenements occupied for the purposes " of the business; but this is precisely the event contemplated by " the second of the rules contained in section 100 and applicable " to Cases I and II, which provides that the computation of the " duty to be charged in respect of any particular trade, manu- " facture, adventure or concern is to be made exclusive of the " profits or gains arising from lands, tenements, or hereditaments " occupied for the purpose of such trade, manufacture, adven- " ture, or concern, and effect has been given to that rule by " deducting the Sch. A assessment. It may be that in the " present case the share of profits so attributed to the elements " in the concern other than the rooms themselves is excessive; " but, if so, that is the effect of section 9 of the Finance Act, " 1898, which provides that the sum deducted under the rule " above quoted is not to exceed the Sch. A assessment. The " hardship (if there be any) may be obviated by getting the Sch. A " assessment increased. As to the alternative argument, that " the profits in question are assessable under paragraph 3 of " Rule 3, it is sufficient to say that the undertaking in the present " case cannot be held to be ' of the like nature ' with ironworks, " gasworks, and the other concerns mentioned in that paragraph."

That, in a nutshell, is the Crown's case.

The case for the respondents is this. It was clearly established by *Fry* v. *Salisbury House Estate Ltd.*[4] that where profits arise from the use of land such as renting it, those profits are covered by the Sch. A assessment and the Crown cannot tax those profits again under Sch. D. Lord Atkin said this[5]: " My

[4] [1930] A.C. 432. [5] Ibid. 458.

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"Lords, it may well be that another mode of expressing the "result I have stated is to hold that a person capable of being "assessed under Sch. A cannot be said in respect of his income "from land to be earning profits from 'trade.' This view "appears to commend itself to some of your Lordships. I do "not dissent from it, but I view it with some misgiving. I find "it difficult to say that companies which acquire and let "houses for the purposes of their trade, such as breweries in "respect of their tied tenants, and collieries and other large "employers of labour in respect of their employees, do not let "the premises as part of their operation of trading. Personally "I prefer to say that, even if they do trade in letting houses, "their income, so far as it is derived from that part of their "trading, must be taxed under Sch. A and not Sch. D. I agree "that this appeal should be dismissed."

The law was altered by statute in 1940, but that is the principle.

The same principle has been expressed with felicity by Lord Greene in the *Sywell* case,[6] to which I shall have to refer in detail later. He said this: "The effect of these decisions "is that where profits are referable to property or occupation the "Crown, like the subject, is bound by the statutory measure in "accordance with which such profits fall to be ascertained. A "further principle I think also emerges, namely, that, even if "the profits in question are made by means of a highly organized "commercial operation and one which in ordinary parlance "would be described as a trading operation, the relevant "schedule, be it A or B, must be applied. When once a "profit is referable to property or occupation, in that category it "must remain. It cannot be taken out of that category by "calling the operation which gives rise to it a trading operation."

The respondents contend here that a large part of the profits they receive is referable to the actual use they make of their town hall, that is the use of the hall and crypt for dancing, roller skating and meetings, and they submit, therefore, that there must be an apportionment. The *Rotunda* case,[7] they submit, is not against them, for the point on apportionment was never taken. They rely principally on the observations of Lord Greene in the *Sywell* case[8] and on the rather earlier decision of *Shop Investments Ltd.* v. *Sweet*,[9] but I need not refer to that case, for it is fully dealt with in the *Sywell* case[8] by Lord Greene.

I turn then to the *Sywell* case.[8] The headnote reads as follows: "A company, which owned an aerodrome equipped "with hangars, lecture rooms, a kitchen, and other buildings, "let to an aviation company at a rent a number of the buildings "with the right to use the aerodrome for the flying purposes of "a Royal Air Force school of flying in common with other users "of the aerodrome for the term of four years from June 10,

[6] [1942] 1 K.B. 317, 326.
[7] [1921] 1 A.C. 1.
[8] [1942] 1 K.B. 317.
[9] 56 T.L.R. 482; 23 T.C. 38.

" 1936; and they also granted the aviation company a licence in " consideration of a yearly payment giving it the sole right to " use a service hangar and the sole right to sell petrol and " execute repairs to aircraft using the aerodrome. The aerodrome " company also granted licences to flying clubs to use the " aerodrome, and they further received income from garage " rents, housing and landing fees of aeroplanes, and a percentage " of the earnings, of another company from the sale of ice cream. " The company were responsible for keeping the aerodrome in " good order and for this purpose employed a groundsman:— " *Held*, by Lord Greene M.R., and Clauson L.J. (du Parcq L.J. " dissenting) that all the activities of the company at the " aerodrome arose from the exercise and exploitation of their " rights of property, and were, therefore, covered by an assess- " ment to income tax under Sch. A, and that the company was " not assessable under Sch. D, Cases I or VI. *Fry* v. *Salisbury* " *House Estate Ld.*,[10] and *Lord Glanely* v. *Wightman* [11] applied. " *Coman* v. *Governors of Rotunda Hospital, Dublin*,[12] and " *Carlisle and Silloth Golf Club* v. *Smith* [13] distinguished. *Shop* " *Investments Ld.* v. *Sweet* [14] approved."

The first point to be noted is that all the activities of the company arose from the exercise and exploitation of their property and there was no finding of fact that the company was carrying on any trade; the provision of such services as were provided being either ancillary to the exercise of their rights of property or treated as de minimis. The late Master of the Rolls was at pains to point out by reference to many examples, the difference between the exploitation of a right of property or occupation and the carrying on upon the land of activities of a sort which anyone is entitled to do wherever he may be. I will read one passage only on this point from the judgment of the Master of the Rolls [15]: " These considerations appear to me " to provide an answer to the question: Why and on what " principle is a person who, for example, sets up a refreshment " stall on his land or provides services for people admitted to his " land, not exhaustively taxed under Sch. A or B (as the case " may be) in respect of the profits so earned? Such a person, in " my view, is not exploiting his rights of property or of occupation " save in the sense and to the limited extent that he must own " or occupy the land before he can erect and carry on the " refreshment stall or perform the services. The profits earned " in such a case are referable, not to the exercise of the rights " of property or of occupation since the customers come on to " the land for the purpose of obtaining refreshment or procuring " the benefit of the services. If, on the other hand, the owner " of the land having (let me suppose) a remarkable view or some

[10] [1930] A.C. 432.
[11] [1933] A.C. 618; 49 T.L.R. 356.
[12] [1921] 1 A.C. 1.
[13] [1913] 3 K.B. 75; 29 T.L.R. 508.
[14] 56 T.L.R. 482; 23 T.C. 38.
[15] [1942] 1 K.B. 317, 328.

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" historic monument merely allows the public to come on to the " land in return for an admission fee, I cannot myself see why " it should be said that his profits are not covered by the Sch. A " assessment since all that he is doing is to exploit his right of " property by granting licences to come on the land. The fact " that he keeps the paths in order or the monument in repair " to make a visit more attractive to the public again appears to " me to make no difference, any more than does the action of the " landlord of a house in keeping it in repair."

As a matter of principle I confess that those observations seem to me to support the Crown's contention. I cannot think that Lord Greene could have thought that any part of the profits of running a refreshment stall should be apportioned, because the persons come on to the land not merely to purchase a cup of tea but incidentally to sit down and enjoy the air and the scenery while drinking it. The activity is one whole activity, namely, carrying on a trade. So here in principle this is one trade or possibly three branches of one trade. The customers of the corporation enter the town hall not merely to make use of the corporation's land but to carry on thereon activities which can be carried on on any suitable premises; holding meetings, dancing and roller skating.

It could hardly be suggested that a shopkeeper, who keeps a large departmental store and who by an attractive display of many different commodities all obtainable under one roof invites customers to come into his vast emporium and to wander round the various departments, could claim an apportionment of the profits of his trade because great use is made by the customers of his premises. It was said the distinction is that the profits in such a case are made from sales and not from the use of land. I do not regard the distinction as valid. In the present case the customers are not buying goods, but the right to dance, to hold meetings or to roller skate. In all these cases the customers are making use admittedly in varying degrees of the premises whereon these activities are carried on, but, in each case the profits result from a trade. The beneficial user of the owner's land involved in these activities is for taxation purposes taken care of by rule 5.

I must now refer to certain observations of the Master of the Rolls in the *Sywell* case [16] which form the keystone of the respondents' case. After reviewing the earlier authorities, he said this: " The last case was *Shop Investments Ltd.* v. *Sweet*,[17] a decision " of Wrottesley J., whose judgment, if I may say so, I have found " particularly illuminating and is, in my opinion, manifestly " correct. There the company, whose business was that of " acquiring and modernizing properties and letting or selling the " properties so modernized, had, on one occasion and contrary

[16] Ibid. 338.

[17] 56 T.L.R. 482; 23 T.C. 38.

" to their usual practice, let a cinema furnished with all its equip-
" ment and plant. Assessments were made in respect of the
" profits of this letting, the amount of the Sch. A assessment
" being allowed as a deduction. The company contended
" (wrongly) that the profits were covered by the Sch. A assess-
" ment. It also contended that the profits made by letting the
" furniture, etc., must be separated from the profit made by
" letting the cinema building itself for which purpose an estimate
" must be made of what part of the total rent was referable to
" the furniture, etc. The object of this contention was, of course,
" to enable the company to show that a proportionate part of
" the rent greater than the assessed annual value was attributable
" to the building itself. Wrottesley J. agreed with this conten-
" tion and, in my opinion, rightly so. If the owner of a building,
" the assessed annual value of which is £X, can let it unfurnished
" for £X plus £Y, he cannot be separately taxed in respect of the
" £Y. If, instead of letting it unfurnished, he furnishes it and
" lets it furnished for £X plus £Y plus £Z, to tax him on £Y
" plus £Z would be to exact double tax in respect of £Y which,
" as the result of the artificial measure of profits adopted under
" Sch. A, has already in law borne tax. An apportionment such
" as was made in this case could, I think, have been claimed in
" the *Rotunda* case [18] and the *Carlisle Golf Club* case,[19] and
" similar cases if the point had been considered, and if (what
" seems unlikely) any benefit could thereby have accrued to the
" taxpayer in those cases."

No doubt it was that last sentence on which the Commissioners in this case relied.

In the *Shop Investments* case,[20] it was admitted that the company fell to be assessed in respect of their letting of furniture and fittings, and the sole question was as to the method of apportionment of a gross rental which covered a lease of the cinema and of the furniture and fittings. Wrottesley J. negatived the view that the company carried on the business of letting furnished cinemas and held that it was not right to apportion the rent by attributing to the unfurnished letting element of the gross rent only such part thereof as was represented by the amount of the Sch. A assessment; it was a matter of factual apportionment. The vital point in my judgment was that the case was not dealing with a Case I assessment at all, for the company was not carrying on a trade, so presumably the assessment fell to be made under Case VI, and as there is no rule corresponding to rule 5 for cases falling under Case VI it is a matter for apportionment in each case. With the greatest possible respect to the late Lord Greene, his remarks (which were obiter) as to the possibility of making an apportionment in the *Rotunda* case [21] overlook this vital distinction. Lord Greene was not himself concerned with a

[18] [1921] 1 A.C. 1.
[19] [1913] 3 K.B. 75.
[20] 23 T.C. 38, 44.
[21] [1921] 1 A.C. 1.

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Case I assessment and there seems no reason to suppose that rule 5 was brought to his attention.

I should normally always follow the dicta of that great master of the law, but, in this case, his remarks seem to me to be in conflict with the very terms of rule 5 and with the observations of Lord Cave which I have read in the *Rotunda* case.[21] In my judgment that rule and those observations govern the present case and exclude any apportionment.

The appeal of the Crown must be allowed. The matter must be remitted to the Special Commissioners with a direction that there is to be no apportionment of the profits of the trade found by them to have been carried on at the town hall, but the respondents are entitled in computing the profits of such trade in each year to deduct the amount of the Sch. A assessment.

*Appeal allowed.*
*Case remitted to Special Commissioners.*

Solicitors: *Solicitor of Inland Revenue; Lewin, Gregory, Torr, Durnford & Co. for Town Clerk, Middlesborough.*

J. L. D.

[21] [1921] 1 A.C. 1.

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[COURT OF CRIMINAL APPEAL.]

C. C. A.

1953
*June 9.*

Lord Goddard C.J., Hallett and Donovan JJ.

## *REGINA *v.* WILSHER.

*Criminal Law—Sentence—Corrective training—Offence while on licence—Power of court to award imprisonment.*

Where a person sentenced to corrective training commits an offence while on licence, a court may, in its discretion, and subject to the report of the Prison Commissioners, impose a sentence of imprisonment for that offence.

*Reg.* v. *Talbot* [1953] 2 W.L.R. 346; [1953] 1 All E.R. 340 qualified.

APPLICATIONS for leave to appeal against conviction.

On January 27, 1953, the applicant, Reginald John Wilsher, was convicted at the Central Criminal Court on a charge of shopbreaking and was sentenced to four years' corrective training, to run consecutively with a sentence of two years' corrective training already being served. At the time of his sentence he was under committal for trial at the Chelmsford Assizes for office breaking, larceny and causing grievous bodily harm to a police constable, and on February 20, 1953, he was convicted of those offences before Hallett J., who sentenced him to two years' corrective training to begin at the expiration of the four-year term.

The Court of Criminal Appeal, in refusing leave to appeal against both the convictions, made certain observations, with which this report is concerned, as to the appropriate punishment for offences committed while on licence.

The applicant was not present and was not represented.

LORD GODDARD C.J. In sentencing the applicant to two years' corrective training, Hallett J.—who is now a member of this court—expressed the opinion that it would be as well if this court considered the matter, especially in view of *Reg.* v. *Talbot*.[1]

Having heard that the applicant had been sentenced at the Central Criminal Court to corrective training, Hallett J. felt in a difficulty because this court has pointed out that it is undesirable, when a person is undergoing a sentence of corrective training and is brought before a court for another offence, to pass a sentence of imprisonment for the latter offence because it would mean that the moment that he finished his corrective training he would have to undergo imprisonment. This might do away with any good he may have received in corrective training. The judge expressed some surprise—which this court shares—that in view of his record, the applicant had been given a sentence of corrective training at the Central Criminal Court. But having received that sentence, the judge thought—in our opinion rightly—that the only thing to do was to add some period to his term of corrective training, and so he passed a sentence of two years' corrective training, to follow consecutively on the sentence that he was already serving.

So far as that is concerned, the court entirely approves, but the attention of the court has been drawn to the difficulty experienced by certain recorders when persons having been sentenced to corrective training and released on licence have committed offences while on licence. Since the Criminal Justice Act, 1948, where a prisoner earns a remission of imprisonment, he is discharged, not on ticket of leave or under licence, as in the old days, but the sentence comes to an end. The position is not the same with corrective training or, as a matter of fact, preventive detention. If a person has been sentenced to corrective training he can be released on licence, but if, while he is on licence, he commits an offence he is liable to be recalled, and the Prison Commissioners may, under the Prison Rules, 1949, make him serve the remaining portion of his sentence as imprisonment. The difficulty that has occurred to some recorders when dealing with offences committed while on licence, is that often the commissioners report that the offenders have shown that corrective training has done no good and they do not recommend them for a further sentence of corrective training.

[1] [1953] 2 W.L.R. 346; [1953] 1 All E.R. 340.

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The court thinks that in such cases a sentence of imprisonment should be imposed. If, however, the Prison Commissioners have reported that they think that a further period of corrective training might be beneficial, the court can exercise its discretion whether to pass a sentence of imprisonment or corrective training.

Solicitors: *Registrar, Court of Criminal Appeal.*

J. D. P.

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[QUEEN'S BENCH DIVISION.]

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*May* 14, 15. 22.
Pilcher J.

## *LEOLGA COMPANIA DE NAVIGACION *v.* JOHN GLYNN AND SON LD.

*Shipping — Charterparty — Conveyance of "lawful merchandise" — Meaning.*

Where a term of a charterparty states that a ship is to be employed only for the conveyance of lawful merchandise, cargo loaded on the ship must not only be such as can be loaded without breach of the law in force at the port of loading, but must also be capable of being lawfully discharged at the port where the charterers order it to be unloaded.

Scrutton on Charterparties (15th ed. at p. 156) and Carver's Carriage of Goods by Sea (9th ed. at p. 454) commented upon.

*Vanderspar & Co.* v. *Duncan & Co.* (1891) 8 T.L.R. 30 is no authority for the proposition that government stores, including ammunition, are not covered by the words "lawful merchandise"; at the most the case is only an authority on usage applied to its own particular facts.

SPECIAL CASE stated by an umpire.

The Leolga Compania de Navigacion, the owners of the s.s. *Dodecanese*, claimed in an arbitration against John Glynn & Son Ld., time-charterers of the vessel, £2,131 12s. 11d., being the amount of hire for the vessel during a period when it was immobilized, or alternatively, the same amount as damages for breach of the charterparty.

The following statement of facts is taken from the judgment of Pilcher J. By a time charterparty dated December 12, 1951, on the Baltime 1920 form, extending over a period which in the result proved to be rather over three months, the s.s. *Dodecanese* was delivered to the charterers at Malta on December 20, 1951, and ultimately redelivered to the owners at Tripoli on April 1, 1952.

The charterparty contained the following material clauses: clause 1: "... steamer to be employed in lawful trades for the "conveyance of lawful merchandise between good and safe ports

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[Reported by Miss C. J. ELLIS, Barrister-at-Law.]

"or places within" certain limits. Clause 10: "In the event "of loss of time caused by drydocking or by other necessary "measures to maintain the efficiency of steamer . . . breakdown "of machinery, damage to hull or other accident preventing "the working of the steamer and lasting more than twenty-four "consecutive hours, hire to cease from commencement of such "loss of time until steamer is again in efficient state to resume "service. . . ." Clause 12: ". . . Charterers to be responsible "for loss or damage caused to steamer or owners by goods being "loaded contrary to the terms of this charter. . . ." Clause 31: "In the event of explosives being shipped it is agreed that "charterers are to supply at their expense the necessary "magazine in order to comply with Board of Trade regulations." Clause 38: "Dangerous cargo may be carried in accordance with "Board of Trade Rules. If gas ejectors are required same to be "supplied and fitted at charterers' expense and to be operated by "ship's personnel."

Having been delivered to the charterers under the charter-party at Malta on December 20, 1951, the vessel loaded cargo at Malta, Tripoli, Benghazi and Tobruk. Some, if not all, of the cargo consisted of ammunition and other explosive war stores.

The vessel arrived at Port Said at 4 a.m. on January 14. She was there boarded by the Egyptian authorities, who made an entry in Arabic in her log-book that she was "black-listed" according to Egyptian law.

On March 1, 1951, and before the vessel entered on the charter, the Egyptian authorities had issued a letter, which was sent to the charterers' agent, the effect of which was stated in paragraph 8A of the special case, as follows: "On November 1, "1951, the Egyptian authorities issued a letter No. 9443, which "letter stated, inter alia, that any cargo or materials consigned "to the British Forces in Egypt were not allowed to be dis-"charged without obtaining special permission from the customs, "and that it was prohibited for vessels to berth for discharge "and/or loading cargoes belonging to the British Army at any "place in Egypt except the ports of Alexandria, Port Said and "Suez. . . ."

The cargo on board the vessel was consigned to Adabiya, in Suez Bay at the southern end of the Suez Canal. The vessel proceeded through the Canal and arrived at Abadiya, where she discharged her cargo. Discharge was completed on January 24. On that day she commenced to load a cargo of military stores, including ammunition, for Aquaba. Loading was completed on January 30, and the vessel was due to sail for Aquaba on January 31. On the afternoon of January 30, however, she suffered a breakdown of her propelling machinery, which effectively immobilized her until it could be repaired. On February 4, the charterers' agents notified the master by letter that his ship must, in the circumstances, be considered as "off hire" from the afternoon of January 31.

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The nature of the machinery breakdown necessitated the renewal of a phosphor bronze block. Owing to the fact that the vessel had been black-listed by the Egyptian authorities, the latter refused to allow the necessary repair to, or renewal of, the phosphor bronze block to be effected on the spot. The master of the vessel, however, apparently succeeded in getting the defective part taken to Cairo, where a new block was made. That was brought back to the ship and installed in position, but it was not until 9 p.m. on March 1 that the vessel was once again in an efficient state to resume service under the charterparty. She was thus delayed in all about thirty days.

The following relevant paragraphs were set out in the special case: "5. The Egyptian authorities refused to allow any repairs "to be done owing to the fact that as the vessel had carried "military stores for the British Forces in Egypt she had been "black-listed. The master, in an endeavour to minimize the "delay had, in fact, managed to get repairs effected to the part "at Cairo. 6. The claimants' claim is for £2,131 12s. 11d., "being the amount of hire from noon on January 31 to 9.0 p.m. "on March 1, 1952, less hire for four days conceded by claimants "as representing the time which would normally have been "spent in effecting repairs and certain other items, all of which "have been taken into account. These figures, as figures, have "been agreed between the two parties. The claimants put in an "alternative claim for damages which amounts to the same "figure as I have just stated. 7. This case turns upon the "question as to who is responsible for the time used doing "repairs, which repairs were inordinately delayed on account of "the vessel being black-listed by the Egyptian authorities owing "to her having, or having had, on board military stores, cart-"ridges, bombs, shells, etc., for the British Forces in Egypt."

Subject to the opinion of the court, the umpire held, as stated in paragraph 8E of the case, that the charterers were in breach of contract, since in *Vanderspar & Co.* v. *Duncan & Co.*[1] it was held by Charles J. that government stores (armaments, ammunition, etc.) were not covered by the words "lawful merchandise," and he awarded and adjudged that the claimants were entitled to recover from the charterers the sum of £2,131 12s. 11d.

In paragraph 8F of the case it was stated that the question for the decision of the court was whether on the facts found and the true construction of the charterparty the claimants were entitled to that sum.

*Eustace Roskill Q.C.* and *A. Bateson* for the charterers.

*Sir Robert Aske Q.C.* and *Michael Holman* for the shipowners.

[1] (1891) 8 T.L.R. 30.

The following cases were cited in argument: *Vanderspar & Co.* v. *Duncan & Co.*[1]; *Mehmet Dogan Bey* v. *G. G. Abdeni & Co. Ld.*[2]; *Andre et Cie, S.A.* v. *J. H. Vantol Ld.*[3]; *Royal Greek Government* v. *Minister of Transport*[4]; *Potter* v. *New Zealand Shipping Co.*[5]; *Capper* v. *Forster*[6]; *Hudson's Bay Co.* v. *Domingo Mumbru S.A.*[7]; *Temple Steamship Co. Ld.* v. *V/O Sovfracht*[8]; *Board of Trade* v. *Temperley Steam Shipping Co. Ld.*[9]; *Balkans and Near East Shipping Agency* v. *United Shipping Agencies Ld.*[10]; *Tatem Steam Navigation Co. Ld.* v. *Anglo-Canadian Shipping Co. Ld.*[11]; *Minister of Food* v. *Reardon Smith Line.*[12]

*Cur. adv. vult.*

May 22. PILCHER J. stated the facts set out above and continued:—One of the difficulties in the case arises from the fact that the umpire has not set out some of the facts of the case with any great precision. On the face of the award, in paragraph 8E, the umpire, taking the view, on the authority of *Vanderspar & Co.* v. *Duncan & Co.*,[1] that government stores (ammunition, etc.) were not lawful merchandise, has found, subject to the opinion of the court, that the charterers committed a breach of contract. He has assessed the damages payable by the charterers in respect of the breach of contract on the basis of the hire payable by them, but withheld, throughout the period during which the vessel was delayed, namely, thirty days, less four days, which was agreed by the parties as being the time in which the repairs to the defective part would have been effected but for the refusal of the Egyptian authorities to allow repairs to be done.

Another difficulty in the case has arisen because of the umpire's reference in paragraph 8E of the case to *Vanderspar & Co.* v. *Duncan & Co.*[1] It was urged with some force by Mr. Roskill, on behalf of the charterers, that this case is no authority for the bald proposition that government stores, including ammunition, are not covered by the words "lawful merchandise." This was conceded by Sir Robert Aske for the shipowners. In my view, it is clear that *Vanderspar & Co.* v. *Duncan & Co.*[1] is no authority for the proposition for which it would appear, on the face of the award, that it was invoked by the umpire. The report of the case is not satisfactory, and at the most the case is only an authority on "usage" applied to its own particular facts.

In these circumstances, the charterers contend that the award is bad on its face and should be set aside. Sir Robert Aske, for the shipowners, pointed out, however, that in paragraph 8F the

[2] [1951] 2 K.B. 405; [1951] 2 T.L.R. 30; [1951] 2 All E.R. 162.
[3] [1952] 2 Lloyd's Rep. 282.
[4] (1949) 66 T.L.R. (Pt. 1) 504.
[5] (1895) 1 Com.Cas. 114.
[6] (1837) 3 Bing.N.C. 938.
[7] (1922) 10 Ll.L.Rep. 476, 478.
[8] (1945) 79 Ll.L.Rep. 1.
[9] (1927) 27 Ll.L.Rep. 230.
[10] (1935) 53 Ll.L.Rep. 180.
[11] (1935) 53 Ll.L.Rep. 161.
[12] [1951] 2 T.L.R. 1158.
[1] (1891) 8 T.L.R. 30.

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umpire states the question for the decision of the court in the widest possible terms: namely, whether on the facts and the construction of the charterparty the claimants are, or are not, entitled to the damages which he has awarded them.

Sir Robert Aske contended that on the wide question submitted it was open to this court, if the necessary facts have been found by the umpire, to consider not only whether there has been a breach of contract by the charterers on the grounds found by the umpire, but whether on the facts found the charterers have been guilty of any breach of contract at all which entitles the shipowners to claim damages.

On the broad question submitted for the opinion of the court I have no doubt that if sufficient facts had been stated by the umpire to enable the court to arrive at a conclusion, it is open to me to consider whether the charterers have, in the circumstances, been guilty of any breach of the charterparty, and, if necessary, also to consider the question which is necessarily bound up with the point, namely, whether the charterers were entitled, in the circumstances, to treat the vessel as off hire and to withhold hire under the off-hire clause.

In this connexion I need only refer to certain passages in the judgments of Bankes L.J. and Atkin L.J. in *Hudson's Bay Company* v. *Domingo Mumbru Sociedad Anonima*.[2] The point, or one of the points, in the case being whether or not it was open to the parties, on the statement by the umpire of the question for the decision of the court, to argue the point which apparently had not been dealt with or decided by the umpire, Bankes L.J. said[3]: "... the special case takes the form that the umpire "states the facts as he finds them, and then asks the court not "a question as to a specific point of law, but he asks the court "generally to say whether having regard to those facts as found "by him the one party or the other was in the right. So I think "it was open to the shipowner to raise the point."

Atkin L.J. said[4]: "Now the first question is: is that open "to them? For the reasons given by my Lord, I think that that "point is open to them, though, in fact, it was not taken before "the umpire where apparently the arbitration seems to have "been conducted before two arbitrators and the umpire, and we "are not told whether legal advisers were present or not. It "seems to me that, where an umpire states a case in the form "that subject to any questions of law he finds the facts so-and-"so, and awards so-and-so, the parties are entitled to take any "question of law that arise upon those facts; and I think it is "a good thing that that should be made clear. I am not at all "sure that by far the most important part of our decision in "this case to the public at large is that part of the decision and "not that part that immediately concerns the construction of "this charterparty."

[2] (1922) 10 Ll.L.Rep. 476.
[3] Ibid. 478.
[4] Ibid.

In common parlance, the real point in this case is very shortly summarized by the umpire in paragraph 7 of the award. [His Lordship read paragraph 7 set out above, and continued:] I start with this general proposition, that prima facie the charterers' obligation to pay hire is continuous. If a charterer withholds hire, purporting to do so under the off-hire clause, it is for him to establish facts which entitle him to do so: see *Board of Trade* v. *Temperley Steam Shipping Co. Ld.*[5] Correspondingly, if the shipowner alleges a breach of contract he must prove it.

In the present case the charterers allege that the vessel was off hire within the words of clause 10 of the charterparty throughout the whole month during which she was held up at Adabiya, and they deny that they have been guilty of any breach of contract. They further say that if they have been guilty of any breach of the charterparty the damages recoverable are only nominal in that the fact that the Egyptian authorities might refuse repair facilities to the ship was not a matter which was foreseen or foreseeable by the parties.

The first matter which I have to consider is, what are the material facts found by the umpire? I take the findings of fact to be that the vessel, loaded with war stores, was boarded in Port Said on January 14, 1952, by the Egyptian authorities who "made an entry in Arabic in the log-book that the vessel was "black-listed according to Egyptian law." I take paragraph 5 of the award to be a finding of fact that after the breakdown the Egyptian authorities refused to allow any repairs to be done owing to the fact that as the vessel had carried military stores for the British Forces in Egypt she had been "black-listed." The vessel was in fact delayed about thirty days, and I assume from paragraph 6 of the award that it was agreed that but for what I will call the action of the Egyptian authorities the vessel would have been delayed as a result of the breakdown of her machinery for only four days instead of thirty days. It is also clear from this paragraph that the sum of £2,131 12s. 11d. was agreed by the parties as a figure, after taking all proper matters into account, representing the hire to which the shipowners were entitled if the vessel was not, as the charterers alleged, off hire during the difference between four and thirty days: namely, twenty-six days.

Under clause 10 of the charterparty it is only loss of time caused, inter alia, by breakdown of machinery, which enables the charterers after twenty-four hours to put the vessel off hire. There is no doubt that the s.s. *Dodecanese*, having become physically immobilized by the breakdown, remained so physically immobilized for thirty days, and clause 10 provides that hire shall cease from the moment of the loss of time until the vessel again is in an efficient state to resume service. This did not

[5] (1927) 27 Ll.L.Rep. 230.

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occur until the end of the thirty days. The umpire has found this clearly in paragraph 4 of his award. He has not dealt with the shipowners' first claim, which was for loss of hire withheld during the whole period by the charterers, but finding that the latter were in breach of the charterparty for a reason which no one now seeks to support, he has awarded the shipowners damages based on the rate of the charter hire for the period by which the delay to the vessel was prolonged by the action of the Egyptian authorities in refusing repair facilities.

It is, I think, clear from the passages in the award to which I have referred that the umpire found as a fact that some twenty-six days of the delay which the vessel incurred was due to what I will continue for the moment to call the action of the Egyptian authorities in refusing repair facilities. He found as a fact that this action was taken by them because the vessel had been black-listed by the Egyptian authorities because she had carried military stores for the British Forces in Egypt. What he does not find as a fact is that there was any Egyptian law entitling the Egyptian authorities to black-list the vessel; nor what black-listing entailed; nor whether the Egyptian authorities had any right under Egyptian law to refuse repair facilities to a vessel which they had black-listed. He does find in paragraph 8A of the award that the charterers' agents and the charterers had notice of the contents of letter No. 9443 before the vessel entered on the charter and "were aware of this embargo" before any cargo was loaded on the vessel, whereas there was no evidence that the charterers brought that letter to the notice of the master of the vessel until January 14, which was the day the vessel entered the Canal and the day she was black-listed.

I think that it would be right that I should assume that wherever in his award the umpire refers to "the Egyptian "authorities" he means the officials of the Egyptian government charged with the administration of Egyptian law.

On these circumstances, the shipowners contend that the charterers, who were under the charterparty the masters of the vessel's trading activities, deliberately sent the vessel loaded with war stores destined for the British Forces in Egypt into the Suez Canal and caused her to discharge this cargo at Adabiya, which was a port in Egypt where the loading and discharge of such cargo was, to their knowledge, prohibited by the terms of the letter referred to. In so doing the owners contend that the charterers were in breach of the terms of the charterparty inserted for the protection of the owners; "Steamer to be "employed in lawful trades for the conveyance of lawful merchandise." They also point to clause 12 of the charterparty, which provides that charterers shall "be responsible for loss or "damage caused to owners by goods being loaded contrary to "the terms of this charter."

On behalf of the shipowners Sir Robert Aske contended that ordnance stores and munitions carried by the vessel were not

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"merchandise" at all, because they were British government property and were not "commodities of commerce"; that is to say, goods ordinarily dealt in by merchants. In a charterparty of this kind, in which the carriage of explosives and dangerous cargoes is specifically permitted subject to Board of Trade rules and regulations, I think that this submission is too wide. Whether in the particular circumstances of the case the cargo carried was "lawful merchandise" is another matter. Before they entered on the charterparty the charterers had received letter No. 9443, to which I have already referred, and must be taken to have known that the Egyptian authorities had prohibited vessels from discharging or loading cargoes belonging to the British Army at Adabiya. In spite of this they caused or permitted the vessel to berth for the purpose of discharging and to discharge her cargo of ammunition, etc., at Adabiya, and while there is no specific finding by the umpire that this cargo belonged to "the British Forces in Egypt," I think that it would be proper for me to infer this fact from this and other facts found in the award rather than to remit the award to the umpire for a specific finding on this point alone.

There is very little authority on the point as to what in any given circumstances constitutes "lawful merchandise." In Scrutton on Charterparties (15th ed., at p. 156) there is this very short passage: "Lawful Merchandise = goods ordinarily shipped "from the port of shipment." Then there is a reference to *Vanderspar & Co.* v. *Duncan & Co.*[6] I am told that that short passage is of some standing in the book, and that it was already there when the author himself was responsible for what was contained in the book.

In Carver's Carriage of Goods by Sea (9th ed., at p. 454) under the heading, "Goods that may be loaded," there is this passage: "'Merchandise' and 'produce.'—General expressions, "such as 'merchandise,' or 'produce,' used to describe the "intended cargo, denote things which have those characters in "the particular trade, having regard especially to the particular "port of loading. 'Produce' has been said to mean 'anything "'produced by the country in the neighbourhood of the port of "'loading, and being an ordinary subject of importation.' "Government stores (ordnance, ammunition, etc.) have been "held to be not covered by 'lawful merchandise'"; and once again there is a reference to *Vanderspar & Co.* v. *Duncan & Co.*[6] If I may say so, it seems doubtful whether the case is an authority for the proposition for which it is cited.

It is clear that if any real meaning is to be given to the words "lawful merchandise" which are, of course, inserted into the charterparty for the protection of the owners, the goods loaded must be such as can be loaded without breach of the law in force at the port of loading. Inasmuch as the master is under

[6] 8 T.L.R. 30.

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the general orders of the charterer as to where a cargo shall be carried within the charter limits, it is at least logical to suppose that the charterer undertakes that the cargo shall also be the type of cargo which can be lawfully carried and discharged at the port to which he has ordered the vessel to proceed. The purpose of the provision that only "lawful merchandise" shall be carried by the charterers would be largely nullified if all that was necessary was that the cargo could be loaded without breaking the laws of the country where it was loaded.

I was referred to *Capper* v. *Forster*,[7] and also to *Potter* v. *New Zealand Shipping Co.*[8] Neither of these cases, however, assist me in the determination of what is meant by the words "lawful merchandise."

Egypt is a sovereign State, and the principal difficulty which I have found in this case is whether I am able to spell out from the facts found by the umpire a finding of fact that the Egyptian law was as stated in letter No. 9443. The umpire finds as a fact that the Egyptian authorities issued this letter, and that the charterers had knowledge of its contents before the cargo was loaded. The letter no doubt constitutes some evidence of what the Egyptian law was at the material time. Egyptian law, for the umpire, was a question of fact. I have little doubt that the umpire was satisfied on the evidence of letter No. 9443 that the Egyptian law was as stated in the letter, and he accordingly stated the purport of the letter in paragraph 8 of his award, to which the preface is: "Upon these contentions I find the "following further facts. . . ." I accordingly infer that the umpire has found that the letter in question stated accurately the effect of Egyptian law. If this be so, the cargo was one which the charterers knew, or ought to have known, before they loaded it, could not be discharged at Adabiya without breaking Egyptian law. The cargo was discharged at Adabiya, and it was not until after that was done that the Egyptian authorities took any active step against the vessel by refusing her repair facilities. The cargo was destined for Adabiya, and in causing it to be discharged there the charterers disregarded the prohibition in letter No. 9443 which, in my opinion, the umpire has found to be an accurate statement of Egyptian law. If the cargo could not lawfully be discharged at the port where the charterers ordered it to be discharged, it was not, in my opinion, lawful merchandise.

The umpire has found as a fact—and I quote from paragraph 5 of the award—"The Egyptian authorities refused to "allow any repairs to be done owing to the fact that as the "vessel had carried military stores for the British Forces in "Egypt she had been black-listed." He has found the total period of delay, and it was agreed by the parties that the repairs to the engine breakdown would only have taken four days but for the intervention of the Egyptian authorities.

[7] (1837) 3 Bing.N.C. 938. [8] (1895) 1 Com.Cas. 114.

In my view, for the reasons which I have set out, the umpire was right in finding that the charterers committed a breach of the charterparty in that they failed in all the circumstances to load the vessel with lawful merchandise, but wrong in so far as he arrived at that conclusion on the authority of *Vanderspar & Co.* v. *Duncan & Co.*[9]

This only leaves the point whether the umpire was entitled to assess the damages as he did on the basis of the hire claimed by the shipowners for the twenty-six days by which it was agreed that the period of delay had been prolonged by the action of the Egyptian authorities in refusing repair facilities.

On behalf of the charterers it was argued that loss resulting to the shipowners from a refusal by the Egyptian authorities to allow repair facilities in the event of a breakdown was not loss or damage naturally flowing from the carriage of unlawful merchandise, nor was such loss reasonably foreseeable in all the circumstances, and that consequently the shipowners were only entitled to recover nominal damages.

If I am right in the view which I take that the umpire's findings of fact justify me in law in finding that the vessel was carrying unlawful merchandise, I find myself quite incapable of accepting the charterers' contentions on this point. In the first place, I think that the matter is substantially concluded by the umpire's findings. He was clearly entitled to find on the evidence that the shipowners had been involved in a substantial loss by the extra delay caused by the action of the Egyptian authorities. On all the facts found it seems to me that the umpire was well entitled to conclude that the charterers, having received letter No. 9443, must have decided to disregard the prohibition contained in it and thus to subject the vessel to any sanctions which Egyptian law might impose on vessels which broke the law. The most effective sanction which can be applied to a merchant ship is to detain or delay her and thus to involve her owners in loss and expense. The only question which the umpire has submitted for the opinion of this court is whether the claimants are entitled to recover this sum of £2,131 12s. 11d. or not. Even if I had felt that it could possibly be said that the umpire, in awarding the sum which he did, had acted on no evidence, or had misdirected himself in law, I am not sure that I should not have been precluded from interfering with the quantum of damages awarded by the form in which the umpire has stated this question for the decision of the court.

I was referred to *Royal Greek Government* v. *Minister of Transport*,[10] in which an award in the form of a special case came up for consideration by Devlin J. In that case the arbitrator had had to choose from a number of possibly competing causes the direct or proximate cause of the damage. Devlin J. said[11]: "So the matter comes down to this, that the arbitrator

[9] 8 T.L.R. 30.
[10] (1949) 66 T.L.R. (Pt. 1) 504.
[11] Ibid. 513.

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" has selected one cause in preference to another as the proximate " or direct cause. I cannot see that any question of law is " involved in this selection. In this last analysis, Sir Robert says " that the decision is for the court applying the standard of the " reasonable man. I cannot accept that. All conclusions of " fact—that is, fact and inference from fact: see *Strathlorne* " *Steamship Co. Ld.* v. *Andrew Weir & Co.*,[12]—are for the " arbitrator. What is reasonable is always a question of fact. " The arbitrator is the person whom the parties have chosen, " as they are entitled to do to apply finally the standard of " common sense; and common sense is, I believe, the only test " that can be applied to the choice between several causes, all " of which are sufficient in law. In my judgment an arbitrator's " finding on causation, unless he can be shown to have mis- " directed himself on some principle of law, or on some point of " construction or to have acted on insufficient evidence, is " conclusive."

With that passage I respectfully agree, and the passage was, moreover, approved by Sellers J. in *Andre et Cie, S.A.* v. *J. H. Vantol Ld.*[13] In that case Sellers J. however entered a caveat with regard to the concluding words of the passage which I have read from Devlin J.'s judgment in connexion with the words " insufficient evidence."

Fortified by the view expressed by Devlin J. and approved by Sellers J. in the cases to which I have referred, I feel well satisfied that in this case it is impossible to say that the umpire has misdirected himself or has acted without any evidence in assessing the damages as he has done. I think, if I may be permitted to say so, that it was common sense for the umpire to assess the damages as he did. Without entering too deeply into the theory of causation where the parties submit to an arbitrator or an umpire the determination of the question whether certain damage is attributable to one or another cause, unless it can be shown, in the words which I have already quoted, that the determination was clearly wrong in law, his finding is unassailable. The parties having chosen their arbitrator or umpire must for better or worse abide by his determination.

The only real doubt which I have felt in the case is whether I ought not to send this award back to the umpire to make specific findings of fact on certain matters; for instance, with regard to the ownership of the cargo on board the vessel; with regard to the precise terms of Egyptian law which were applicable, and the effect of black-listing under Egyptian law.

Mr. Roskill, on behalf of the charterers, contended that the award was bad on its face and ought to be set aside, and he also criticized the findings of fact of the umpire, saying that they were imprecise and insufficient to justify the conclusion at which he had arrived. Mr. Roskill deliberately refrained from inviting

[12] (1934) 40 Com.Cas. 168, 172. [13] [1952] 2 Lloyd's Rep. 282.

me to remit the award to the umpire to find further facts. Concluding, as I do, not without some hesitation, that it is possible to spell out sufficient findings of fact in the award to enable me to determine the question submitted to the court, I do not propose to send it back to the umpire, but to affirm the award which he has made, and I accordingly do so.

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*Award affirmed.*
*Judgment for the shipowners.*

Solicitors: *Thomas Cooper & Co.; Holman, Fenwick & Willan.*

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[COURT OF APPEAL.]

## * WOODS *v.* DURABLE SUITES LD.

C. A.

[1951 W. No. 3010.]

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*June* 4, 5.

Singleton and Morris L.JJ. and Harman J.

*Factory — Dermatitis — Use of synthetic glue — Failure by worker to apply protective measures — Absence of evidence as to foreman's supervision in observance of protective measures—Employers' duty limited to taking reasonable care to provide safe system of work.*

The plaintiff contracted dermatitis while working with synthetic glue, and brought an action for damages against his employers, the defendants, alleging, inter alia, that there had been insufficient supervision of the workers to ensure that they took the necessary precautionary measures against contracting the disease. The trial judge found that the precautionary measures prescribed by the employers were, if observed, adequate to provide reasonable protection to their employees; that the plaintiff had received specific instruction in the protective steps required but had neglected to avail himself of them; and that the transfer of a vigilant foreman from the department in which the plaintiff worked at the material time might have led to a slackening in the standard of care observed by the workpeople. He gave judgment for the defendants. On appeal by the plaintiff:—

*Held*, that the employers were not in breach of their duty at common law to take reasonable care to provide a system of work which did not subject those employed by them to unnecessary risk.

*Per* Singleton L.J. The decision of the Court of Appeal in *Clifford* v. *Charles H. Challen & Son Ld.* [1951] 1 K.B. 495 was a decision on its particular facts and did not lay down a new standard of legal duty by which employers are required by their foreman not to tolerate any slackness in the observance of safety precautions. I do not believe it to be part of the common law of England that an employer is bound, through his foreman, to stand over workmen of age and experience every moment they are working and every time that they cease work in order to see that they do what they are supposed to do.

*Clifford* v. *Charles H. Challen & Son Ld.* [1951] 1 K.B. 495; [1951] 1 T.L.R. 234; [1951] 1 All E.R. 72 discussed and distinguished on its facts.

Decision of Lloyd-Jacob J. affirmed.

APPEAL from Lloyd-Jacob J.

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In December, 1950, the plaintiff, Walter John Woods, aged fifty-six, who had been employed by the defendants, Durable Suites Ld., in their furniture factory for some time, was transferred to the veneer department, where he worked as a glue spreader. That work almost inevitably involved the workers' hands and arms coming into contact with synthetic glue, a substance known to be dangerous in that it was liable to cause dermatitis unless proper prophylactic precautions were taken. On June 8, 1951, the plaintiff was found to have contracted dermatitis. He brought an action for damages against the defendants, alleging, inter alia, that they were guilty of negligence at common law, in that there was no proper provision of barrier cream or soap or washing facilities, and no proper instruction as to the precautions to be taken, and no proper system of work in that there was insufficient supervision of the workers to see that the precautions were taken. The defendants denied negligence, and pleaded alternatively that the plaintiff had been guilty of contributory negligence in failing to take the precautions available to him to guard against contracting dermatitis.

No statutory regulations had been issued in respect of the particular hazard, but circulars published by H.M. Stationery Office in 1943 and 1946 gave instructions as to the nature of dermatitis and precautions recommended against contracting the disease; and one of those circulars—Form 366—was prominently displayed near the plaintiff's place of work at the material time.

Evidence was given by the defendants' manager, Mr. Fisher, and also by his brother, who had been foreman in charge of the particular department before the plaintiff's transfer to that work; but the foreman who was in charge at the material time did not give evidence.

Lloyd-Jacob J., giving judgment on November 20, 1952, expressed himself as satisfied that at all material times the plaintiff was made aware of the danger of getting glue on his hands and of the precautionary measures, as recommended by Form 366, which his employers required to be observed. Those were that he should cream his hands with barrier cream before beginning work and after every washing, and that he should remove any adherent glue with rags and then wash his hands in hot or warm water every time he was splashed. The judge also expressed himself as satisfied that gloves were made available for use by the plaintiff and his fellow workers, but held on the evidence that the protection by gloves was impracticable in operation and that the employers were well aware that the glue spreaders could not satisfactorily use them. He continued: "I am satisfied that "the precautionary measures prescribed by the employers were, "if observed, adequate to provide reasonable protection to their "workpeople and, in particular, this plaintiff. None the less, "the identification of this plaintiff's ailment as occupational "dermatitis indicates that these precautionary measures were not "fully observed, and the plaintiff's repeated references during his

"evidence to the scarcity or absence of cleansing and protective "materials, although not justified in fact, afford some confirma- "tion of his neglect to avail himself of them. Can this failure be "in any manner and to any extent attributed to the employers? "It would appear that, ever since the veneer department of the "defendant company's business was opened, it has been under "the direct charge of Mr. M. D. Fisher, as manager. He accepts "full responsibility for seeing that all the appropriate workpeople "are acquainted with the precautions proper to be taken against "infection from glue, and for seeing that adequate supplies of "materials required therefor are available. He it was who "transferred the plaintiff from other duties to glue spreading in "December, 1950, and he it was who specifically instructed the "plaintiff in the protective steps that were required."

After referring to the change of foreman, his Lordship said: "It may well be that the transfer of the foreman brother to "another part of the country, by removing the manager's watch- "dog, led to a slackening in the standard of care observed by the "workpeople."

The judge, after saying that the decision of the Court of Appeal in *Clifford* v. *Charles H. Challen & Son Ld.*[1] did not justify the proposition contended for by the plaintiff, namely, that the employers' duty required a foreman to be posted to prevent non-observance of the precautions and to ensure that the workmen made full use of the protective devices, gave judgment for the defendants.

The plaintiff appealed.

*C. J. A. Doughty* for the plaintiff.
*Stephen Chapman* for the defendants.

Counsel for the plaintiff cited and relied on *Clifford* v. *Charles H. Challen & Son Ld.*[1]

SINGLETON L.J. stated the facts and the judge's findings, and continued: After referring to the change of foreman Lloyd-Jacob J. said: "It may well be that the transfer of the foreman "brother to another part of the country, by removing the "manager's watchdog, led to a slackening in the standard of "care observed by the workpeople." That is treated by Mr. Doughty as a finding of fact that the employers, after the change of foreman, which took place a little time before the plaintiff entered on this branch of the work, ceased to do their duty in encouraging their workmen to follow the precautionary measures. I do not read it as a finding that the employers were in any way negligent. The judge found that the plaintiff had been properly instructed; that while the manager's brother was the foreman there was a complete watching of the men with everything entirely satisfactory. He added: "It may be that on the change

[1] [1951] 1 K.B. 495; [1951] 1 T.L.R. 234; [1951] 1 All E.R. 72.

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" of foreman there was a slackening in the standard by the men." I do not think that that statement ought to be treated as a finding of fact that there was any lack of care upon the part of the management of the defendant company.

Lloyd-Jacob J. considered *Clifford* v. *Charles H. Challen & Son Ld.*,[1] a decision of this court on which Mr. Doughty placed reliance in this court and in the court below. That was a case of the same nature as that which is now under appeal. It is of the greatest importance that it should be borne in mind that though the nature of the illness and the nature of the work are the same, the facts are quite different. Mr. Doughty claims that the decision of this court in *Clifford* v. *Charles H. Challen & Son Ld.*[1] lays down a standard to be adopted in a case of this nature. In other words, he seeks to treat that decision as deciding a question of law rather than as being a decision on the facts of that particular case.

The duty which employers owe to their workmen has been stated many a time, and never better than by Lord Herschell in *Smith* v. *Baker & Sons*[2] in these words: " It is quite clear that " the contract between employer and employed involves on the " part of the former the duty of taking reasonable care to " provide proper appliances, and to maintain them in a proper " condition, and so to carry on his operations as not to subject " those employed by him to unnecessary risk." That is the test which has been followed through the years, and a glance at the opening passage of the first judgment in *Clifford* v. *Charles H. Challen & Son Ld.*[3] will show that it was in the mind of the Lord Justice who gave the first judgment.

In *Wilsons and Clyde Coal Co. Ld.* v. *English*[4] Lord Maugham stated the duty in this way: " The third, which is a " kind of limitation or explanation of the second, is that in the " case of employments involving risk, that rule applies only " when the maxim volenti non fit injuria can fairly be invoked. " In such employments it was held that there was a duty on the " employer to take reasonable care and to use reasonable skill, " first, to provide and maintain proper machinery, plant, appli- " ances, and works; secondly, to select properly skilled persons " to manage and superintend the business; and thirdly, to " provide a proper system of working." The whole of that passage is governed by the words " to take reasonable care and " to use reasonable skill."

In *Clifford* v. *Charles H. Challen & Son Ld.*[5] a notice in the form of Form 366 was posted in the works, but not near the place where the plaintiff worked. There was no barrier cream available at the place where he worked, though he could get some from the store, which was not very convenient. The plaintiff in

[1] [1951] 1 K.B. 495; [1951] 1 T.L.R. 234; [1951] 1 All E.R. 72.
[2] [1891] A.C. 325, 362; 7 T.L.R. 679.
[3] [1951] 1 K.B. 495.
[4] [1938] A.C. 57, 86; 53 T.L.R. 944; [1937] 3 All E.R. 628.
[5] [1951] 1 K.B. 495.

*Clifford's* case [5] went to the factory as a trainee in 1946. "He "worked in the radio cabinet shop for about six months and then "for the remaining three years of his service he was in the piano "fitting shop, where upright pianos were being fitted together." In 1949 the plaintiff suffered from dermatitis, and he brought his action against the employers. "He alleged that the employers "did not provide a special protective cream, called barrier cream, "and that they did not provide in the shop where he worked "running water in which he could wash. It was common "knowledge in the works that there was a danger of dermatitis "arising from the use of the synthetic glue and that it was "necessary to take precautions against it. The plaintiff himself "knew of this danger and knew of the precautions which should "be taken. . . . In the piano fitting shop there was no notice "and there was no barrier cream. . . . If a man did not have a "small tin or jar of his own, he could get the cream from the "store . . . and then take it back to the shop and there apply it, "and so protect himself. But none of the workmen did it in this "shop. There was only one bucket of water for washing the hands. "The barrier cream was kept in the factory store. The plaintiff "and the other men in the piano fitting shop could have obtained "the cream from the store if they had wished. The foreman of "this shop was asked: 'Was barrier cream popular?' He "replied: 'I do not think so. I had not a great belief in it "'myself.' In effect, the foreman's evidence was that he did "nothing to enforce or encourage the use by the men under his "charge of this barrier cream. The foreman said that the one "bucket of water in the shop got very dirty and that he had to "complain about it. He eventually got a second bucket, but the "men used it for washing rags, and so they reverted to the one "bucket for washing hands." [6]

On those facts Sellers J. decided in favour of the defendants. He came to the conclusion that there was no breach by the employers of their statutory duty nor any breach of their duty at common law. The workman appealed, and this court allowed his appeal. I have read a portion of the facts as stated in the report in order to show the difference between that case and the case now under appeal, and the danger of treating the one as governing the other.

The first judgment in the Court of Appeal was given by Denning L.J., who said [7]: "The question is whether the "employers fulfilled their duty to the workman. The standard "which the law requires is that they should take reasonable care "for the safety of their workmen. In order to discharge that "duty properly an employer must make allowances for the "imperfections of human nature. When he asks his men to "work with dangerous substances, he must provide proper "appliances to safeguard them; he must set in force a proper

[5] [1951] 1 K.B. 495.
[6] Ibid. 496.
[7] Ibid. 497–8.

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"system by which they use the appliances and take the neces-
"sary precautions; and he must do his best to see that they
"adhere to it. He must remember that men doing a routine
"task are often heedless of their own safety and may become
"slack about taking precautions. He must therefore, by his
"foreman, do his best to keep them up to the mark and not
"tolerate any slackness. He cannot throw all the blame on them
"if he has not shown a good example himself."

I would observe that when an action of this kind is brought it is the workman who is endeavouring to throw the blame on the employers. Denning L.J. was dealing with the facts of that particular case. When he used the words [8] "He must therefore, "by his foreman, do his best to keep them up to the mark and "not tolerate any slackness," it must not be thought that he is saying "If the foreman, personally, does not do that, the "employers are of necessity at fault." In the present case the manager said: "I instructed this man how to do his work and "what precautions he should take." The evidence of the manager was accepted by the judge. If the manager instructs the man, there is no need perchance for the foreman to instruct him as to the same matter.

Mr. Doughty would have this court read the words of Denning L.J. as meaning that there must always be a foreman standing over the men, watching to see whether they use the barrier cream or not. I do not think that Denning L.J. can have meant that. He began his judgment by saying [9]: "The standard "which the law requires is that they should take reasonable "care for the safety of their workmen." Mr. Doughty sought to develop an argument of this kind: "The judge said it may "well be that some slackness crept in after the change of fore-"man (and the new foreman was not called). Denning L.J. "said that the employer must, by his foreman, do his best to "keep them up to the mark and not tolerate any slackness. On "the finding of fact the plaintiff is entitled to succeed."

I do not agree; I do not believe it to be part of the common law of England that an employer is bound, through his foreman, to stand over workmen of age and experience every moment they are working and every time that they cease work, in order to see that they do what they are supposed to do. That is not the measure of duty at common law. The duty is to take reasonable care and so to carry on their operations as not to subject those employed by them to unnecessary risk.

Of course, the greater the danger the greater the precautions which are necessary; no one disputes that. But it is not right to seek to read those words of Denning L.J. as stating a general duty; he was dealing with the particular facts of that case. A little later in his judgment he said [10]: "The foreman did not insist on "it; as he said, he was not a great believer in it himself"—

[8] Ibid. 498.
[9] Ibid. 497.
[10] [1951] 1 K.B. 495, 498.

that is, the use of the barrier cream. I am satisfied myself, on reading the judgments delivered in the Court of Appeal, that it was very largely because of the attitude of the foreman in that case, who did not believe in the use of barrier cream and so did not encourage his men to use it, that the Court of Appeal reversed the judgment of Sellers J. on what really was a question of fact.

Asquith L.J. said that he had come to the same conclusion as Denning L.J., after similar hesitation. He added [11]: "On "balance, I think, by a small margin, and subject to contributory "negligence on his part, the plaintiff has succeeded in discharging "the burden upon him of showing that his injury resulted from "want of a safe working system on the part of the employers."

Cohen L.J. said [12]: "Where an employer is making use of a "dangerous process, it is not enough for him to have available "somewhere in the factory the appliances necessary to minimize "the danger: the system of working must be one in which the "appliances will be available at the place where they are needed, "and the man in charge of the work should be responsible for "seeing, so far as he can, that the workmen make use of the "appliances provided."

If there are young people or trainees employed in a factory, obviously the need for the watching of them is greater than in the case of skilled and experienced men. This plaintiff was some fifty-six years of age at the time. He knew what was required of him; he knew the drill; he had been instructed by the manager what he should do. He was one added to a team. There were eight people employed on this class of work; they all knew what they should do; this man did not do that which he knew he ought to do. Lloyd-Jacob J. came to the conclusion that the employers were not shown to have been at fault. I should have reached the same conclusion on this evidence, though I would not like anything that I say to be read as causing anyone to think that I do not realize the necessity for observance of the precautions which are recommended when synthetic glues are used.

I agree with Lloyd-Jacob J. that negligence on the part of the employers was not proved; my reason for taking a little time to express my views on this case is that I feel that the fact that the plaintiff succeeded in *Clifford's* case,[13] on appeal, and the judgments which were delivered in that case may have led some to think that a new standard was laid down by the Court of Appeal in that case. It was not. The old standard remains. It is the duty of the employer to take reasonable care so as not to subject his workmen to unnecessary risk.

In my opinion this appeal should be dismissed.

MORRIS L.J. I am of the same opinion. Mr. Doughty addressed two main submissions to the court. In the first place, he said: "Accepting the findings of fact of the judge, it should

[11] Ibid. 499.
[12] Ibid. 500.
[13] [1951] 1 K.B. 495.

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"be held that there was a failure properly to supervise." In the second place, Mr. Doughty criticized certain findings of the judge as not being warranted by the evidence, and in particular he submitted that the judge was wrong in saying that proper instructions had been given to the plaintiff.

I do not find myself able to accept either of those submissions. The judge held that the plaintiff was made aware of the danger of getting glue on his hands and of the precautionary measures which the employers required to be observed. The judge was not satisfied that supplies of barrier cream were not sufficient. He held that the precautionary measures, if observed, would have been adequate to prevent injury. He further held that when the manager transferred the plaintiff in December, 1950, to the glue-spreading activity, he specifically instructed him in the protective steps that he should take. And, lastly, the judge held that the defendants were never aware that there was non-observance of the requirements which they had laid down. I consider that there was ample material which warranted the findings of the judge which I have briefly summarized.

[His Lordship considered the evidence as to the manager's instructions to the plaintiff in respect of precautionary measures to be taken in connexion with synthetic glue, and continued:] It seems to me that the judge was fully warranted in finding that the manager did specifically instruct the plaintiff in regard to the precautionary and protective steps that he should take. The obligation of an employer towards his servants includes an obligation to exercise due care and skill to provide a proper system of work and to provide effective supervision. If an employer allows safety precautions to lapse and to fade away into desuetude, it may well be that, on the facts of a particular case, there may be proof that there has been a failure to exercise due care and skill to provide a proper system of work, but each case must depend on its own exact facts.

The duty to exercise due care to provide effective supervision does not involve that an employer must provide a corps of overseers to ensure that some process, in regard to which there has been faithful and ample coaching, is at all times properly carried out. Again, each case must depend on its own facts. If a time comes when there is knowledge of the neglect of, or the rejection of, safety precautions, then, on the facts of the particular case, it may be that it can be established that there has been a failure to take reasonable care to supervise the smooth working of a safe system.

On the facts of the present case, in my judgment the judge came to a correct conclusion.

HARMAN J. I agree.

*Appeal dismissed.*

Solicitors: *Shaen, Roscoe & Co.; Clifford-Turner & Co.*

M. M. H.

[PROBATE, ETC., DIVISION.]

## * HARRISON *v.* HARRISON.

1953
*Mar.* 26.

Collingwood J.

*Husband and Wife — Divorce — Jurisdiction — Domicile — Domicile of quasi choice in South Australia — Intention to reside in New Zealand—Residence in England at majority—English domicile of origin revived.*

The husband of the wife petitioner in an undefended divorce suit was born in England of English parents who emigrated to South Australia when he was 18. The husband himself remained for a time in England and later went to New Zealand, where, at the age of 20, he married the petitioner. While the husband was still a minor the parties came to England for a temporary purpose; but they had previously decided to make New Zealand their permanent home. The husband became sui juris while in England, and he was still in England when the petition was filed:—

*Held*, that on attaining his majority his English domicile of origin had revived, for he had already formed an intention to discard his South Australian domicile of choice, and had not acquired a New Zealand domicile of choice, because, although he had the necessary intention to make his permanent home there, there had been no factum of residence there since he had become sui juris.

*Udny* v. *Udny* (1869) L.R. 1 Sc. & Div. 441; *In re Craignish* [1892] 3 Ch. 180; 8 T.L.R. 451 followed and applied.

*In re Macreight, Paxton* v. *Macreight* (1885) 30 Ch.D. 165 distinguished.

UNDEFENDED PETITION for divorce.

The respondent husband was born in England on June 18, 1930, of English parents domiciled in England. In 1948 his parents emigrated to South Australia, but the respondent remained in England. After serving for a short period in the Royal Navy he went to New Zealand while still a minor; he there met the petitioner whom he married on December 23, 1950, at Gisborne, New Zealand. Before their marriage the parties had decided to live permanently in New Zealand; the respondent, with a view to training his own horses in New Zealand, was training for this business, and it was decided that he should come to England, where there were better facilities, for a period of further training. He and the petitioner arrived in England on March 27, 1951, and he became sui juris on June 18 of that year, while still in this country.

On January 31, 1952, the respondent was sentenced to 12 months' imprisonment for an assault on the petitioner on November 25, 1951; on December 16, 1952, Collingwood J. gave leave to the petitioner to file a petition for divorce within three years of the marriage on the ground of cruelty. The petition was filed on January 8, 1953, and served on the respondent in England.

The question arose whether the court had jurisdiction in the circumstances, or whether the parties were domiciled abroad.

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*James Miskin* for the petitioner. A person's domicile of origin is that of his father at the date of his birth (providing he is legitimate): *Udny* v. *Udny* [1]; *In re Craignish.*[2] In the present case, therefore, the respondent's domicile of origin was English. While an infant, a person's domicile follows that of his father, but any domicile which he may acquire by reason of a change in his father's domicile is not his domicile of origin, but a domicile of choice: see *Udny* v. *Udny* [3]; *In re Craignish.*[4] For convenience it might be termed a domicile of "quasi" choice. He is incapable of acquiring a domicile of his own choice until he reaches the age of 21, and becomes sui juris.

In this case the respondent's English domicile of origin was displaced in 1948 when his parents went to South Australia, and he then acquired a domicile of "quasi" choice in that province irrespective of his residence. On June 18, 1951, he became sui juris and capable of acquiring a domicile of choice by an act of his own volition, and of discarding any domicile which as a minor he had acquired solely owing to a change in his father's domicile. He had in fact never gone to Australia, nor so far as was known expressed any intention of going there; he had on the contrary expressed an unequivocal intention of making New Zealand his permanent home.

It is accordingly submitted that there is sufficient evidence to establish that he had formed an intention to discard his South Australian domicile of "quasi" choice; that intention took effect when he became sui juris. The question must therefore arise whether he has acquired a new domicile of choice to take its place, or whether his domicile of origin has been revived.

Both the factum of residence, and the animus to make the country of residence a permanent home, are necessary for the acquisition of a domicile of choice. The respondent undoubtedly had the necessary animus in respect of New Zealand, but the factum of residence was lacking. In these circumstances it is submitted that when the respondent became sui juris he abandoned his domicile of "quasi" choice in South Australia, and that as he had not by reason of his residence in England acquired a domicile of choice in New Zealand his English domicile of origin re-asserted itself. He was therefore domiciled in England when the petition was presented, and the court accordingly has jurisdiction in these proceedings.

[He referred also to *In re Macreight, Paxton* v. *Macreight,*[5] and submitted that that case was to be distinguished on the ground that in that case there was insufficient if any evidence to show an intention on the part of the deceased to change or discard the domicile of "quasi" choice, which he had acquired when his English parents took him as a boy to Jersey, where he had remained until he joined the British Army in 1854.]

[1] (1869) L.R. 1 Sc. & Div. 441.
[2] [1892] 3 Ch. 180; 8 T.L.R. 451.
[3] L.R. 1 Sc. & Div. 441, 457.
[4] [1892] 3 Ch. 180, 184, 185
[5] (1885) 30 Ch.D. 165.

COLLINGWOOD J. I hold that the court has jurisdiction to hear the petition.

[His Lordship, having heard the evidence, granted a decree nisi of divorce.]

*Decree nisi.*

Solicitor: *F. N. W. Lockyer, Law Society, Divorce Department.*

J. B. G.

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[PROBATE, ETC., DIVISION.]

## *JONES v. JONES.

1953
*May 4.*

Collingwood and Karminski JJ.

*Husband and Wife—Desertion—Defence of belief in deserted spouse's adultery—Burden of proof.*

Where the defence to a charge of desertion is an alleged reasonable belief that the other spouse has committed adultery, such a defence, which falls into the category of charges easy to make and less easy to disprove, must be fully and completely proved, and unless so proved, should be rejected.

APPEAL from justices for the petty sessional division of Bangor.

The parties were married in 1939, and on September 18, 1952, the wife alleged before the justices that the husband had been guilty of wilful neglect to provide her with reasonable maintenance. The husband contended that he had reasonable grounds for believing that she had committed adultery. The wife gave evidence that the husband had thrown doubts upon the paternity of each of their three children during her pregnancies, and although he denied this, he admitted that he had inserted an advertisement in a local newspaper, after the birth of the third child, stating that he would not be responsible for his wife's debts.

The husband alleged in his evidence that after his return from overseas he had cause to complain of his wife's association with a local police sergeant. The grounds of his complaint were, he said, that he had noticed the sergeant ringing his bicycle bell on one occasion when he (the sergeant) passed in the street, and had been led to conclude that the sergeant was trying to attract the wife's attention; that he had seen the wife speaking to the sergeant in the street, and that he had received certain information from the neighbours. He further alleged that, after finding that the wife, who slept in a different room, had left the house, he had gone out and seen her run from a garage-door at about 1.30 a.m. on August 1, 1952, and that she had been followed shortly afterwards by the sergeant, who had walked away. He had spoken to the sergeant, and on his return home had found

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the wife lying on her bed fully clothed and looking "terrified." He said that the wife had denied being with the sergeant, and had told him that she had been visiting a friend, one Mrs. Williams. The husband did not accept the story of such a visit.

The wife's evidence was to the effect that she had taken the dog for a walk and had visited Mrs. Williams; that the dog had escaped, and that she had found it near the garage. She had seen a constable in the neighbourhood of the garage, but had not spoken to him. The neighbour gave evidence that she remembered the wife's visit; but she was unable under cross-examination to swear that the visit had been on the night in question. The husband left the wife shortly afterwards.

The justices referred among the reasons which they gave to a complaint alleged to have been made by the husband to the police sergeant's superior officer on the first opportunity, which they held to be a material factor in the husband's favour, and concluded: "After seeing and hearing both parties the justices "accepted the husband's evidence in general, and particularly "his version of what he saw on the night of July 31, 1952. The "justices came to the conclusion on the facts presented that the "husband had a bona fide belief, induced by the wife, that she "had committed adultery," and they dismissed her summons.

The wife appealed.

*W. L. Mars-Jones* for the wife.

*B. G. Irvine* for the husband.

Reference was made, in addition to the cases cited in the judgment, to *Everitt* v. *Everitt* *; *Frampton* v. *Frampton* †; *Beer* v *Beer*.‡

COLLINGWOOD J. stated the facts and continued:—It is on that material that the justices found that the husband had a bona fide belief, induced by the wife, that she had committed adultery, and her application was accordingly refused. It is well established by *Glenister* v. *Glenister* [1] and a number of subsequent cases in which that decision has been approved, that if a wife has so conducted herself as to lead any reasonable person to believe, until she gives some explanation, that she has committed adultery, a husband, becoming aware of the fact and honestly drawing that inference and leaving his wife, ought not to be held to have left her without reasonable cause. Further, with reference to the question of a husband's bona fide and reasonable belief in his wife's adultery, I will refer to a short passage from Evershed M.R.'s judgment in *Allen* v. *Allen* [2]: "It seems to me that, if a man says: 'I bona fide and reasonably

* [1949] P. 374; [1949] 1 All E.R. 908.

† [1951] W.N. 250.

‡ [1948] P. 10; 63 T.L.R. 606; [1947] 2 All E.R. 711.

[1] [1945] P. 30; [1945] 1 All E.R. 513.

[2] [1951] W.N. 322; [1951] 1 All E.R. 724, 731.

" ' believe that my wife is an adulteress ' as a defence in pro-
" ceedings of this character, the result is neither irrational nor
" unjust if he be regarded as saying this: ' I say and allege that
" ' the evidence and materials in my possession are such that on
" ' them a court should and would find that adultery had been
" ' committed '."

Let me apply that criterion to the evidence before the justices in this case. Assume that the wife had been speaking to the sergeant in the street on one occasion (she can hardly have been held responsible for the ringing of his bicycle bell), and assume that upon the other occasion she had come at that hour of the morning from the vicinity of the embrasure by the garage door. What the justices said about that was that they " considered that " the complaint made by the husband to the police inspector on " the first opportunity which he had was a material factor in his " favour." I will return to that passage in a moment. They went on: " After seeing and hearing both parties the justices " accepted the husband's evidence in general, and particularly his " version of what he said he saw on the night of July 31, 1952. " The justices came to the conclusion on the facts presented that " the husband had a bona fide belief, induced by the wife, that " she had committed adultery."

With regard to the first of those paragraphs, which is No. 11 in their reasons, it is a little difficult to understand to what that paragraph refers. Those events happened in the early morning of August 1, 1952, and the husband on that day did go to the police inspector, the sergeant's superior officer, and a statement to that officer, which was quite clearly not admissible in evidence, was put in. But how the justices could have decided that that complaint, made to the police inspector or to anybody else, on the first opportunity which the husband had, was a material factor in his favour, I confess that I am quite unable to see. It looks as though they meant that it afforded corroboration of his evidence with regard to the events of the early morning of August 1, 1952. It cannot possibly afford corroboration of that. I can only think that they were confusing the matter with a quite different class of case, in which the fact that a complaint is made to a suitable person at the earliest opportunity after an offence has been committed is admissible as showing consistency of conduct on the part of the complainant. But I am quite unable to see what that has to do with this case.

Taking the evidence of the husband at its highest, in my opinion it is impossible to say that it comes anywhere near the test laid down by Evershed M.R. in the passage to which I have referred. Further than that, to quote a passage from *Glenister* v *Glenister*,[3] the husband must establish this: " The husband, " becoming aware of the facts and honestly drawing that infer-
" ence [that the wife has committed adultery], and leaving his-

[3] [1945] P. 30, 38.

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Collingwood J.

" wife on that ground, ought not to be held to have left her " without reasonable cause." In his cross-examination the husband was asked a number of questions bearing upon his state of mind, and he said in answer to those questions: " I am " contesting the case because I caught her out with the sergeant " at twenty minutes to two in the morning, and in my opinion " that is an offence. I left home because she ran away and there " was a person whom I had continually told her about. I " cannot say whether he had committed adultery with her." Nowhere there did he suggest that he entertained a suspicion of his wife's adultery. What he was saying was: " I had warned " her about not talking to this man before, and I found that she " was disobeying me, and disobeying me at this hour in the " morning, and I think that that is an offence." In my opinion it is impossible to say that the wife had given reasonable grounds for belief in her adultery, even if the husband had gone to the length of saying that he entertained such a belief.

In my opinion the justices here have misdirected themselves as to the requirements of *Glenister* v. *Glenister*,[3] and they have misdirected themselves with regard to the matter in paragraph 11 of their reasons. I am not losing sight of the oft-repeated principles laid down by the House of Lords in *Watt or Thomas* v. *Thomas*.[4] This case falls clearly within the third of the principles enunciated by Lord Thankerton in that well-known judgment, and for that reason the finding cannot stand.

We have not the material before us on which to decide the amount of maintenance which should be awarded to the wife, and, therefore, it will be necessary for the matter to be remitted to the justices for them to ascertain that amount. We do find, however, wilful neglect to maintain.

KARMINSKI J.: I agree. This is a case where the justices expressed a preference for the version of the facts given by the husband over that given by the wife, and I agree with my Lord that their conclusions on that finding are unsatisfactory. They found that there was a material factor in favour of the husband, namely, the fact that his complaint about the alleged behaviour of his wife and the sergeant was made to the police inspector on the first available opportunity. The statement made by the husband to the police inspector seems to have been put in in re-examination; no objection was taken to it, and it reached the file of this court. But how that statement can in any way be a material factor in the husband's favour I am, like my Lord, unable to understand. Be that as it may, it appears, on reading paragraphs 11 and 12 of the justices' reasons, to have influenced them, and if that is right, and I believe it is, then we are not precluded, as my Lord has pointed out, from querying and, indeed, dissenting from the justices' finding on the facts.

[3] [1945] P. 30, 38.

[4] [1947] A.C. 484; 63 T.L.R. 314; [1947] 1 All E.R. 582.

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Karminski J.

But even if the facts as found by the justices were right, I am satisfied that they misdirected themselves seriously as to the requirements of the law in cases of this kind. In paragraph 9 of their reasons they said: "The leading case of *Glenister* "v. *Glenister*[5] was cited by the husband's solicitor in his closing "address." They went on in paragraph 10: "The justices "retired and . . . called in their clerk, and asked for his guidance "regarding the authority quoted. He read out the headnote and "the judgments, and also read out the case of *Chilton* v. "*Chilton*,[6] which he advised was relevant to the present case." I do not know from that what advice the clerk gave, or whether such advice was accepted or not. The principle of law is clear enough, and has often been stated both in this court and in the Court of Appeal. But I have considerable doubt whether the justices really understood it, or how, if they did, they could have come to the conclusion at which they arrived.

I desire to add one cautionary note about cases of this kind. Adultery is a defence to charges of desertion and of wilful neglect to provide reasonable maintenance. So is a reasonable belief honestly maintained by a husband in his wife's adultery. In this case no affirmative defence of adultery was raised. The omission is not, perhaps, surprising, since on the evidence before the justices it would appear to have been quite impossible to have presented even a prima facie case of adultery. The husband, therefore, was driven to rely on the defence of reasonable belief in his wife's adultery. In my view the defence of reasonable belief in a wife's adultery is one which in most circumstances is not susceptible of easy proof. Nor should it be. It falls into the category of charges which may be easy to make and less easy to disprove.

Here the husband produced virtually no evidence on which a charge of reasonable belief could be founded. Nevertheless, he succeeded before the justices. I believe it to be implicit that in cases like this, where the defence is reasonable belief, the defence should be fully and completely proved, and that unless it is so proved it should be rejected.

I agree with my Lord that this appeal must be allowed, that the husband be found to have wilfully neglected to provide his wife with reasonable maintenance, and that the matter be remitted to the justices to establish the amount of maintenance to be awarded.

*Appeal allowed.*

Solicitors: *Rhys Roberts & Co. for Price White & Co., Bangor.*

J. B. G.

[5] [1945] P. 30.

[6] [1952] P. 196; [1952] 1 T.L.R. 1316; [1952] 1 All E.R. 1322.

[COURT OF CRIMINAL APPEAL.]

1953
*June* 8.

Hallett, Streatfeild and Donovan JJ.

## * PRACTICE NOTE (CRIMINAL APPEALS).

*Criminal Law—Appeal to Court of Criminal Appeal—Different grounds of appeal—One on law, others on fact—Whether appeal or application for leave to appeal lies—Criminal Appeal Act*, 1907 (7 *Edw.* 7, *c.* 23), *s.* 3.

Where a convicted person is entitled under section 3 (*a*) of the Criminal Appeal Act, 1907,[1] to appeal without leave to the Court of Criminal Appeal on a ground of appeal which involves a question of law alone, he is not entitled, merely because the ground of appeal in the notice of appeal raises a question of law alone, also to appeal without leave on a ground of appeal which involves a question of fact alone or a question of mixed law and fact.

APPEAL from Lord Goddard C.J.

The appellant, Frederick Robinson, was convicted at the Central Criminal Court before Lord Goddard C.J. on two charges, the first, a charge of robbery with violence, and the second, a charge of robbery with aggravation. He was found guilty and sentenced to ten years' imprisonment.

A notice of appeal, in very general terms, was lodged on the appellant's behalf, and was supplemented by particulars of the grounds of appeal, which had been settled by counsel. Those particulars were given under three heads. In the first place, it was complained "that the Lord Chief Justice misdirected the "jury in law in telling them that evidence against the appellant "on the first count of robbery was also evidence of his guilt on "the second count of robbery." The second head was: "That "the Lord Chief Justice misdirected the jury on fact" in nine particulars, which were there specified; and the third head was that: "Generally the Lord Chief Justice omitted to put the "defence adequately to the jury and in the circumstances of a "difficult case the summing-up was improperly unfavourable to "the appellant thereby resulting in a miscarriage of justice."

The case was put into the list both as an appeal and as an application for leave to appeal, the appeal being listed first.

*Edward Clarke* for the appellant.
*Victor Durand* for the Crown.

[Reported by Miss C. J. ELLIS, Barrister-at-Law.]

[1] Criminal Appeal Act, 1907, s. 3: "A person convicted on indictment "may appeal under this Act to the "Court of Criminal Appeal—(*a*) "against his conviction on any "ground of appeal which involves a "question of law alone; and (*b*) with "the leave of the Court of Criminal "Appeal or upon the certificate of the "judge who tried him that it is a fit "case for appeal against his convic- "tion on any ground of appeal which "involves a question of fact alone, or "a question of mixed law and fact, "or any other ground which appears "to the court to be a sufficient ground "of appeal; . . ."

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HALLETT J., delivering the judgment of the court, stated the facts relevant to the procedural point and continued:—There arises in connexion with this matter a question of procedure with which it is desirable that the court should deal. First of all, there would be neither this court nor the right of appeal to it but for the provisions of the Criminal Appeal Act, 1907. Accordingly, if a question arises as to the right of appeal, it is to the statute that one must look to discover what right was conferred, and subject to what conditions, if any, and to what limitations, if any, and it is necessary for this purpose to look only at section 3. [His Lordship read section 3 (*a*) and (*b*) and continued:] The words of clause (*a*), in our opinion, must be carefully observed. The defendant is not given a general right of appeal, as Mr. Clarke appears to be contending, to the Court of Criminal Appeal if he has a ground of appeal which involves a question of law alone. He may appeal to the Court of Criminal Appeal without leave on any ground of appeal which involves a question of law alone. At first sight it might appear that the correct application of clause (*a*) turned on one of three views. The first view is that the clause gives a right of appeal only if the only ground of appeal is one involving a question of law alone. In other words, the view might be taken that the appellant only gets a right of appeal at all without leave if he elects to confine himself to a point of law alone. The second view which might be taken is that by clause (*a*) he is granted a right of appeal without leave in so far as his ground of appeal is a ground of appeal which involves a question of law alone. The third view, which is the view for which Mr. Clarke, as we understand it, contends, is that if he has a ground of appeal which involves a question of law alone, then he can appeal without leave both on that question and on questions of fact or mixed law and fact.

The first view, the strict view, is perhaps the view which is being applied when cases in which the notice of appeal includes questions of fact as well as questions of law have been listed to be heard as applications. The information which the court has is that in the past where there have been notices with a mixture of grounds of law and fact, the practice has been to put them in as applications for leave to appeal. I gather that Mr. Clarke's recollection of the practice is different. I want to make it quite plain, of course, that where any difficulty arises on this question as to how a particular matter should be listed, it is the practice of the registrar, or those acting for him, to take the directions of the Lord Chief Justice or some other member of the court. It must not be thought from what I am saying that anything has been done by the registrar without seeking directions, but it has been the practice, according to the information we have, that as a rule where the notice has a mixture of grounds of law and grounds of fact, the whole matter should be put in as an application for leave to appeal; and if the first or strict view

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PRACTICE NOTE (CRIMINAL APPEALS).

were taken that an appellant has only a right to appeal without leave if he confines himself to a point of law, that would be the right procedure.

On the present occasion, however, the matter having been considered, it was thought that as the appellant had a ground of appeal which involved a question of law alone—and no one has suggested that it was a frivolous point which could be dealt with under section 15 (2) of the Act—it would not be right to say to the appellant: "You cannot raise this point without leave "because you have chosen in your notice of appeal to associate "it with other points which clearly fall within the scope of (*b*)." For that reason, directions were given, as far as the point of law was concerned, that the matter should be listed as an appeal to be heard without leave. On the other hand, if the third view were taken, the view that to have a point of law and include it in the notice is sufficient to enable the appellant to argue points of fact without leave, then it seems to us that that would be a clear way of making clause (*b*) in very many cases indeed entirely inoperative. In this case, as I have already said, there is a substantial point of law, but in many cases the point of law is, to employ a word used by Mr. Clarke, of a tenuous nature, and if by including some point of law which has sufficient substance for it not to be disposed of summarily as frivolous the court can thereby be compelled to entertain an appeal on grounds of fact without leave, it seems to us that what the statute obviously intended by clause (*b*) would be rendered in very many cases entirely useless.

For these reasons, we think that where the appellant is entitled under section 3 (*a*) to appeal to this court on a ground of appeal which involves a question of law alone, that does not entitle him also to appeal to this court on a ground of appeal which involves a question of fact alone or a question of mixed law and fact. We recognize, indeed we could not but recognize, that the course which has been followed on the present occasion has grave practical inconveniences. In some ways, it would be much more convenient if we could deal with both matters at one and the same time. On the other hand, it would be gravely inconvenient and, as it seems to us, against the spirit of what Parliament has provided by clause (*b*) if we were to allow questions of mixed fact and law to be put forward without leave merely because one of the grounds inserted in the notice of appeal was a ground which raised questions of law alone.

[His Lordship then gave the judgment of the court on the appeal on the point of law.]

*Appeal dismissed.*

Solicitors: *Marie L. Bundy; Solicitor, Metropolitan Police.*

[QUEEN'S BENCH DIVISION.]

## * SHELDON *v.* BROWN BAYLEY'S STEEL WORKS LD. AND DAWNAYS LD.

1953
*June* 8, 15.

Barry J.

*Practice—Writ—Service—Failure to serve within* 12 *months—Whether writ a nullity—Effect of unconditional appearance—R.S.C., Ord.* 8, *r.* 1; *Ord.* 70, *r.* 1.

In proceedings for damages for a fatal accident brought by the widow of a deceased workman under the Fatal Accidents Acts and the Law Reform (Miscellaneous Provisions) Act, 1934, the defendants entered an unconditional appearance, but subsequently issued a summons to have the writ set aside, alleging that it had not been served upon them until after the expiration of 12 months from the date of issue. A master set aside the writ. On appeal by the plaintiff to a judge in chambers:—

*Held*, affirming the decision of the master, that the service of a writ after the expiration of 12 months from the date of issue is not a mere irregularity, but renders the writ wholly ineffective for all purposes. The court or a judge has no power to permit the service of a writ which is no longer in force. The writ was therefore a nullity and the defendants were entitled to have it set aside despite their unconditional appearance.

Dictum of Goddard L.J. in *Battersby* v. *Anglo-American Oil Co. Ld.* [1945] K.B. 23; 61 T.L.R. 13; [1944] 2 All E.R. 387 followed.

*Lloyd* v. *Great Western Dairies Co.* [1907] 2 K.B. 727; 23 T.L.R. 570 distinguished.

SUMMONS adjourned into court.

On October 12, 1950, Mr. Leslie Sheldon met with a fatal accident, and on October 3, 1951, the plaintiff, Mrs. Iris Sheldon, the widow and administratrix of the deceased, commenced proceedings by issuing a writ against Brown Bayley's Steel Works Ld. (the first defendants) and Dawnays Ld. (the second defendants) to recover damages under the Fatal Accidents Acts for the benefit of herself and other dependants of the deceased and under the Law Reform (Miscellaneous Provisions) Act, 1934, for the benefit of the deceased's estate, alleging that her husband's death had been caused through the negligence and/or breach of statutory duty of the defendants their servants or agents.

Both defendants alleged that the writ in the action was not served on them until after the expiration of 12 months from the date of issue. The first defendants entered a conditional appearance and the service upon them was set aside. From that decision there was no appeal. The second defendants entered an unconditional appearance on October 13, 1952, but subsequently, on November 25, 1952, took out a summons and applied to a master for an order that the service of the writ

[Reported by Mrs. E. M. WELLWOOD, Barrister-at-Law.]

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upon them should be set aside, notwithstanding that appearance had been entered, on the ground that the writ was served after the expiration of 12 months from the date of issue. The plaintiff opposed the application. Master Clayton made an order setting aside the writ.

The plaintiff appealed to the judge in chambers.

*H. V. Lloyd-Jones Q.C.* and *J. D. W. Hayman* for the plaintiff.

*Neil Lawson* for the second defendants.

*Cur. adv. vult.*

June 15. BARRY J., giving his judgment in open court. This is the plaintiff's appeal from an order of Master Clayton setting aside the service of a writ to which the second defendants had entered an unconditional appearance, on the ground that the writ had been served after the expiration of 12 months from the date of its issue. As the matter is of some general importance and involves a question as to the construction of Ord. 8, r. 1,[1] upon which there is, I think, no direct authority, I thought it right to deliver my judgment in open court.

The plaintiff's husband, Mr. Leslie Sheldon, was killed in an accident which occurred on October 12, 1950. On October 3, 1951, the plaintiff commenced an action against both the defendants by the issue of a writ claiming damages under the Fatal Accidents Act, 1846, and the Law Reform (Miscellaneous Provisions) Act, 1934. There is a conflict of evidence between the plaintiff and the second defendants as to the date upon which that writ was served. An affidavit filed by a managing clerk employed by the plaintiff's solicitors suggests and purports to establish that service was effected upon the defendant company within 12 months of the date of the writ, by posting a copy of the writ and statement of claim to the registered office of the company on October 1, 1952. The second defendants, by the

[1] R.S.C., Ord. 8, r. 1: "No original writ of summons shall be in force for more than twelve months from the day of the date thereof, including the day of such date; but if any defendant therein named shall not have been served therewith, the plaintiff may, before the expiration of the twelve months, apply to the court or a judge for leave to renew the writ; and the court or judge, if satisfied that reasonable efforts have been made to serve such defendant, or for other good reasons, may order that the original or concurrent writ of summons be renewed for six months from the date of such renewal inclusive, and so from time to time during the currency of the renewed writ . . . and a writ of summons so renewed shall remain in force and be available to prevent the operation of any statute whereby the time for the commencement of the action may be limited, and for all other purposes, from the date of the issuing of the original writ of summons."

Ord. 70, r. 1: "Non-compliance with any of these Rules, or with any rule of practice for the time being in force, shall not render any proceedings void unless the court or a judge shall so direct, but such proceedings may be set aside either wholly or in part as irregular, or amended, or otherwise dealt with in such manner and upon such terms as the court or judge shall think fit."

affidavit of one of their directors, who is also secretary to the company, contend that the writ was not received at their registered office until October 7, 1952, by which date the 12 months' period had expired. On October 13, 1952, the second defendants entered an unconditional appearance and, on November 25 issued the present summons to set aside the service of the writ.

The first defendants in the action, who also alleged that the writ had been served upon them more than 12 months after the date of its issue, entered a conditional appearance, and the service upon them was subsequently set aside. Against that order there has apparently been no appeal. In the present appeal the plaintiff's main contention is that, even if it be found against her that service was not effected within 12 months, this irregularity has been waived by the second defendants by their entry of an unconditional appearance, and that it is now too late for them to ask for the service of the writ to be set aside. It is common ground that before their appearance the defendants were in possession of all relevant information with regard to dates which would have justified the entry of a conditional appearance, had they been so advised. There is also no dispute as to the propriety of service by post or the application of section 347 of the Companies Act, 1948, and section 26 of the Interpretation Act, 1889.

I must first reach a conclusion as to whether the writ was served outside the 12-monthly period provided by Ord. 8, r. 1. I need not refer in detail to the affidavits which I have already mentioned. It is sufficient for me to say that neither of them is conclusive on this point, as neither eliminates the possibility of some breakdown in office routine. Each party contends that the burden of proof rests upon the other, but, on the whole, I think that the defendants, having appeared unconditionally, must show that service upon them was not effected within 12 months. On the balance of probabilities, I think that they have discharged this burden. After considering the two affidavits, and having in mind the experience of the first defendants referred to in Mr. Simmons' affidavit, I am forced to the same conclusion as that reached by Master Clayton, namely, that the writ was not served upon Dawnays Ld. within 12 months from the day of the date thereof.

[His Lordship read Ord. 8, r. 1, and continued:] In the present case the plaintiff made no application for the renewal of the writ within 12 months from its date. Under Ord. 64, r. 7, the court has power to enlarge this time and to renew a writ at some later period. Mr. Lloyd-Jones, however, very rightly conceded that in all probability, to put it at its lowest, the court would not have exercised this jurisdiction in the plaintiff's favour (had it been asked to do so) in respect of the cause of action under the Fatal Accidents Act, 1846, as any enlargement of time would have deprived the defendants of their accrued right to rely on the period of limitation imposed by section 3 of that

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statute. Mr. Lloyd-Jones relied upon Ord. 70, r. 1, which provides that non-compliance with the Rules of the Supreme Court does not render the proceedings void, and argued that, by entering an unconditional appearance, these defendants had done for the plaintiff what the court would not have done, and have, in effect, precluded themselves from questioning the validity of the writ served upon them.

Mr. Neil Lawson, for his part, conceded that, if the defect in the writ had been a mere irregularity falling within the terms of Ord. 70, r. 1, such defect would have been waived, and so cured, by the defendants' unconditional appearance. In the present case, he said the writ was not merely irregular or defective: it was a nullity and void, or at least entirely ineffective as a means of commencing an action, and could not be made effective by unconditional appearance or by any other step taken by the defendants: ex nihilo nihil fit.

It is thus necessary for me to consider the true effect of Ord. 8, r. 1, and, in particular, whether an unrenewed writ, served more than 12 months after the date of its issue, is one which is defective only on account of irregularity, or is wholly inoperative and void.

In support of his argument, Mr. Lloyd-Jones placed considerable reliance on the decision of the Court of Appeal in *In re Kerly, Son and Verden*,[1] and upon the note to Ord. 8, r. 1, on p. 59 of the 1953 edition of the Annual Practice, which purports to be founded upon this decision. The note says that the words "No . . . . writ shall be in force," etc., mean "shall "be in force for the purpose of service for 12 months, not that "the writ ceases to be efficacious for any purpose whatever." If, he argued, the writ remained efficacious after 12 months for all purposes except service, and the defendants in fact accepted service and entered an unconditional appearance, its sole disability had been remedied by waiver.

Mr. Lloyd-Jones also relied on *Lloyd* v. *Great Western Dairies Company*,[2] in which the Court of Appeal held that failure to obtain the leave of the court before joining other causes of action with a claim for possession of land and mesne profits, amounted only to an irregularity which could be, and had been, waived by the defendants. The court pointed out that the joinder of a cause of action for the recovery of land with some other separate claim was a form of action recognized by the Act and rules, and was one which might be adopted by the leave of the court or a judge, which could be given either before or after the issue of the writ. In seeking to apply this authority to the present case, Mr. Lloyd-Jones pointed out that the plaintiff could have obtained an order for the renewal of the writ if she had applied within 12 months from its date, and the court would have had jurisdiction to renew after that period,

[1] [1901] 1 Ch. 467; 17 T.L.R. 123, 189.

[2] [1907] 2 K.B. 727; 23 T.L.R. 570.

albeit, as a matter of discretion, that relief would probably not have been granted in respect of any part of her claim that was already statute-barred. Thus, said Mr. Lloyd-Jones, the defect in the present writ was confined, as in *Lloyd's* case,[2] to a failure to obtain an order from the court demanded by the Rules. In this, as in *Lloyd's* case,[2] the defect amounted only to an irregularity, which had been waived by unconditional appearance.

Mr. Lloyd-Jones also relied on *Fry* v. *Moore* [3] and *Orr Ewing* v. *Orr Ewing*,[4] but in neither of those cases was the validity of the writ in question, and they certainly do not carry his case any further than the two authorities to which I have already referred.

For the second defendants, Mr. Neil Lawson submitted that the matter was concluded in the defendant's favour by the decision of the House of Lords in *Smurthwaite* v. *Hannay*,[5] and the comparatively recent decision of the Court of Appeal in *Battersby* v. *Anglo-American Oil Company Ld.*[6] In the former case separate and distinct causes of action of several plaintiffs were joined on the same writ. On an application by the defendants to stay or dismiss the action the plaintiffs contended, inter alia, that if their joinder was unwarranted by the Rules, that was a mere irregularity of which it was too late for the defendants to take advantage. Lord Herschell L.C. dismissed that contention by saying [7]: "If unwarranted by any enactment or "rule, it is, in my opinion, much more than an irregularity." Lord Russell of Killowen dealt with the same question, and said [8]: "In my judgment, such joinder of plaintiffs is more "than an irregularity: it is the constitution of a suit as to parties "in a way not authorized by the law and the rules applicable "to procedure; and apart altogether from any express power "given by the rules, it is fully within the competence of the "court to restrain and to prevent an abuse of its process."

In *Battersby's* case,[9] which related to the renewal of a writ after the period allowed for service had expired, Goddard L.J. used words which are directly applicable to the present problem. In discussing *Holman* v. *George Elliot & Co. Ld.*,[10] which the court refused to follow, Goddard L.J. said [11]: "Acceding to an "argument advanced by the plaintiff, MacKinnon L.J. is reported "as saying [12]: 'Mr. Fox-Andrews for the plaintiff points out, "'and I think with reason, that this is not a case where the "'order of the learned judge, in extending the period for the "'service of the writ, deprives the defendants of an accrued right "'of defence under Lord Campbell's Act. The right of defence

[2] [1907] 2 K.B. 727; 23 T.L.R. 570.
[3] (1889) 23 Q.B.D. 395.
[4] (1882) 22 Ch.D. 456.
[5] [1894] A.C. 494; 10 T.L.R. 649.
[6] [1945] K.B. 23; 61 T.L.R. 13; [1944] 2 All E.R. 387.
[7] [1894] A.C. 494, 501.
[8] Ibid. 506.
[9] [1945] K.B. 23.
[10] [1944] K.B. 591; 60 T.L.R. 394; [1944] 1 All E.R. 639.
[11] [1945] K.B. 23, 28.
[12] [1944] K.B. 591, 593.

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" ' by the limitations section of Lord Campbell's Act would arise " ' if the writ had not been issued before October 9, 1942. It " ' was, in fact, issued on October 7, 1942, two days before the " ' expiry of the 12 months from the date of the accident.' With " all respect, we are unable to agree that the issue of a writ " which has become a nullity by reason of non-service within " the prescribed time satisfies the section. If the writ has ceased " to be in force the position is the same as if it had never been " issued. Otherwise we see no reason for the concluding words " of rule 1 of the order which provides for a renewed writ pre- " venting the operation of statutes of limitations. These words " would be unnecessary if a writ which had expired and had not " been renewed would answer that purpose. A new writ, issued " more than 12 months after the date, would clearly be out of " time, so either the writ originally issued must be renewed or " the action is barred."

Mr. Lloyd-Jones submitted that those words were obiter dicta, as it was unnecessary for the court to decide that the writ became a nullity unless served within the prescribed period. In a sense I think that this is so. The passage from MacKinnon L.J.'s judgment,[13] to which Lord Goddard referred,[14] was itself unnecessary for the decision in *Holman's* case,[15] and it seems clear from the authorities cited that the Court of Appeal in *Battersby's* case[16] had ample authority for deciding that, in the circumstances under consideration, the writ should not be renewed, without also deciding that the writ itself had become a nullity, or that the position was the same as if it had never been issued. I am, however, bound to give weight to this clear expression of opinion, although it may not, in strictness, be binding upon me. Indeed, be it binding upon me or not, I am satisfied that it correctly represents the law in relation to this question.

I find it impossible to hold that the service of a writ which is no longer " in force " is a mere irregularity which can be rectified by waiver. Whether or not the term " a nullity " describes the situation with complete accuracy, I am satisfied that if not served within 12 months a writ is dead and ineffectual for all purposes. It is true that the court has jurisdiction to infuse fresh life into the corpse, but until that jurisdiction is exercised what was a writ is no longer a writ and is wholly ineffectual. It is, I think, no more a writ than a document in the form of a writ which could become a writ when properly sealed and issued in the central office of the court. The service of such a document could in no circumstances be effective, and it would be idle for a plaintiff to contend that its defect was a mere irregularity because if it had been taken to the central office and the appropriate fee paid, it would, as a matter of right, have been issued as a writ.

[13] Ibid.
[14] [1945] K.B. 23, 28.
[15] [1944] K.B. 591.
[16] [1945] K.B. 23.

On close examination, I do not think that *In re Kerly, Son and Verden* [17] bears the interpretation for which Mr. Lloyd-Jones contends, nor does it justify the note in the Annual Practice to which I have referred if that note is intended to mean that, without service or authorized acceptance of service by the defendant's solicitor within 12 months, a writ retains efficacy for any purpose unless and until it is renewed by the court. In *Kerley's* case [17] the writ had in fact been served within 12 months in the sense that the defendant's solicitors, with the defendant's authority, had accepted service and undertaken to enter an appearance. As Rigby L.J. pointed out,[18] an authorized acceptance of service by the defendant's solicitors waived all obligation as to service on the part of the plaintiff and was equivalent to service upon the defendant. In these circumstances Rigby L.J. held that Ord. 8, r. 1, had no application. Stirling L.J. appears to have considered that this rule had still some relevance, as he was not satisfied that the solicitor's undertaking fell within the exact provisions of Ord. 8, r. 1. He was, however, careful to confine his decision to the particular facts then before the court, and at most that decision means that a writ remains in force after 12 months if within that period the solicitors for the defendant have, with his authority, indorsed upon it "We accept "service and will enter an appearance in due course."

*Lloyd* v. *Great Western Dairies Co.*[19] is clearly distinguishable from the present case. There is no power in the Act or rules enabling the court or a judge to permit the service of a writ which is no longer in force. Such a power would be something wholly different from the existing jurisdiction to renew a spent writ, in proper circumstances, so as to enable it to be effectually served.

In the result I am clearly of opinion that the service of this writ upon the second defendants in the action was a nullity and that, in consequence, despite their unconditional appearance, the defendants are entitled to have it set aside.

I need hardly add that I have reached this conclusion with considerable reluctance as it involves the defeat of the plaintiff's major claim on what must seem to her the merest technicality. Parliament has, however, imposed a time limit for the commencement of proceedings under the Fatal Accidents Act, and hardship must necessarily arise if through mistake or any other reason this limit is exceeded.

My duty is to administer the law as I apprehend it, and I am satisfied that the order of the master was correct. The appeal must, therefore, be dismissed.

I think that it is right for me to say that no question of discretion is involved in this case at all. My decision is formed on the correct interpretation of a question of fact based on affidavit

[17] [1901] 1 Ch. 467.
[18] Ibid. 476.
[19] [1907] 2 K.B. 727.

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evidence and upon the construction of Ord. 8, r. 1. In the circumstances, if leave to appeal is desired, I think that it is a case in which it is proper for me to grant it.

*Appeal dismissed. Leave to appeal.*

Solicitors: *W. H. Thompson; Kenneth Brown, Baker, Baker, agents for Gee & Edwards, Swansea.*

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[QUEEN'S BENCH DIVISION.]

1953
*May* 13, 14, 15; *June* 4.

Pearson J.

## *HAWKINS *v.* COULSDON AND PURLEY URBAN DISTRICT COUNCIL.

*Licensor and Licensee—Dangerous premises—Hidden trap known to licensor — Danger not appreciated by licensor — Liability — Test whether a reasonable man, with licensor's knowledge, would have appreciated the danger.*

A licensor is not liable for the consequences of a hidden trap or danger if through lack of adequate inspection he has failed to ascertain the existence of the physical facts which constitute the danger, but if he does know of the physical facts which constitute the danger, and a reasonable man, having that knowledge, would appreciate the risk involved, the licensor is not excused from liability by his own failure to appreciate the risk involved.

Where, therefore, the plaintiff, a licensee, when descending, after dark, steps in the possession and under the control of the defendants, suffered injuries as a result of the condition of one of the steps, which, combined with the insufficiency of the light, amounted to a concealed danger, and the physical facts constituting the danger were known to the defendants who did not appreciate the risk involved, although a reasonable man having that knowledge would have done so:—

*Held,* that a review of the authorities showed that, in fixing a licensor with liability for injuries to a licensee resulting from a hidden danger, the question whether the test to be applied as to the licensor's knowledge of the danger was the objective test—whether he knew the physical facts constituting the danger and a reasonable man, having that knowledge, would have appreciated the risk involved—or the subjective test—whether the licensee must show, directly or by inference, that the licensor appreciated the risk involved—had been left open; that in the case of a child licensee the objective test had been applied in deciding whether the licensor had knowledge of the danger, and that, while there were possible differences between the cases of a child and an adult licensee with regard to the inference of leave and licence, the existence of a trap and the sufficiency of the warning, there was no reason why any different test should be applied in deciding whether the licensor had knowledge of the danger; that there was sufficient authority in favour of the application of the objective test to justify and require its application in the present case and that, applying that test, the defendants had knowledge of the danger. The plaintiff was accordingly entitled to recover damages.

*Baker* v. *Bethnal Green Borough Council* [1945] 1 All E.R. 135, 140, and *Pearson* v. *Lambeth Borough Council* [1950] 2 K.B. 353, 362; 66 T.L.R. (Pt. 1) 561; [1950] 1 All E.R. 682, where the question whether the objective or the subjective test was applicable was left open, referred to.

*Cooke* v. *Midland Great Western Railway of Ireland* [1909] A.C. 229; 25 T.L.R. 375, applied.

ACTION.

On August 13, 1946, a house was requisitioned by the defendants, the Coulsdon and Purley Urban District Council, under authority from the Ministry of Health, for the housing of persons inadequately housed. Leading down from the porchway of the house to the garden and entrance gates were three stone steps, the top step being level with the tiled pavement of the porch; each step was four feet six inches long, the two upper steps having a depth of six inches, and the bottom step three and a half inches at the north end, where it was broken, and one and a half inches at the south. All the steps were considerably worn down, and at the time of the requisition the bottom step was broken to some extent at the north corner; for at least a year before October 5, 1951, it was badly broken with one large piece off, and large cracks in the part that still remained intact. The step could have been repaired at a very small cost. There was a street lamp on the pavement outside the garden, but a large fir tree came between the light from the lamp and the steps. After the requisition on August 13, 1946, a schedule of condition was prepared for the purpose of recording the state of the property on requisition; that schedule, signed by the defendant's surveyor and also by the owner, referred to the steps as "stone steps "worn and one broken at corner." Between 1946 and October 5, 1951, the defendants' officers inspected the house from time to time, and during that period both inside and outside repairs were carried out by them. The defendants' rent collectors made weekly visits to the house, and it was part of their duties to report any complaints and matters requiring attention. In 1950 the defendants' repairs supervisor inspected the house and recommended repairs to the downstairs flat, but he made no recommendations with regard to the front steps and considered that there was no outside work to be done.

On October 1, 1951, the owner of the house, although the house still remained under requisition was, by agreement with the defendants, allowed to enter into occupation of the upper floor. She became ill, and on October 5, 1951, a friend, the plaintiff, came to visit her, arriving about half an hour before dark. The plaintiff did not look at the steps to such an extent as to see that they were broken, but went to the upper flat, where she stayed until about eight p.m. When she left there was a light in the upper landing and a light in the back part of the hall, but the porch was unlighted. As she was feeling her

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way down the steps in the darkness the plaintiff trod on the broken step and, as a result, fell, breaking her leg.

The plaintiff claimed damages against the defendants, alleging that they were, by virtue of a requisition, in occupation and/or control of the porchway, steps and approaches to the house, that she was lawfully visiting the person occupying the upper floor under an agreement with the defendants, and that the defendants owed a duty to take reasonable care to prevent her, on the occasion of that visit, from suffering any damage from any hidden danger or trap in the porchway, steps or approaches of which they were aware; she alleged that the porchway, steps or approaches constituted a hidden danger or trap as the defendants well knew, but that in breach of that duty and/or negligently they had failed to take such care.

The defendants denied that they owed any duty to the plaintiff or that the steps constituted a hidden danger or a trap, or that there had been any breach of duty or negligence on their part; they alleged that the plaintiff's fall was due to her own negligence in descending the steps with full knowledge of their condition and without keeping a proper look-out and without due care for her own safety. Damages, subject to liability, were agreed at £1,000.

*Frank Whitworth* for the plaintiff.
*M. D. Van Oss* for the defendants.

The following cases were referred to in argument: *Howard* v. *Walker* [1]; *Gautret* v. *Egerton* [2]; *Pearson* v. *Lambeth Borough Council* [3]; *Rochman* v. *J. E. Hall Ld.* [4]; *Lucy* v. *Bawden* [5]; *Huggett* v. *Miers* [6]; *Fairman* v. *Perpetual Investment Building Society* [7]; *Coates* v. *Rawtenstall Borough Council* [8]; *Bolton* v. *Stone* [9]; and *Mersey Docks and Harbour Board* v. *Procter*.[10]

*Cur. adv. vult.*

June 4. PEARSON J. stated the facts and continued:—I make the following findings of fact, or of mixed fact and law: (a) The defendants were in possession and control of the steps. (b) The plaintiff was using the steps as a licensee of the defendants. (c) The bottom step had been badly broken for at least a year and was dangerous, being likely to cause an accident, especially to a person descending the steps at night. The south end of the steps would be more frequently used, but the north end would be sometimes used, for instance, if two persons went down the

[1] [1947] K.B. 860; 63 T.L.R. 518; [1947] 2 All E.R. 197.
[2] (1867) L.R. 2 C.P. 371.
[3] [1950] 2 K.B. 353; 66 T.L.R. (Pt. 1) 561; [1950] 1 All E.R. 682.
[4] [1947] 1 All E.R. 895.
[5] [1914] 2 K.B. 318; 30 T.L.R. 321.
[6] [1908] 2 K.B. 278; 24 T.L.R. 582.
[7] [1923] A.C. 74; 39 T.L.R. 54.
[8] (1937) 157 L.T. 415; [1937] 3 All E.R. 602.
[9] [1951] A.C. 850; [1951] 1 T.L.R. 977; [1951] 1 All E.R. 1078.
[10] [1923] A.C. 253; 39 T.L.R. 275.

steps together, or if one person intended to walk round the bonnet of a waiting car to the near side front passenger's seat. (d) Even if the lamp was lit, as I think it probably was, there was not enough light to enable a normally careful person, coming out of a well-lighted room and descending the steps on a dark night, to see that the bottom step was broken. (e) The badly broken step was a concealed danger to the plaintiff, who was using the steps by night and did not know that one of the steps was broken. (f) The plaintiff was not careless of her own safety either in failing to notice the broken step when she walked up on the other side of the steps shortly before lighting-up time on the same day, or in walking down the steps in the dark without waiting for a torch to be brought or for the headlights of the car to be turned on, or in any other way. Although she was not entitled to assume that the steps were in good condition, she could, in my opinion, reasonably assume that she would be treading on a step and not into a hole or on to loose and moveable fragments of a broken step. (g) The accident was caused by the concealed danger constituted by the badly broken step and the deficiency of light. (h) The physical facts constituting the danger, namely, the badly broken step and the deficiency of light, were known to the defendants through their officers concerned with the condition of the requisitioned property. (i) A reasonable man, having the defendant's knowledge of the physical facts, would have appreciated the risk involved. (j) It was not proved, and I do not consider that there are sufficient grounds for inferring, that the defendants appreciated the risk involved. If they had, they would presumably have incurred the small expense necessary to remove the danger by cementing in the broken pieces.

With regard to the position of a licensee walking in the dark there are numerous reported cases, including *Hounsell* v. *Smyth* [1] (relating to an open quarry on waste land); *Wilkinson* v. *Fairrie* [2] (relating to a staircase in a passage); *Huggett* v. *Miers* [3] (relating to an unlighted staircase in an office building); *Lewis* v. *Ronald* [4] (relating to an unlighted staircase); *Mersey Docks and Harbour Board* v. *Procter* [5] (relating to dock premises); *Coleshill* v. *Manchester Corporation* [6] (relating to a trench on a road in course of construction); *Caseley* v. *Bristol Corporation* [7] (relating to an unfenced dock); *Rochman* v. *J. and E. Hall Ld.* [8] (relating to an unlighted lift). The subject is discussed in Salmond on Torts, 11th ed. (1953), p. 573, and in Winfield's Textbook of the Law of Tort, 5th ed. (1950), pp. 582–3; and (in relation to

[1] (1860) 7 C.B.(N.S.) 731.
[2] (1862) 1 H. & C. 633; 32 L.J. Ex. 73.
[3] [1908] 2 K.B. 278; 24 T.L.R. 582.
[4] (1909) 101 L.T. 534; 26 T.L.R. 30.
[5] [1923] A.C. 253; 39 T.L.R. 275.
[6] [1928] 1 K.B. 776; 44 T.L.R. 258.
[7] [1944] 1 All E.R. 14.
[8] [1947] 1 All E.R. 895.

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invitees) in Charlesworth on the Law of Negligence, 2nd ed. (1947), at pp. 194–6.

The principle to be applied is stated by Lord Sumner in *Mersey Docks and Harbour Board* v. *Procter*[9]: "A licensee "takes premises, which he is merely permitted to enter, just as "he finds them. The one exception to this is that, as it is put "shortly, the occupier must not lay a trap for him or expose "him to a danger not obvious nor to be expected there under "the circumstances. If the danger is obvious, the licensee must "look out for himself: if it is one to be expected he must "expect it and take his own precautions. If he will walk "blindfold, he walks at his peril, even though he is blindfolded "by the action of the elements. As usual in cases of duties of "care, the reasonable man is the standard on both sides. The "licensor must act with reasonable diligence to prevent his "premises from misleading or entrapping a licensee, who on "his side uses reasonable judgment and conduct under circum-"stances that can be reasonably foreseen. The licensee is to take "reasonable care of himself and cannot call a thing a trap, the "existence of which a reasonable man would have expected or "suspected, so as to guard himself from falling into it." Applying that principle, I find that this badly broken step in an apparently ordinary short flight of front door steps was not obvious to the plaintiff, descending at night, and was not to be expected there under the circumstances, and was a danger the existence of which a reasonable man, using reasonable judgment and conduct under the circumstances, would not have expected or suspected. In my judgment, there is no absolute rule of law that in all cases a licensee moving in the dark takes the risk of any danger which in daylight would be obvious.

Another question arises, which is one of law and presents considerable difficulty. To be entitled to recover, the licensee must show that the danger was known to the licensor. Is it enough for the licensee to show that the licensor knew the physical facts constituting the danger, and that a reasonable man, having that knowledge, would have appreciated the risk involved? For convenience I will call that "the objective test." If that is the right test to apply, the plaintiff succeeds in this case on my findings set out above. Or is it necessary for the licensee to show, directly or by inference, that the licensor appreciated the risk involved? I will call that "the subjective test." If that is the right test to apply, the plaintiff fails in this case.

Interesting arguments on this question were presented by Mr. Van Oss on behalf of the defendants and by Mr. Whitworth on behalf of the plaintiff. The question was expressly left open by the Court of Appeal in *Baker* v. *Bethnal Green Borough Council*,[10] and in *Pearson* v. *Lambeth Borough Council*.[11] I

[9] [1923] A.C. 253, 274.
[10] [1945] 1 All E.R. 135, 140.
[11] [1950] 2 K.B. 353, 362.

therefore reserved judgment in this case and have investigated the earlier decided cases in search of guidance on this question.

In *Bolch* v. *Smith* [12] Baron Wilde made some observations upon the liability of a licensor in respect of traps. He said [13]: "If A gives B permission to cross his yard in which there are "several ways, and there is a pit in the yard which is usually "covered, but on a particular night it being uncovered "B falls into it, I can understand that A would be liable. "But if the hole has always been uncovered, and B in broad day "walks into it, would A be liable?"; and later he said [14]: "That disposes of the case; but I will add that I do not mean to "say that if the defendant had made a hole in the yard, and had "covered it in a way that was insufficient, but which appeared to "be sufficient, he would not have been liable. But here there "was nothing of that character. The danger was open and "visible; there was nothing which could be called a 'trap'."

Those observations are consistent with the objective test, but were not necessarily intended to be a full statement of the facts required to be proved in order to establish the liability. In any case, they were obiter dicta.

In *Indermaur* v. *Dames*,[15] which is the leading case on the liability of an invitor to an invitee, the judgment of the court (consisting of Erle C.J., Willes, Keating and Montague Smith JJ.) was delivered by Willes J. and contains the following passage [16]: "It is observable, that, in the case of *Southcote* v. "*Stanley*,[17] upon which much reliance was properly placed for "the defendant, Alderson B. drew the distinction between a bare "licensee and a person coming on business, and Bramwell B. "between active negligence in respect of unusual danger known "to the host and not to the guest, and a bare defect of con-"struction or repair, which the host was only negligent in not "finding out or anticipating the consequence of. There is con-"siderable resemblance, though not a strict analogy, between this "class of cases and those founded upon the rule as to voluntary "loans and gifts, that there is no remedy against the lender or "giver, for damage sustained from the loan or gift, except in case "of unusual danger known to and concealed by the lender or "giver." That was an obiter dictum, but of the whole court; and the judgment was approved by the Court of Exchequer Chamber.[18]

In *Gautret* v. *Egerton* [19] there was a demurrer to the declaration and the declaration was held to be insufficient. Willes J. said [20]: "The plaintiff must, in his declaration, give the defen-"dant notice of what his complaint is. He must recover "secundum allegata et probata. What is it that a declaration

[12] (1862) 7 H. & N. 736; 31 L.J. Ex. 201.
[13] 7 H. & N. 736, 742, 743.
[14] Ibid. 746, 747.
[15] (1866) L.R. 1 C.P. 274.
[16] Ibid. 286.
[17] (1856) 1 H. & N. 247; 25 L.J. Ex. 339.
[18] (1867) L.R. 2 C.P. 311.
[19] (1867) L.R. 2 C.P. 371.
[20] Ibid. 374.

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"of this sort should state in order to fulfil those conditions? It "ought to state the facts upon which the supposed duty is "founded, and the duty to the plaintiff with the breach of which "the defendant is charged. It is not enough to show that the "defendant has been guilty of negligence, without showing in "what respect he was negligent, and how he became bound to "use care to prevent injury to others. All that these declara- "tions allege is, that the defendants were possessed of land, and "of a canal and cuttings intersecting the same, and of certain "bridges across the canal and cuttings communicating with and "leading to certain docks of theirs; that they allowed persons "going to and from the docks, whether upon the business or for "the profit of the defendants or not, to pass over the land; and "that the deceased persons, in pursuance of and using that "permission, fell into one of the cuttings, and so met their "deaths. The consequences of these accidents are sought to be "visited upon these defendants, because they have allowed "persons to go over their land, not alleging it to have been upon "the business or for the benefit of the defendants, or as the "servants or agents of the defendants; nor alleging that the "defendants have been guilty of any wrongful act, such as digging "a trench on the land, or misrepresenting its condition, or any- "thing equivalent to laying a trap for the unwary passengers: "but simply because they permitted these persons to use a way "with the condition of which, for anything that appears, those "who suffered the injury were perfectly well acquainted. That "is the whole sum and substance of these declarations."

Later he said [21]: "Assuming that these were private docks, "the private property of the defendants, and that they permitted "persons going to or coming from the docks, whether for their "own benefit or that of the defendants, to use the way, the "dedication of a permission to use the way must be taken to be "in the character of a gift. The principle of law as to gifts is, "that the giver is not responsible for damage resulting from "the insecurity of the thing, unless he knew its evil character at "the time, and omitted to caution the donee. There must be "something like fraud on the part of the giver before he can be "made answerable. It is quite consistent with the declarations "in these cases that this land was in the same state at the time "of the accident that it was in at the time the permission to "use it was originally given. To create a cause of action, some- "thing like fraud must be shown. No action will lie against a "spiteful man who, seeing another running into a position of "danger, merely omits to warn him. To bring the case within "the category of actionable negligence, some wrongful act must "be shown, or a breach of some positive duty: otherwise, a man "who allows strangers to roam over his property would be held "to be answerable for not protecting them against any danger

[21] Ibid. 375, 376.

" which they might encounter whilst using the licence. Every " man is bound not wilfully to deceive others, or do any act which " may place them in danger. It may be, as in *Corby* v. *Hill*,[22] " that he is responsible if he puts an obstruction on the way " which is likely to cause injury to those who by his permission " use the way: but I cannot conceive that he could incur any " responsibility merely by reason of his allowing the way to be " out of repair." Keating J. was of the same opinion.

Willes J. in his judgment in *Gautret* v. *Egerton*,[23] and also in the earlier judgment delivered by him on behalf of the court in *Indermaur* v. *Dames*,[24] was plainly using the subjective test and considered that it was necessary to apply the subjective test. But that is not the end of the inquiry, because since those judgments were given there have been a number of cases in the House of Lords and the Court of Appeal on the subject of the liability of a licensor to a licensee, and these will have to be considered carefully.

The decision of the House of Lords in *Cooke* v. *Midland Great Western Railway of Ireland*,[25] gave rise to discussion and was authoritatively interpreted as based on findings or inferences that the children had access to the turntable with the leave and licence of the railway company, and that the turntable was a trap for the children: *Latham* v. *R. Johnson and Nephew Ld.*,[26] *per* Lord Sumner [27] (then Hamilton L.J.); *Glasgow Corporation* v. *Taylor* [28]; *Robert Addie & Sons (Collieries) Ld.* v. *Dumbreck*,[29] *per* Lord Hailsham L.C.[30]

The finding or inference of leave and licence will be found in the report of *Cooke's* case [31] in the speeches of Lord Macnaghten,[32] Lord Atkinson,[33] and Lord Collins,[34] where the word " invitation " is evidently not used in the technical sense of a common business interest but rather as meaning a licence coupled with allurement. The important feature of *Cooke's* case,[35] for the present purpose of ascertaining what degree or kind of knowledge of the danger must be shown to have been possessed by the licensor, is that Lord Macnaghten,[36] Lord Atkinson [37] and Lord Collins [38] applied what I am calling " the " objective test " as part of the reasoning leading to the conclusion in favour of the appellant. Lord Macnaghten said [39]: " The question for the consideration of the jury may, I think, be " stated thus: Would not a private individual of common sense " and ordinary intelligence, placed in the position in which the

[22] (1858) 4 C.B.(N.S.) 556; 27 L.J. C.P. 318.
[23] L.R. 2 C.P. 371, 374.
[24] L.R. 1 C.P. 274.
[25] [1909] A.C. 229; 25 T.L.R. 375.
[26] [1913] 1 K.B. 398; 29 T.L.R. 124.
[27] Ibid. 418, 419, 420.
[28] [1922] 1 A.C. 44, 50, 53–54, 63; 38 T.L.R. 102.
[29] [1929] A.C. 358; 45 T.L.R. 267.
[30] [1929] A.C. 358, 366.
[31] [1909] A.C. 229; 25 T.L.R. 375.
[32] [1909] A.C. 229, 236.
[33] Ibid. 240.
[34] Ibid. 241.
[35] [1909] A.C. 229.
[36] Ibid. 234.
[37] Ibid. 238.
[38] Ibid. 241.
[39] Ibid. 234.

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" company were placed, and possessing the knowledge which " must be attributed to them, have seen that there was a likeli- " hood of some injury happening to children resorting to the place " and playing with the turntable, and would he not have thought " it his plain duty either to put a stop to the practice altogether, " or at least to take ordinary precautions to prevent such an " accident as that which occurred?" It will be seen that the test applied there is to consider whether a private individual of common sense and ordinary intelligence, placed in the company's position and possessing that knowledge which must be attributable to the company, would have seen the likelihood of injury.

Lord Atkinson said [40]: " The right may be only the restricted " right of a bare licensee, or it may be the more extended right " of a person invited. The principle that the owner of land upon " which a licensee enters on his own business, or for his own " amusement, is only responsible for injuries caused to the latter " by hidden dangers of which the former knew, but of which the " licensee was ignorant and could not by reasonable care and " observation have detected, must, in any given case, be applied " with a reasonable regard to the physical powers and mental " faculties which the owner, at the time he gave the licence, " knew, or ought to have known, the licensee possessed. To the " blind the most obvious danger may be a trap. To the idiotic " the most perilous act may appear safe and cautious. The duty " the owner of premises owes to the persons to whom he gives " permission to enter upon them must, it would appear to me, " be measured by his knowledge, actual or imputed, of the habits, " capacities, and propensities of those persons." Lord Collins said [41]: " I think there was evidence that the turntable, fastened " as it was only by a bolt so easily withdrawn, was a dangerous " thing for young children to play with, and that the defendants, " as reasonable men, ought to have known it."

It seems to me, therefore, that *Cooke's* case [42] includes a decision of the House of Lords in favour of the objective test, in a case where there was a licence and a trap for children.

Next, there is a passage in the judgment of Lord Sumner in *Latham* v. *R. Johnson & Nephew Ltd.*[43] which reads: " Two " other terms must be alluded to—a ' trap ' and ' attraction ' " or ' allurement.' A trap is a figure of speech, not a formula. " It involves the idea of concealment and surprise of an appear- " ance of safety under circumstances cloaking a reality of danger. " Owners and occupiers alike expose licensees and visitors to " traps on their premises at their peril, but a trap is a relative " term. In the case of an infant, there are moral as well as " physical traps. There may accordingly be a duty towards " infants not merely not to dig pitfalls for them, but not to lead " them into temptation. ' Allurements,' too, is a vague word.

[40] Ibid. 238.
[41] Ibid. 241.
[42] [1909] A.C. 229.
[43] [1913] 1 K.B. 398, 415; 29 T.L.R. 124.

" It may refer only to the circumstances under which the injured " child has entered the close. Here it is hard to see how " infantile temptations can give rights, however much they may " excuse peccadilloes. A child will be a trespasser still, if he " goes on private ground without leave or right, however natural " it may have been for him to do so. On the other hand, the " allurement may arise after he has entered with leave or as of " right. Then the presence in a frequented place of some object " of attraction, tempting him to meddle where he ought to " abstain, may well constitute a trap, and in the case of a child " too young to be capable of contributory negligence it may " impose full liability on the owner or occupier, if he ought, as a " reasonable man, to have anticipated the presence of the child " and the attractiveness and peril of the object."

The last sentence of that passage, referring to the standard of the reasonable man, was expressly cited with approval in *Glasgow Corporation* v. *Taylor*[44] (cited above) by Lord Buckmaster[45] and by Lord Shaw of Dunfermline.[46] There is also in the speech of Lord Shaw[47] the sentence: " Where the dangers " are not familiar and obvious, and where in particular they are " or ought to be known to the municipality or owner, special " considerations arise."

In *Robert Addie & Sons (Collieries) Ld.* v. *Dumbreck*[48] Lord Hailsham referred to the judgment of Lord Sumner in *Latham* v. *R. Johnson & Nephew Ld.*[49] as[50] " a judgment with which I " find myself in full agreement."

It thus appears that in the case of a child licensee the objective test is to be applied in deciding whether the licensor had knowledge of the danger. Is there any reason for applying a different test in the case of an adult licensee? There are possible differences between a child licensee and an adult licensee with regard to the inference of leave and licence, the existence of a trap and the sufficiency of the warning. But I cannot see any reason why any different test should be applied in deciding whether the licensor had knowledge of the danger. Moreover, there is at least some indication of the objective test applying to the case of an adult licensee in the passage which I have already cited from Lord Sumner's speech in *Mersey Docks and Harbour Board* v. *Procter*,[51] containing the words: " As usual " in cases of duties of care, the reasonable man is the standard " on both sides. The licensor must act with reasonable diligence " to prevent his premises from misleading or entrapping a " licensee, who on his side uses reasonable judgment and conduct " under circumstances that can be reasonably foreseen."

In *Fairman* v. *Perpetual Investment Building Society*,[52]

[44] [1922] 1 A.C. 44; 38 T.L.R. 102.
[45] [1922] 1 A.C. 44, 50.
[46] Ibid. 63.
[47] Ibid. 61.
[48] [1929] A.C. 358; 45 T.L.R. 267.
[49] [1913] 1 K.B. 398; 29 T.L.R. 124.
[50] [1929] A.C. 358, 367.
[51] [1923] A.C. 253, 274.
[52] [1923] A.C. 74; 39 T.L.R. 54.

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Lord Atkinson [53] and Lord Wrenbury [54] said that a licensor is liable in respect of dangers of which he knew or ought to have known. In *Sutcliffe* v. *Clients Investment Co. Ld.*,[55] in the Court of Appeal, it was said that the words "or ought to have "known" in the above-mentioned passages from the speeches in *Fairman's* [56] case should be regarded as inserted per incuriam.

In *Robert Addie & Sons (Collieries) Ld.* v. *Dumbreck*,[57] Lord Hailsham said [58] that a licensor is liable in respect of dangers of which he knew or ought to have known. But the Court of Appeal again said in several cases that the words "or ought to "have known" were inserted per incuriam: *Coates* v. *Rawtenstall Borough Council* [59]; *Ellis* v. *Fulham Borough Council* [60]; *Haseldine* v. *C. A. Daw & Son Ld.*[61]; *Sutton* v. *Bootle Corporation*.[62]

With regard to this apparent conflict of opinions, Lord Greene M.R. said in *Baker* v. *Bethnal Green Borough Council* [63]: "Counsel for the respondent put forward what I must confess "at first sight appears to me to be a very attractive explanation "of that difficulty. What he said was that, if a licensor knows "of the existence of what in fact is a trap or a hidden danger, "that is sufficient, because he cannot be heard to say that "although he knew the physical facts which constituted the "danger from a purely objective point of view, the fact that it "was a danger did not occur to his mind. In other words, that "when the phrase 'or ought to be known' was used, it was "directed to that view of the position, and refers, not to the "physical objective facts, but to the circumstances that those "facts constitute a danger. That appears to me to be a very "attractive view, but much though I should like to do so, I do "not find it necessary to consider whether it is correct or not. "It would be necessary to explore with some care the earlier "authorities on the subject of licensor and licensee before "accepting it. I am prepared to deal with this case on the "hypothesis that in order to fix a licensor with liability it is "necessary to bring home to him not merely knowledge of the "facts which constitute the danger, but his own knowledge that "those facts do constitute a danger."

Then in *Pearson* v. *Lambeth Borough Council* [64] in the Court of Appeal, the question was again discussed [65] and left undecided. I should, of course, have been glad if it had been possible still to leave it undecided in this case, in view of the conflict of

[53] [1923] A.C. 74, 86, 89.
[54] Ibid. 96.
[55] [1924] 2 K.B. 746; 40 T.L.R. 765.
[56] [1923] A.C. 74; 39 T.L.R. 54.
[57] [1929] A.C. 358; 45 T.L.R. 267.
[58] [1929] A.C. 358, 365.
[59] [1937] 3 All E.R. 602, 606, 607.
[60] [1938] 1 K.B. 212, 221; 53 T.L.R. 884; [1937] 3 All E.R. 454.
[61] [1941] 2 K.B. 343, 372; 58 T.L.R. 1; [1941] 3 All E.R. 156.
[62] [1947] K.B. 359, 365, 366; [1947] 1 All E.R. 92.
[63] [1945] 1 All E.R. 135, 140.
[64] [1950] 2 K.B. 353; 66 T.L.R. (Pt. 1) 561; [1950] 1 All E.R. 682.
[65] [1950] 2 K.B. 353, 360–2.

opinions which has been revealed by the examination of the previously decided cases. But for the purposes of the present case a decision on this question cannot be avoided. Having regard to the findings of fact which have been set out above, my conclusion, from examination of the previous cases, is that there is sufficient House of Lords authority in favour of the objective test to justify and require its application here. The licensor is not liable if through lack of adequate inspection he has failed to ascertain the existence of the physical facts which constitute the danger. But if the licensor does know of the physical facts which constitute the danger, and a reasonable man, having that knowledge, would appreciate the risk involved, the licensor is not excused by his own failure to appreciate the risk involved.

Applying that principle here on the findings of fact which I have set out above, I hold that the plaintiff is entitled to succeed against the defendants for the agreed sum of damages, which is £1,000, and there will be judgment for the plaintiff for that sum.

*Judgment for the plaintiff.*

Solicitors: *Speechly, Mumford & Craig; William Charles Crocker.*

J. F. L.

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[COURT OF CRIMINAL APPEAL.]

## * PRACTICE NOTE (CERTIFICATE OF APPEAL).



*Criminal Law—Appeal against conviction on point of law—Desirability of certificate of appeal being granted by trial judge—Criminal Appeal Act*, 1907 (7 *Edw.* 7, *c.* 23), *s.* 3 (*a*)—*Criminal Justice Act*, 1948 (11 & 12 *Geo.* 6, *c.* 58), *s.* 38 (2).

A CHAIRMAN of quarter sessions, after an appellant's conviction, intimated that he would be prepared to give a certificate that it was a proper case for an appeal, but that, as a point of law was involved, he did not consider that a certificate was needed, although if it was he would grant one.

HALLETT J., having delivered the judgment of the court allowing the appeal, said:—There is one matter to which I ought to draw attention. Under section 3 (*a*) of the Criminal Appeal Act, 1907, a person convicted on indictment may appeal against his conviction to this court without leave on any ground which involves a question of law alone. This was a question of law alone, and the chairman and defending counsel were right in thinking that accordingly an appeal could be brought to this court without

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leave. None the less, we desire to point out that if a court of trial thinks that the point indicated is such that it would be right for it to be investigated here, a certificate should be granted, although under section 3 (*a*) an appeal may be possible without it, because under section 38 of the Criminal Justice Act, 1948, the result of there being no certificate is that in the event of the appeal being dismissed time will only run from conviction if the court so directs, whereas if a certificate be granted by the judge, recorder or chairman, as the case may be, time will run from conviction without the court so directing. Therefore, the existence of a certificate has a very substantial advantage as regards the length of time which has to be served although appeal to this court may be possible without it. The point does not arise in this case because we have allowed the appeal, but it should be borne in mind by those who have to deal with such matters, and we thought it desirable to draw attention to it.

J. F. L.

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[CHANCERY DIVISION.]

1953
*June* 23.
UPJOHN J.

## * PRACTICE DIRECTION (DAY FOR TRIAL).

*Practice—Day for trial—Originating summonses and motions with witnesses—Appearance in warned list—Effect—procedure relating to witness actions.*

WHEN an originating motion with witnesses came on for hearing counsel for the plaintiffs asked for an adjournment as the plaintiffs were not ready for trial, because they had thought that the Practice Direction of March 20, 1952 (Annual Practice, 1953, p. 3761), was applicable, and that the motion would not come on for trial until six weeks after its appearance in the warned list unless a day were otherwise fixed.

UPJOHN J. said that the direction of March 20, 1952, applied only to witness actions, and not to originating summonses or originating motions with witnesses; these latter came on for hearing in the ordinary way after appearing in the warned list, and not less than four days after they had been set down.

I. G. R. M.

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[COURT OF APPEAL.]

## * RICH (AN INFANT) AND ANOTHER v. LONDON COUNTY COUNCIL.

C. A.
1953
*Apr.* 22.

Singleton, Hodson and Morris L.JJ.

*Negligence—Personal injuries—Schoolboy injured by coke thrown by another scholar—Coke heaped in school playground and not fenced—Accessibility—Duty of education authority.*

An education authority, having had difficulty during the war years and subsequently in obtaining regular supplies of fuel for heating the school premises in winter, during the summer time heaped large quantities of coke, for which there was not room in the covered bunkers, in the school playground used by the senior scholars. Children attending the infant school were expressly forbidden to go into that playground, but a boy seven years of age obtained pieces of the coke and threw them at the infant plaintiff, one piece striking the infant plaintiff in the eye and destroying the sight of it.

In an action brought by the father of the infant plaintiff on behalf of his son damages for negligence were claimed against the education authority, and the trial judge, while finding that there had been adequate supervision and instruction of the children by the school teachers and that the authority had no practical alternative to heaping coke in the playground, nevertheless held the authority negligent in not taking steps to fence the coke in a manner which would have made it inaccessible to the infants. He awarded damages. On appeal:—

*Held*, that the supervision of the children by the teachers having been, as found by the trial judge, adequate, the education authority had not failed in their duty, which was to exercise the care which a careful father would exercise in the like circumstances, and the appeal must be allowed.

*Jackson* v. *London County Council and Chappell* (1911) 28 T.L.R. 66; (1912) 28 T.L.R. 359 (C.A.), distinguished.

APPEAL from Slade J.

The defendants, the London County Council, as education authority, have under their care and management nearly a thousand schools in the area of the county of London, and among them one in Montem Street, Tollington Park, N. 4. During the war and subsequently, owing to the difficulty of getting regular supplies of fuel for the winter, it was found necessary to obtain large supplies during the summer months, and owing to the limited bunker accommodation it was necessary to heap large quantities of coke in the open. At the Montem Street school there were separate playgrounds provided for infants and older children, and the coke was heaped in a corner of the playground for senior scholars, the infants being strictly forbidden to go there or to meddle with the coke.

On February 16, 1950, a seven-year-old boy named Malcolm Forrest, who had apparently entered the school premises by way of the senior boys' playground on his way to the infant school, threw at the infant plaintiff, Derek Rich, who was in the infants'

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playground, a piece of coke which, striking Derek in the eye, destroyed the sight of the optic.

The infant plaintiff, suing by his father, claimed damages from the London County Council for personal injuries and expenses, alleging negligence on the part of the council in failing to provide adequate or proper supervision while the infant children were in their playground, and in failing to fence in, or to safeguard against interference by children, the heaps of coke.

Slade J. found that there had been adequate supervision of the infant children, and that the council had no practical alternative to heaping coke in the playground, but, applying the test approved in *Williams* v. *Eady* [1] by Lord Esher M.R. "that the "schoolmaster was bound to take such care of his boys as a "careful father would take of his boys," he held that the council were negligent in not taking steps to fence the coke in a manner which would prevent the schoolchildren from having access to it. He therefore awarded £1,750 damages to the infant plaintiff, and £384 as expenses to the plaintiff father.

The council appealed.

*H. Lloyd-Jones Q.C.* and *F. H. Lawton* for the council.
*Montague Berryman Q.C.* and *S. I. R. Craig* for the plaintiffs.

The only cases cited in argument were cited in the judgment.

Singleton L.J. stated the facts and continued:—Mr. Lloyd-Jones, on behalf of the defendants, has submitted that the judgment of the judge is wrong, that it goes too far, and that it places too high a duty upon those who manage and conduct a school such as this was. Mr. Berryman, on behalf of the plaintiffs, has submitted that this was a question of fact for the decision of the judge; that he was the judge of fact; that there was evidence upon which he could come to the conclusion at which he arrived; and that this court ought not to interfere with his judgment.

I need hardly say that a finding of fact by the judge of first instance, based upon the evidence of witnesses whom he sees and hears, will always receive full consideration in this court, and it is only if this court is satisfied that the conclusion of the judge is wrong that it will interfere. Mr. Berryman is right to a large extent, in describing the question as one of fact, but before a proper decision can be reached upon that question of fact it is necessary to ascertain what is the measure of duty owed to a child by those responsible for the management of a school.

When this school was built provision was made for storing coke, or coal or other fuel, and the same sort of provision was, I imagine, made in other schools, but after there had been a short period of war it was found that there were difficulties in

[1] (1893) 10 T.L.R. 41, 42.

obtaining regular supplies of coke or coal. The desire of every authority is to have schools, attended by children, sufficiently heated. As there were difficulties in obtaining supplies of fuel regularly, it became essential to have quantities in hand over and above that which could be stored in the places provided for storage; and that necessity, we are told, applied in schools throughout London. The evidence shows that at one time, in one part of the playgrounds of this school, there were about 60 tons of coke, and quite often 40 tons. In February, 1950, there were about three tons. The judge, in considering this part of the case, was of opinion that the defendants could do nothing else than store additional coke somewhere, and, as there was no place in which they could put it under cover, they put it in the senior boys' playground.

A boy going to the infants' side of the school could go in one of two ways. One was to enter the school premises from Montem Street, and thereafter to pass through the senior boys' playground, close by the place at which this heap of coke was. There was an entrance, and the door was not kept locked, from one playground into the other, but when he reached the infants' quarters a boy was not supposed to go into the other parts of the school premises. If during school hours he was, with others, let out for a quarter of an hour's playtime, it was his duty to keep to the infants' playground, and that was well known to all.

The fact that there was in the senior boys' playground this heap of coke was an anxiety and a burden to the teachers and to the heads of the school. No one liked it, and it is quite easy to see why. Coke is dirty and dusty, and if children play upon it or run against it they get dirty and dusty. The dust blows about, and over and above that, if children are playing on it, and running up and down it, one of them may fall and receive some sort of injury, and I daresay it is quite likely that, when they are playing about, one of them may throw something at another. Strange to say, there does not seem to be any evidence that there was any throwing of coke by one child at another child until that which caused this accident. The fact that the coke was exposed in the yard so that children could run on it meant, too, that the coke would be damaged and be less effective for the purpose for which it was required.

It was regarded by the authorities as a danger. The headmistress had complained and reports had been made from time to time. I daresay that happened at every school where coke had been piled in the playground. It takes up part of the space which is required as a playground; it is inconvenient, and it is unpleasant. That was all known. It was known, too, that quite often children throw things at one another. Not coke, but missiles, it was said. Everyone knew that it was wrong. The little boy who lost his eye was asked about it, and he said that he knew that things should not be thrown; he knew that he would be punished if he threw things. Some children picked

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up the coke and threw it against the wall. That, I suppose, made a noise. It was fun, and they liked doing it—not the infants of whom the infant plaintiff was one, but the children in the senior part of the school.

The school keeper gave evidence. He said that when he found boys playing on the coke he always chased them away; they were out of hand a little at one time, but in January, 1950, another headmaster came, a Mr. Fish, who apparently was more strict than his predecessor had been, and there was no further trouble after that time in regard to playing on the coke. That was the evidence of Mr. Whitney, and the judge accepted it.

As I have said, Slade J. found that there was no practical alternative for the county council to adopt; they had to have a heap of coke in the playground. Further, he found that the infants were supposed to keep to their own part of the playground, and not to go into the playground which was for older children. He found that there was adequate supervision. He accepted the evidence of the headmistress and of the other mistresses and helpers who were called, that there was adequate supervision, and that no supervision would have prevented this accident, because children do some things at a time when the teacher's back is turned. He found, too, that the boys knew that they would be punished if they threw missiles, and he said: "The question resolves itself into whether something ought to "have been done physically to prevent access to these dumps of "coke so long as they remained in playgrounds accessible to "children, and to as many as 270 children in the infants' school "alone."

I have pointed out that the dump or heap of coke was not in the infants' part of the premises, though it is right to say that infants could get through the doorway into the other playground. From the evidence in this case it appears as though that is what must have happened, for the one who did the injury was a boy called Malcolm Forrest, who was seen by Derek Rich to come round the corner to the place where the infant plaintiff was, almost opposite the covered playshed in the infants' playground. Malcolm Forrest and another boy each had a piece or pieces of coke. Malcolm Forrest had a shot at Derek Rich and hit him on the leg. Derek Rich stooped down to pick up the piece to throw it back at Malcolm Forrest, and meantime Malcolm Forrest threw another piece and caught Derek Rich in the eye.

Slade J. referred in his judgment to the case to which our attention has been directed, *Jackson* v. *London County Council and Chappell*.[1] The facts in that case were: "A contractor, who "was to carry out certain repairs at a public elementary school, "left a quantity of rough stuff composed of sand and lime in a "truck in a corner of the school playground. The headmaster "of the school gave instructions to the school caretaker to have

[1] (1911) 28 T.L.R. 66; (1912) 28 T.L.R. 359 (C.A.).

"the stuff removed, as he considered it was dangerous, and the "caretaker telephoned to the contractor asking him to remove "it. The stuff, however, was not removed. When the boys "came out of school the stuff was left unguarded, and one of "the boys threw a portion of the stuff at the plaintiff, who was "also a scholar at the school, injuring his eye. In an action by "the plaintiff against the education authority and the contractor "for damages, *Held*, that there was evidence upon which the "jury could find that both the education authority and the "contractor had been guilty of negligence."

When the facts are examined, it would appear that the headmaster's anxiety was lest a boy should play with the truck itself and tip it up in some way. That was in fact done, and, after the truck had been tipped and the strange mixture of things in it strewn about, the boys threw pieces at each other. The contractor had failed to do that which the headmaster had asked that he should do. Thereafter it was a little difficult for the headmaster to be heard to say that he did not think that it was dangerous, and it could be said that he owed a duty to the boys to have the danger removed, if danger there was.

The action was against both the contractor and the London County Council as the education authority. After verdict the question was raised whether there was evidence to go before the jury, and Bray J. said, in giving judgment, that [2] "he had grave "doubt whether there was any evidence of negligence in the "case fit to go to the jury. He told the jury that they must be "reasonably satisfied that the accident which happened was one "which might reasonably have been anticipated by the defen-"dants and guarded against. The real question was whether "there was any evidence as to that. It was so much a question "of degree that it was difficult to say when near the boundary "line on which side the case fell. It was more a question of "fact than of law." After giving judgment for the amount awarded by the jury, £50, the judge added "that he had so "much doubt about the case, that there would be a stay of "execution without any terms, in order to give the defendants "an opportunity of appealing."

There was an appeal, which came before a court consisting of Vaughan Williams, Farwell and Kennedy L.JJ. Vaughan Williams L.J., having read the questions which had been left to the jury and their answers, said that [3] "the effect of them "was that the jury must have found that this barrow was a "dangerous thing to leave where it was left. He (the Lord "Justice) did not know whether the jury were influenced by "sentimental sympathy in favour of the boy. The evidence "against the schoolmaster was that he recognized this barrow as "a source of danger, and with regard to the contractor it was "clear from the evidence that he was told to take some steps

[2] 28 T.L.R. 67. [3] Ibid. 360.

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"to remove the barrow, but that he had not acted sufficiently. "In his judgment, this appeal failed and ought to be dismissed," and the other two Lords Justices agreed. The report of the case in this court is quite short. It appears that both in the court of first instance and in the Court of Appeal grave doubt was felt as to the result. It is not clear whether there was a submission before the case went to the jury that there was no evidence fit for consideration by the jury. The matter was argued after verdict, and Bray J., although he had very considerable doubt, thought that there was sufficient evidence to go before the jury, and the Court of Appeal held that the jury's verdict could be supported. That is as far as the case goes.

That case differs on its facts from this case in that something unusual had been brought on to the school premises, namely, a laden truck, and the headmaster's fear was that the boys might play with that truck and cause some damage or damage themselves. In this case there was a heap of coke, as there had been since approximately the year 1941, for until the year 1950 the difficulties of getting regular supplies of coke had not been overcome even by the London County Council.

We have to consider whether or not the judgment of Slade J. can be supported upon the facts proved before him and accepted by him. Perhaps the most important of his findings is that there was adequate supervision. There were a large number of infants in the infants' side of this school, but there were plenty of people to supervise them, and they were properly supervised during their play time. That is the finding of the judge. But, having considered the authorities, he adopted as the test that which was stated by Lord Esher M.R. in *Williams* v. *Eady*.[4] That was an action by a boy against a schoolmaster for an injury alleged to have been caused by the schoolmaster's negligence in leaving a bottle of phosphorus about. Lord Esher M.R. said that[5] "as to the law on the subject there could be no doubt; "and it was correctly laid down by the learned judge, that the "schoolmaster was bound to take such care of his boys as a "careful father would take of his boys, and there could not be a "better definition of the duty of a schoolmaster." That test has been adopted ever since.

Slade J., in his judgment, continued: "I feel sympathy with "the London County Council for the position in which they have "found themselves, with adequate reasons for storing the coke "where they did, no practical or practicable alternative, adequate "supervision (as I have found), adequate exhortation and "instructions (as I have found). But with the knowledge that "they had, and, if they did not have it, with the knowledge "that they ought to have had (and I am satisfied that they did "have it), what should they have done, bearing in mind their "duty to which I have already referred? It seems to me that

[4] (1893) 10 T.L.R. 41.

"there were only one or two things that they could have done "to discharge that duty, and that is: (1) remove the coke from "the playgrounds, or (2) take steps to ensure that it was no "longer accessible to the boys. If they could not do (1), then "they could have done (2). They need not have put up a wire "fence in case it had the risk which Dr. Topping envisaged. "What they could have done was to put up some form of fence "or wooden structure which would have, for all practical "purposes, prevented the boys from having access to the coke."

A little later he said: "Posing the question to myself: what "would a careful father have done towards his own son, with "knowledge of that risk which his son was running being pointed "out to him over and over again? Would such a father have "left the coke there unprotected? With the consequences which "the father knew might ensue and which, in due course, did "ensue, I answer the question by saying that no careful parent "would so have acted, and I accordingly find that the defendants "were negligent in not taking steps to protect the coke, or "prevent the boys from having access to the coke."

I cannot accept that. It seems to me that it is putting much too high a burden upon the education authority, and it is stating the way in which a father would approach the duty to his children in too general a way, as I think. I wonder how many yards in private houses or attached to public buildings have been without some fuel in the yard or yards in recent years. The necessity for that was recognized by the judge. One who looks from a window in this building can see coke or some other fuel —it is, I think, coke—in the yard. It has to be kept there, I assume, because of the difficulty in getting regular supplies. That difficulty may go. As the judge pointed out, it is regarded as a temporary difficulty. But it is said by him that a careful father, looking upon a matter of this kind, would say: "I must "have this fenced off for the safety of my children." What the expense would be in the small back yard of the private house, or what it would be in the case of one school in the London County Council area, I do not know. What I do know from the evidence is that no one said that an accident of this kind, arising from the throwing of coke, had ever happened before, and no one said that any infant was known to have taken a piece of coke and thrown it at another child in this school before. Yet it is said that the duty of the education authority is either not to have the heap of coke there or to put up some form of fence or wooden structure which would, for all practical purposes, have prevented the boys from having access to the coke. That means putting up something over which boys could not climb. If it were something over which boys could climb, it would not for all practical purposes prevent the boys from having access to the coke. I cannot accept that as the duty in these circumstances.

Slade J. found that the supervision at this school was adequate. Often there are difficulties which can be overcome by

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supervision. The supervision at this school was adequate. The school keeper said that there had not been trouble in regard to the coke since the new headmaster came in about January, 1950, approximately a month before this accident. An accident of a most unfortunate kind happened, which everyone must regret exceedingly, but I do not see that the defendants, the London County Council, can be blamed for it. I have given full consideration to the argument of Mr. Berryman. If this is a question of fact, I am bound to say that I take a different view from that which the judge took, but I am not sure that it is wholly fact.

For the reason that I gave it is necessary to look at the test which Slade J. laid down. He found that the duty upon the London County Council in the circumstances was to do one of two things: either to remove the coke or to take steps to ensure that it was no longer accessible to the boys. I do not agree with that. If their supervision was adequate, it was not necessary that they should take steps to ensure that the coke was no longer accessible to the boys. Their duty was to exercise the care which a careful parent would exercise in the like circumstances. Upon the evidence in this case I do not find that they failed in that duty.

For those reasons I am of opinion that this appeal should be allowed and that judgment should be entered for the defendants.

Hodson L.J. I agree. [His Lordship summarized the facts and continued:] The judge, in a very careful judgment, directed himself perfectly accurately as to the law when he said, quoting Lord Esher M.R. in *Williams* v. *Eady*,[5] that a master was bound to take such care of his pupils as a careful father would take of his children, and he sought to apply that standard to this case. In doing so, he first of all considered the question of supervision, and said in his judgment: "First, I am satisfied that there was "adequate supervision of the infants during the breaks and on "this occasion. Miss Price was there the whole time actually "standing in the bay where the infants were supposed to remain "except for the purpose of going to the lavatory."—Miss Price being the teacher in charge.—"If they went to the lavatory "there was Mrs. Logan, the infants' helper, again to shepherd "them and to prevent them from going astray, that is to say, "where they were not supposed to be. It so happened that some "other boy had chosen, about the same moment, to run his head "into a wall and Mrs. Logan's attention was temporarily taken "up with attending to this little boy, as, indeed, might always "happen whatever degree of supervision she could exercise. It "is sufficient for me to leave it at that and to say that I am "satisfied that the supervision was adequate, and I am satisfied, "moreover, that no supervision, even if more than adequate,

[5] (1893) 10 T.L.R. 41, 42.

"would have prevented this accident. You can supervise as "much as you like, but you will not stop a boy being mis- "chievous when your back is turned. That, of course, is the "moment that they choose for being mischievous. Secondly, I "am satisfied that Miss Camburn"—the headmistress of the infants' school, which has in it some 270 pupils—"did every- "thing that she possibly could in the way of instruction, exhorta- "tion, and threat of punishment, and I am further satisfied that "Malcolm, when he threw this piece of coke, and Derek, when "he was about to throw it back again, knew perfectly well that "they were doing what was wrong and that they would be "punished or would be liable to be punished if they were "caught."

Having arrived at that finding of fact, and having found that it was reasonable for the London County Council to have coke stored on the premises, the question is whether the judge was right in going further and demanding of the defendants some- thing more than the supervision which he had already said was adequate. With all respect to him, I think that in that the judge fell into error. In his judgment he said: "But with the "knowledge that they had, and, if they did not have it, with "the knowledge that they ought to have had (and I am satisfied "that they did have it), what should they have done, bearing "in mind their duty to which I have already referred? It seems "to me that there were only one or two things that they could "have done to discharge that duty and that is (1) remove the "coke from the playgrounds, or (2) take steps to ensure that it "was no longer accessible to the boys. If they could not do (1), "then they could have done (2)." Then he made a reference to a wire fence, and proceeded: "What they could have done "was to put up some form of fence or wooden structure which "would have, for all practical purposes, prevented the boys from "having access to the coke."

The impracticability of keeping children from access to missiles by the erection of physical barriers has only to be stated to be reasonably obvious, in my view, and one would have thought that this case on this footing was very difficult to argue at all. One has only to envisage the difficulties of a master taking a party of children to the seaside—an argument which, we were told, was put before the judge in this case—to realize to what lengths one is led when one considers means which might have to be employed to prevent children picking up missiles, a missile being, I suppose, anything which is not too heavy for the child to lift—it may be a stone or a piece of coke, or an inkpot or anything else. I think that the only crumb of assistance which the plaintiffs have been able to obtain in this case is derived from the fact that in *Jackson* v. *London County Council and Chappell*,[6] to which my Lord has referred, an

[6] 28 T.L.R. 66, 359.

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accident occurred in circumstances not wholly dissimilar from those in this case and the plaintiff succeeded. I do not propose to re-read the facts in that case; I would merely draw attention to the fact that the only decision there was that there was some evidence on which the jury could arrive at their conclusion, and that, so far as the short report of the case goes, it does not appear that any steps were taken to supervise the children or to guard against the accident which occurred.

On the contrary, in this case the evidence was strong, and it was accepted by the judge, that so far as supervision was concerned the steps taken were adequate, and so far as exhortation and instruction were concerned, again adequate steps were taken directed to this particular point, namely, the throwing of missiles. In my judgment, therefore, treating this matter as an exceptional case in which this court is taking a different view of the facts from that taken by the judge who carefully examined them in the first instance, this appeal must be allowed.

MORRIS L.J. I have reached the same conclusion. It is common ground between the parties to this litigation that it was the duty of the London County Council, as the education authority, to act as a reasonable, careful and solicitous parent would have acted in the circumstances. The judge, in his judgment, posed for himself the question as to how a careful parent would have acted and whether such a parent would or would not have left the coke unprotected.

Mr. Berryman has stressed before us the consideration that Miss Camburn appreciated that there were risks attendant upon the accessibility, within the area of the school premises, of the pile of coke. Not unnaturally Miss Camburn, as a careful headmistress, desired to protect herself in every possible way, and she called the attention of those above her to the possibility that the presence of the coke might lead to some unfortunate circumstances. The question which is raised in this appeal is whether it can be said to be negligent in a reasonable, careful and solicitous parent to permit the accessibility to a child of something that may conceivably be used as a missile if every reasonable supervision is exercised over the child. In my judgment, such a question must be answered in each case having regard to its own facts and circumstances. It is of great consequence in this case to have in mind that the judge has found that there was nothing lacking in the supervision of the children and nothing lacking in the measure of exhortation that was given to them. But he came to the conclusion that on the facts of this case a careful parent would not have left the coke unprotected.

As this is a question which, in my judgment, can be determined equally well by us in this court, having all the evidence and the findings of fact before us, as it could have been determined by the judge, I feel free to form my own conclusion in

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regard to the matter. My conclusion differs from that reached by the judge. Here was a case where everything reasonably possible that could be done was being done, and had been done, to look after the children. It is true that there is a propensity in children to throw things. Their ingenuity in finding things to throw may be difficult to circumvent. It seems to me that it cannot be said that it is the duty of a reasonable, careful and solicitous parent to endeavour to put a child into a straight jacket or to seek to remove from his reach anything that may conceivably be used by him to indulge his mischievous propensity, always provided that reasonable, proper and adequate supervision over the child is exercised.

I do not consider that it has been shown that in this case the defendant council fell short in the fulfilment of the duties which lay upon them.

*Appeal allowed.*
*Leave to appeal to House of Lords refused.*

Solicitors: *J. G. Barr; Mark Lemon.*

A. W. G.

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[COURT OF APPEAL.]

## * PRACTICE NOTE (SECURITY FOR WIFE'S COSTS).

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*June 22.*
Somervell, Jenkins and Hodson L.JJ.

*Husband and Wife—Divorce—Legal aid—Appeal—Security for costs—Wife's petition—Appeal by husband—Security for Wife's Costs of Appeal—Affidavit of impecuniosity—Legal Aid and Advice Act,* 1949 (12 & 13 *Geo.* 6, *c.* 51), *s.* 1 (7) (*b*).

ON a motion for security for a wife's costs of an appeal it appeared that the wife, who was the petitioner, had obtained a decree *nisi* of divorce on the ground of the husband's cruelty. The husband had served a notice of appeal and the wife, who was an assisted person, had then asked the husband for security and, having been refused, now moved the court for an order to that effect.

After the hearing, during which *Wigley* v. *Wigley*,[1] *Brightstein* v. *Brightstein*[2] and *King* v. *King*[3] were referred to, SOMERVELL L.J. said that it was clear from section 1 (7) (*b*)

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[Reported by NIUL HOGG, Esq., Barrister-at-Law.]

[1] [1951] P. 156; [1950] 2 All E.R. 1218.
[2] [1947] 2 All E.R. 121.
[3] [1943] P. 91; 59 T.L.R. 362; [1943] 2 All E.R. 253.

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of the Legal Aid and Advice Act, 1949,[4] that the fact that the wife was an assisted person could not relieve the husband of his liability to give security for her costs once her impecuniosity was proved. He pointed out, however, that the mere fact that she was an assisted person was not evidence of this. There should be an affidavit to that effect before the court.

JENKINS and HODSON L.JJ. agreed.

Such an affidavit having been produced the court made an order for security of £10.

[4] Legal Aid and Advice Act, 1949, s. 1 (7): "Save as expressly provided by this part of this Act or by regulations made thereunder,—. . . (*b*) the rights conferred by this part of this Act on a person receiving legal aid shall not affect the rights or liabilities of other parties to the proceedings or the principles on which the discretion of any court or tribunal is normally exercised."

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[QUEEN'S BENCH DIVISION.]

1953
*June* 8, 9.
Pearson J.

## *DAY *v.* HARLAND AND WOLFF LD.

[1952 D. No. 1210.]

*Shipping—Dry dock—Accident—Painting ship with anti-fouling composition—"Work of repair"—Breach of statutory duty—Common law liability—Shipbuilding Regulations,* 1931 (*S.R. & O.* 1931, *No.* 133), *reg.* 11 (*b*).

By the Shipbuilding Regulations, 1931, ". . . when a ship is "being repaired in public dry dock, the person who contracts with "the owner of the ship . . . to execute the work of repair, shall be "deemed to be the occupier . . . and it shall be his duty to comply "with the" regulations.

The meaning of "repair" in the regulations is not confined to the rectification of defects which have become apparent, but includes some element of anticipation, and work does not cease to be a work of repair because it is carried out in anticipation of forthcoming, or in rectification of incipient, defects.

Where, therefore, a workman sued his employers for damages for personal injuries resulting from a fall from a staging from which he was painting the bottom plates of a ship with anti-fouling paint, and his fall was due to the dangerous condition of a plank forming part of the staging, the condition of which was such that, if the Shipbuilding Regulations applied to the work being carried out, the employers were in breach of regulation 11 (*b*):—

*Held*, that anti-fouling paint was an important part of a ship without which it would be incomplete, and that the work of repainting with anti-fouling paint, as opposed to such work as oiling, brushing, cleaning or polishing, was the work of rectifying incipient defects and was a work of repair to which the regulations applied. The employers accordingly, were in breach of regulation 11 (1) (*b*).

*Dredge* v. *Conway, Jones & Co.* [1901] 2 K.B. 42; 17 T.L.R. 355 and *London and North Eastern Railway Co.* v. *Berriman* [1946] A.C. 278; 62 T.L.R. 170; [1946] 1 All E.R. 255 considered.

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ACTION.

The plaintiff, a ship's painter, was employed by the defendants who, under a contract with the owners, were engaged in repainting the s.s. *Warwick Castle* in the King George V dry dock at Woolwich. On September 26, 1951, the plaintiff, in the course of his employment, was painting the "ship's table," the bottom plates of the ship, with anti-fouling paint; he was standing on a staging consisting of two planks supported on metal trestles, and using an elongated brush when he slipped and fell some 12 feet to the concrete floor of the dock, sustaining serious injuries.

The King George V dry dock was owned by the Port of London Authority and hired by shipowners or contractors; trestles and planks, the property of, and provided by, the Port of London Authority had to be used in it, the system being that when the painting of a ship was completed the planks were tied together in bundles and left on the floor of the dock. When water was admitted to the dock some of the planks floated, but others, owing to the presence of oil in the dock, became impregnated with water and oil. The plank, or one of the planks, on which the plaintiff was standing when he fell was so oily as to be dangerous to a person standing on it, and it was that oily condition of the plank which caused him to fall.

The plaintiff claimed damages against the defendants in respect of the injuries received as a result of the fall. He alleged that the defendants were carrying out works of repair to the s.s. *Warwick Castle* in a public dry dock within the meaning of the Shipbuilding Regulations, 1931,* of which they were the occupiers for the purposes of Parts I to VIII of the regulations, and that his fall and injuries were caused by a breach by the defendants of regulation 11 (*b*) (i)†; alternatively, he alleged that the defendants were negligent at common law.

The defendants denied that the work which they were carrying out constituted repair work or that the regulations applied to it.

*R. Geraint Rees* for the plaintiff.
*Ronald Hopkins* for the defendants.

* Shipbuilding Regulations, 1931: "In pursuance of section 79 of the "Factory and Workshop Act, 1901, ". . . the following regulations . . . "shall apply to the construction and "repair of ships in shipbuilding "yards. . . . In these regulations:— "Public dry dock means any dry dock "which is available for hire . . . "Duties . . . when a ship is being "repaired in public dry dock, the per- "son who contracts with the owner of "the ship . . . to execute the work of "repair, shall be deemed to be the "occupier for the purposes of Parts I "to VIII and it shall be his duty to "comply with the . . ." regulations.

† Reg. 11 (*b*): "All staging shall "(i) be securely constructed of sound "and substantial material and shall "be maintained in such condition as "to ensure the safety of all persons "employed."

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The following cases were referred to in argument: *Wood* v. *Walsh & Sons* ‡; *Hoddinott* v. *Newton, Chambers & Co. Ld.* §; *Dredge* v. *Conway, Jones & Co.* ‖; *London and North Eastern Railway Co.* v. *Berriman* ¶; and *Taylor* v. *Ellerman's Wilson Line Ld.***

PEARSON J. stated the facts; held that if the Shipbuilding Regulations, 1931, applied to the work being carried out the condition of the plank from which the plaintiff fell was a breach of regulation 11 (*b*) which caused his fall, and that, under the regulations, the defendants, by virtue of their contract with the shipowners, were deemed to be the occupiers of a shipbuilding yard; and continued: The question remains whether the work of painting the bottom plates of the ship with anti-fouling paint was "work of repair" within the meaning of the regulations. On that question I have been referred to certain cases—namely, the decision of the Court of Appeal in *Wood* v. *Walsh & Sons* [1]; a decision of the House of Lords in *Hoddinott* v. *Newton, Chambers & Co. Ld.*[2]; *Dredge* v. *Conway, Jones & Co.*,[3] a Court of Appeal decision; the well-known House of Lords' case of *London and North Eastern Railway Co.* v. *Berriman* [4] and *Taylor* v. *Ellerman's Wilson Line Ld.*,[5] a recent decision of Ormerod J.

The dividing line between work of repair and work of that kind of maintenance which is not repair is not easy to draw, and there is an element of degree in the matter. So far as the authorities are concerned, I think that the Court of Appeal decision in *Dredge* v. *Conway, Jones & Co.*[6] that whitewashing an internal ceiling within a building constitutes repair within the meaning of section 7 of the Workmen's Compensation Act, 1897, is an important authority in giving a wide meaning to "repair" in a somewhat similar case. That decision, and the reasoning on which it was based, have not in my view been overruled by anything that was said in *London and North Eastern Railway Co.* v. *Berriman.*[7] In that case Lord Porter said [8]: "The exact "meaning of repair is perhaps not easy to define, but it con- "tains, I think, some suggestion of putting right that which has "gone wrong. It does not include the mere keeping in order "by oiling, brushing or cleaning something, which is otherwise "in perfect repair and only requires attention to prevent the "possibility of its going wrong in the future." Lord Simonds said [9]: "It is probably irrelevant for I do not understand that

‡ [1899] 1 Q.B. 1009; 15 T.L.R. 279.
§ [1901] A.C. 49; 17 T.L.R. 134.
‖ [1901] 2 K.B. 42; 17 T.L.R. 355.
¶ [1946] A.C. 278; 62 T.L.R. 170; [1946] 1 All E.R. 255.
** [1952] 1 Ll.L.Rep. 144.
1 [1899] 1 Q.B. 1009; 15 T.L.R. 279.
2 [1901] A.C. 49; 17 T.L.R. 134.
3 [1901] 2 K.B. 42; 17 T.L.R. 355.
4 [1946] A.C. 278; 62 T.L.R. 170; [1946] 1 All E.R. 255.
5 [1952] 1 Ll.L.Rep. 144.
6 [1901] 2 K.B. 42.
7 [1946] A.C. 278.
8 Ibid. 307.
9 Ibid. 314.

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" any argument was founded on cleaning as distinct from oil-
" ing. The work upon which he was engaged was a matter of
" routine and did not arise out of any defect which he was
" instructed to put right."

Broadly speaking, I think that the idea of repair is remedying defects, but I think that it can also properly include an element of the " stitch in time which saves nine "; that is to say, work does not cease to be repair work because it is done to a large extent in anticipation of forthcoming defects, or in rectification of merely incipient defects, rather than in the rectification of defects which have already become serious. I think that some element of anticipation is permitted.

There has not been evidence of an expert character as to what is involved exactly in the operation of putting on anti-fouling paint, or whether the ship when it first sails the seas has anti-fouling paint on its bottom plates; so it is necessary to draw inferences, and to take a reasonable commonsense view of the matter. It seems to me that it must be supposed that the anti-fouling paint on the bottom plates of the ship is part of the ship. It was explained to me that the object of anti-fouling paint is to prevent sea water and marine barnacles and other objects from adhering to the bottom of the ship as much as possible; if that is its object, or if it is by way of protection and preservation of the bottom plates, it seems to me reasonable to suppose that a ship is not complete without its anti-fouling paint. A shipowner presumably does not consider it worth-while to pay money to have the anti-fouling paint on the bottom of his ship renewed, unless there is some reasonable need for it to be done, and the proper inference is that the anti-fouling paint has become defective or is in process of becoming defective. The object of the repainting, therefore, is to renew the defective or incipiently defective paint; that it is different in kind from oiling, brushing and cleaning, even polishing. I think that the paint on the bottom plates is part, and an important part, of the ship, and that this work of repainting with anti-fouling paint is work of rectifying defects, or at any rate rectifying incipient defects, and for that reason is a work of repair.

There was also the further argument—whether strictly it is a legitimate argument I am not quite sure—that the kind of work which was being done in this case was the kind of work which needed the protection afforded by the regulations. There can be no doubt about that; the kind of staging put up here is the kind of staging which ought to be made safe, and these are operations which presumably must be done in dry docks. I think probably that there is some proper argument to that effect, and that regard ought to be had to the apparent scope and effect of the regulations in construing the word " repair " for that purpose. I hold, therefore, that the work in question is work of repairing within the meaning of the regulations; and I think that

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the decision in *Taylor* v. *Ellerman's Wilson Line Ld.*[10] can be distinguished on the facts.

I would add that in *Potteries Electric Traction Co.* v. *Bailey*,[11] a paint shop was held to be devoted to the maintenance of road vehicles, but I do not find anything in that case inconsistent with my present conclusion; if anything, there is a passage which is slightly helpful towards it. There the word in the statute was "maintenance"; "a place used for the maintenance of the "occupier's own road vehicles." "Maintenance," of course, is a vague word. It is not necessarily distinguished from "repair"; it may in some contexts be the same as "repair"; it may in some contexts be a wider word which includes repairing as well as other operations; so I do not think that that case is of any great assistance. I only mention it to show that it has not been overlooked. I find, therefore, that there has been a breach of the Shipbuilding Regulations, 1931, and that that breach caused the accident.

There are two other questions; whether there is a common law liability of the defendants to the plaintiff; and whether there was any want of reasonable care on the defendants' side; what ought they to have done that they did not do, or what did they omit to do which they ought to have done and which a reasonable man would have done? That is not an easy question, but on the whole I was convinced by Mr. Rees' argument that, although the defendants are not primarily responsible for the system nor for the state of the planks, nevertheless they have to use them, and require their workpeople to use them, and there may be some responsibility on them to look after the condition of the planks.

There was a set of planks which the defendants had to hire from the Port of London Authority. Those planks sometimes were, and sometimes were not, so oily as to be dangerous. I think in such a case that there is an obligation on the defendants to take great care to see that oily planks are not used in making a staging. If planks which are initially oily have to be used, they ought to be cleaned off as they are being put up, or immediately before or immediately after. That is not an impracticable operation, because the evidence was that it was sometimes done. That could have been done, and I think that on the whole the right conclusion is that there is a common law liability on those grounds.

His Lordship then held that there was no contributory negligence on the part of the plaintiff, considered the medical evidence and assessed the damages at £2,250, and gave judgment for the plaintiff for that amount.

*Judgment for the plaintiff.*

Solicitors: *W. H. Thompson*; *Carpenters*.

J. F. L.

[10] [1952] 1 Ll.L.Rep. 144.

[11] [1931] A.C. 151; 47 T.L.R. 154.

[QUEEN'S BENCH DIVISION.]

## * SIMPSON *v.* CONNOLLY.

1953
*June* 15, 16.

[1951 S. No. 3827.]

Finnemore J.

*Contract—Sale—Debt—Discharge conditional on transfer of land—Not a "sale" of land.*

An agreement to extinguish an existing debt if land is transferred is not a sale of land.

ACTION.

In 1948, as a result of dividing up land and money, the property of a company of which the plaintiff, Percival Henry Simpson, and the defendant, Harry Stuart Connolly, were members, the defendant owed to the plaintiff a sum of £367 10s. There was an agreement that the debt should be paid by instalments of £50 a month. The defendant paid three instalments in March, April and May, 1949.

On September 6, 1949, the plaintiff's solicitors wrote to the defendant pointing out that the agreement to pay £50 a month had not been carried out, that £217 10s. was still owing, and that unless they received that sum within three days they were instructed to issue a writ. The defendant replied on September 11, stating that it was the plaintiff's suggestion that the balance of money owing might be met by the transfer of a portion of the defendant's land. In reply to that the plaintiff's solicitors wrote on September 12: "... We have taken our client's instructions. "He informs us that he never agreed that the payment of £50 "per month should be suspended. He certainly was, and is, "interested in purchasing the further piece of land at a reasonable "price, but this does not appear to be any reason why you should "have withheld the monthly payments ... we are, therefore, "instructed quite without prejudice to put forward a suggestion "that as a fair price for the land according to the distribution "appears to be £225 per acre, if you transfer the four-fifths of "the acre to him this should square all the debt owing between "you. We shall be glad to know whether you are prepared to "agree to this, otherwise our instructions are to issue a writ "against you for the money owing by you forthwith."

The defendant replied on September 17, saying that it would be necessary to check the acreage, but nothing was done until, on October 25, the plaintiff's solicitors wrote: "... Unless we "hear from you by return that you are prepared to agree to the "suggestion contained in our letter of the 12th ultimo, or pay "us a cheque for £217 10s. we are instructed to issue a writ in "this matter which we shall do without further reference to

[Reported by Miss C. J. ELLIS, Barrister-at-Law.]

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"you." The defendant replied on October 26, saying that he was surprised to receive that letter as he understood that the matter rested with the plaintiff. On October 28 the plaintiff's solicitors wrote saying that they had seen the plaintiff, who considered that the defendant had delayed matters too long, and that unless they received a cheque by the following Monday or a confirmation that the defendant was prepared to transfer the piece of land in settlement of all claims a writ would be issued.

The defendant ultimately agreed to the transfer of the land and about that time let the plaintiff into possession. On November 2, the plaintiff's solicitors wrote asking the defendant to instruct his solicitors to let them have a contract "for the sale of the piece of land." The plaintiff's solicitors not having received a reply, wrote again on November 25, saying that unless they received a draft contract within seven days the plaintiff's offer of settlement would be withdrawn and a writ issued. The defendant replied five days later that he had overlooked that any further action was required and would give the matter his attention.

There was no further correspondence until February, 1951, but in the interval the plaintiff on several occasions told the defendant that he wanted the transfer, but the defendant did not do anything about it. At the beginning of 1951 the plaintiff contacted one Harrison, a prospective purchaser of the whole of his own land, which should have included the extra piece which he was supposed to have transferred to him by the defendant. On March 8, 1951, the plaintiff's solicitors wrote to the defendant reminding him that no deed had even been drawn up in respect of the land, and asking him to confirm that he would be prepared to join in a conveyance to the new purchaser of that piece of land. Having received no reply they wrote again on March 30: "We are surprised to find "we have received no reply to our letter of the 8th instant. We "understand that our client has also tried to get in touch with "you on three occasions with regard to the £25 which you "borrowed from him. In view of your apparent deliberate "attempts to evade him, our instructions are to issue a writ "against you for the recovery of this money unless we hear from "your or your solicitors with some satisfactory proposal regarding "the sale of the piece of land to our client and the repayment of "the money lent to you."

Receiving no reply, the plaintiff's solicitors wrote to the defendant's solicitors on April 4 referring to the transfer and the debt and stating that they were instructed to issue proceedings unless they could get a satisfactory settlement. The defendant's solicitors replied on April 17 suggesting that the plaintiff's solicitors should send them a draft conveyance. In reply to a query by the plaintiff's solicitors, the defendant's solicitors wrote that the land had been mortgaged but that it was shortly to be discharged and that it would therefore not be necessary for the mortgagee to join in if the conveyance to the plaintiff were dated the date when the

existing mortgage was paid off. Further letters were exchanged between the solicitors, and on May 11 the defendant's solicitors wrote to the solicitor of Harrison, the prospective purchaser of the land: "... We are afraid, however, that the present mortgagee will not release the land you mention. A fresh mortgage has, however, been arranged, and if the transfer goes through it will be dated between the day of payment off of the existing mortgage and the date of the new mortgage. We have, however, not been able to obtain instructions or replies to our letters for some time and are afraid that we cannot produce deeds or take any further steps in the matter unless someone guarantees the payment of our costs. We hold the deeds on behalf of the present mortgagees." Thereafter nothing was done by the plaintiff or his solicitors. About July, the plaintiff saw the defendant and told him that the agreement was off as he (the defendant) had not carried out his part and the plaintiff wanted his money.

In September, 1951, a writ was issued for the sum of £217 10s., together with £25 lent by the plaintiff to the defendant which was not in issue.

The defendant's case was that the plaintiff was not entitled to sue for the money because he (the defendant) had been ready and willing and still was, to convey and transfer the land in question to the plaintiff; that no date was ever fixed for completion; and that time was never of the essence of the contract. The defendant alleged that the plaintiff never called on him to complete the matter by any particular date, except in November, 1949, and that that was waived because the plaintiff did nothing until 1950, and the early part of 1951. The defendant claimed that the transaction was a contract for the sale of land, which the plaintiff could not repudiate and, as he could not repudiate that contract, he could not sue the defendant for the money which was due.

The plaintiff's answer was that the transaction was not a contract for the sale of land at all; that if it was, and even if no time was fixed for completion, the defendant, by his conduct, had shown that he was not willing or able to transfer the property; that he had never done so, and that a reasonable time had long since elapsed. The plaintiff admitted that he had given the defendant no ultimatum apart from that which was put in the letters of April to the defendant's solicitors; but when his (the plaintiff's) solicitors wrote and said that they could not get any answer from the defendant, and he did not give the plaintiff any direct answer, and the defendant's solicitors were not prepared to produce any documents or do anything more unless someone guaranteed their costs, he (the plaintiff) claimed that he was entitled to say that that was an indication to him, as a reasonable, sensible person, that, for some reason, the defendant was not either able or willing to carry on with the contract. He also alleged that long after a reasonable time had elapsed the defendant still had the property

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under mortgage which he had not paid off, and therefore he was not in a position to transfer the land to the plaintiff.

*A. C. Goodall* for the plaintiff.

*J. R. C. Samuel-Gibbon* for the defendant.

The following cases were cited in argument: *Brickles* v. *Snell* [1]; *Smith* v. *Hamilton* [2]; *Halkett* v. *Earl of Dudley* [3]; *Harold Elliott and H. Elliott (Builders) Ld.* v. *Pierson* [4]; *In re Sandwell Park Colliery Co., Field* v. *The Company* [5]; *Bellamy* v. *Debenham* [6]; *Thorpe* v. *Fasey* [7]; *J. and P. Coats Ld.* v. *Inland Revenue Commissioners* [8]; *Payne* v. *The Cork Co. Ld.* [9]

FINNEMORE J. stated the facts and continued: This is a case in which there is not much difference on facts, but a great deal of argument and controversy about the legal position. I have been referred to a great many cases. Mr. Samuel-Gibbon cited a passage from *Smith* v. *Hamilton* [10] which emphasized in a modern case the position which arises when there is no time fixed for completion: the purchaser or vendor cannot just say: "Well, the "time has gone and the contract is at an end"; one has to give some kind of notice, or what has been called in this case, I think, an ultimatum, to say that "If you do not complete this matter "after a certain time we shall treat the contract as at an end." No such ultimatum ever was given in this case, and therefore when the plaintiff said to the defendant in July, "I am no longer "bound by this agreement," whatever it was, he was acting wrongly, because he had not the power to do it.

Mr. Samuel-Gibbon also referred me to *Halkett* v. *Earl of Dudley*, [11] but I think that that was rather on the point which Mr. Goodall concedes, that is to say, that when the plaintiff found that there was a mortgage on this land, he did not at once withdraw and on that ground repudiate, and did not, indeed, intend to do so.

The first point which I have to decide is: what was this contract between these two people? Was it a contract for the sale of land, or was it a contract that a debt due from one party to the other should be conditionally discharged, the condition being that this piece of land should be transferred from the defendant to the plaintiff? If the second alternative is the right one, all the complications and refinements, if one may so call them, which have been argued on both sides with regard to what happened afterwards appertaining to a contract for the sale of land have, I think,

[1] [1916] 2 A.C. 599.
[2] [1951] Ch. 174; 66 T.L.R. (Pt. 2) 937; [1950] 2 All E.R. 928.
[3] [1907] 1 Ch. 590.
[4] [1948] Ch. 452; [1948] 1 All E.R. 939.
[5] [1929] 1 Ch. 277.
[6] [1891] 1 Ch. 412; 7 T.L.R. 199.
[7] [1949] Ch. 649; 65 T.L.R. 561; [1949] 2 All E.R. 393.
[8] [1897] 1 Q.B. 778; 13 T.L.R. 548.
[9] [1900] 1 Ch. 308; 16 T.L.R. 135.
[10] [1951] Ch. 174; 66 T.L.R. (Pt. 2) 937; [1950] 2 All E.R. 928, 935.
[11] [1907] 1 Ch. 590.

no application, and the plaintiff is able to say: "You owe me a "lot of money; I agreed to discharge that debt provided that you "transferred to me certain land; you have never transferred that "land to me; it was not on my shoulders to do anything at all "about it; it was your responsibility; you have never done it, in "spite of the letters which have been written; in spite of my "personal interviews and requests nothing has been done; and "therefore, after a reasonable time had gone by, without issuing "an ultimatum and without doing anything on my side, I was "entitled to say, as I did: You have not performed the condition, "and, as you have not performed the condition, the discharge is "not valid, and I am therefore entitled to my £217 10s. which "admittedly was due to me."

The answer to this point depends, of course, on what is meant by a sale of land. I am told by counsel on both sides that there is no direct authority on this point, and I have not been able to find it considered anywhere. I was referred to section 205 (1) (xxiv) of the Law of Property Act, 1925, which provides: "'Sale' includes an extinguishment of manorial incidents, but "in other respects means a sale properly so called."

It is argued for the plaintiff that a sale means in the case of land, as in the case of goods, an exchange of land (or goods) for money. It is laid down clearly in the books which deal with sale of personal chattels that a sale or a contract of sale is an agreement to exchange goods for money, although it is possible that part of the consideration might be something other than money, as, for example, when a persons buys a new car for an agreed price, part of which he pays in money and part of which he satisfies by means of surrendering another car. But the general principle of English law in regard to sale is that a sale means the exchanging of property for money. That applies—and I think both counsel agree—to a sale of land and to a sale of chattels equally.

The real problem is whether it is still a sale if no money passes but one person says to another, to take this case, if you give me a piece of land, I will excuse you your debt which you owe me. That is the point, put as shortly and compactly as I can put it on this particular part of the case. Is it the conditional discharge of a debt by the handing over of land, or is it the sale of land, that is to say, the handing over of land or a contract to transfer land in return for money?

In my view it is a fine point, but, doing the best I can, in the absence of authority, on the principles so far as I understand them, I have come to the conclusion that it is not, properly so called, a contract for the sale of land, because it is not really an agreement to hand over land in return for money; it is an agreement to extinguish an existing debt if land is transferred.

I think that it is to be noted in this case that this land is never precisely mentioned; no exact price in money per acre or per square yard was ever agreed upon, or anything of that sort; no

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attempt was ever made in any way whatever to relate the value of the land to the value of the debt which was due from the defendant to the plaintiff. What happened was that there was this piece of land which both the men knew; it was a piece of land which the plaintiff was possibly anxious to have; he was anxious to have his debt paid; and the letters to which I referred earlier show, I think quite plainly, that he was saying, either himself or through his solicitor, to the defendant: "Well, there it is; pay "me my money or, if you like, settle this debt by transferring this "land to me." I appreciate that in one or two letters the solicitors did refer to a sale and did refer to a price; but I have to look at the realities of the situation. I think that I understand the definition of sale and the principle underlying a sale in this country. Is was not a sale in that sense.

If that is so, I do not think that it is disputed by Mr. Samuel-Gibbon that the onus then would be on the defendant to carry out his side of the bargain; and, as I am satisfied that that would be so, that means that he has to transfer the land, and none of the refinements which affect a contract of the sale of land when there is delay come into the matter at all.

The defendant would, of course, have a reasonable time in which to transfer the land. I should not think that anybody could argue that he was not given a very reasonable amount of time indeed before the contract was repudiated by the plaintiff. Months and months went by. Even if he had not been requested to carry out his side of the bargain, it was his duty to do so. But I think that he was requested to do so on a good many occasions by the rather patient and, perhaps, long-suffering plaintiff, albeit remembering that he was in possession of the land, and therefore the urgency of the transfer may not have been unduly in the minds of either of them. I am satisfied that the plaintiff did try to get this matter finished, and it was the defendant who, indeed, showed by the way in which he treated the matter over and over again and by the way in which he treated his own solicitors, that he dealt with this matter in the most casual, off-hand or, indeed, negligent way, and if he has got into the difficulty in which he now finds himself, he has entirely himself to blame for it.

[His Lordship then considered some of the matters which would have arisen, had the contract been one for the sale of land, and continued:] But, as I say, for the purpose of my judgment in this case I base it on the view that this was a contract in the terms which I have already indicated and not a contract for the sale of land.

*Judgment for the plaintiff.*

Solicitors: *Church, Adams, Tatham & Co. for W. Bradly Trimmer & Son, Alton; Arthur Taylor & Co.*

[COURT OF APPEAL.]

## *WARD *v.* MILLS.

C. A.

1953
*June* 15.

Somervell, Jenkins and Hodson L.JJ.

*Legal Aid — Emergency certificate — Duration — Failure to grant definitive certificate within period of permitted extension of emergency certificate—Certificate deemed to be revoked—Defendant not a legally assisted person—Costs of appeal—Jurisdiction of court—Legal Aid (General) Regulations*, 1950 (*S.I.* 1950, *No.* 1359), *regs.* 10 (9); 12 (1)—*R.S.C., Ord.* 64, *r.* 7.

By regulation 10 (9) of the Legal Aid (General) Regulations, 1950, an emergency certificate shall, at the end of the permitted period of extension be deemed to have been revoked unless within that period "a certificate is issued in respect of the proceedings "to which the emergency certificate relates"; and by regulation 12 (1) a person whose certificate is revoked shall be deemed never to have been an assisted person in those proceedings.

By reason of the failure of the legal aid authorities to assess the means and contribution of the defendant within the period of extension a final certificate could not be issued and the emergency certificate issued to him was deemed to have been revoked. On an application to the court to exercise its discretionary power under Ord. 64, r. 7, of the Rules of the Supreme Court and extend the time for granting a full legal aid certificate or, in the alternative, to limit the costs payable by the unsuccessful defendant as though he was an assisted person:—

*Held*, that Ord. 64, r. 7, was restricted to time appointed by the Rules of the Supreme Court and was inapplicable. The defendant was not an assisted person and in the absence of special circumstances costs must follow the judgment.

COSTS OF APPEAL.

On December 12, 1952, the Court of Appeal heard the appeal of a defendant from a decision of Judge Glazebrook sitting at Southend County Court. On February 6, 1953, judgment was given against the defendant, but no order was then drawn up by reason of the fact that it was uncertain whether the defendant was a legally aided person and entitled to special treatment in the matter of costs. On December 10, 1952, he had been granted an emergency certificate, which, having been extended under regulation 10 (9) of the Legal Aid (General) Regulations, 1950, expired on March 9, 1953. The assessment of the defendant's means and contribution was not completed until March 16, and therefore no final certificate having been issued within the period of extension the emergency certificate was revoked and the defendant was deemed never to have been an assisted person.

For the defendant it was now submitted that the court had discretionary power under Ord. 64, r. 7, of the Rules of the Supreme Court to extend the time during which a full certificate could be issued, or, in the alternative, should deal with the costs

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of the appeal as if the defendant had become a legally aided person.

*T. H. K. Berry* for the defendant.
*G. H. Rountree* for the plaintiff.

SOMERVELL L.J. This case arises out of the decision of this court in this case. The defendant appealed to this court from the decision of the county court judge and the matter was heard on December 12, 1952. Judgment was reserved, and was given on February 6, 1953. The case was originally to have come on at the end of October, 1952, but an adjournment was granted on the basis that the defendant was applying for legal aid. He apparently spent some time in seeking assistance from other sources. He failed to get that assistance, and on December 10 he applied for and was granted a legal aid emergency certificate. That emergency certificate was extended under regulation 10 (9) of the Legal Aid (General) Regulations by the local committee from six weeks to three months and, therefore, expired on March 9, 1953. The order was not drawn up when we delivered our judgment because there was a question with regard to costs, and whether it would turn out that the defendant, the unsuccessful appellant, was or was not covered by the legal aid scheme. The necessary steps which follow on the granting of an emergency certificate were undoubtedly set in motion. The procedure is, stating it very broadly, that means are investigated by the National Assistance Board, and if, as a result of that investigation, it is thought a proper case for legal aid a full certificate is issued which dates back to the time of the granting of the emergency certificate.

In the present case the National Assistance Board had not estimated the defendant's contribution by March 9, when the emergency certificate expired; in fact they did not do so until March 16. It is said that that was no fault of the defendant, and I am not disagreeing with that; but I think, in fairness to the National Assistance Board, that it is perhaps right to bear in mind that the application was not made, as one would normally expect it to be, at the time when the notice of appeal was served, and, indeed, as I have said, was not made until some time after the case would normally have come on, and only two days before it actually came on for hearing. Mr. Berry, for the defendant, admitted that there were great difficulties in the way of his submission that the defendant was, or, alternatively, ought to be treated as if he was, a legally assisted person in respect of this appeal.

Regulation 10 (9) provides: "An emergency certificate shall "remain in force for a period of six weeks or such longer period "not exceeding three months as the local committee may allow, "and unless within that period a certificate is issued in respect of "the proceedings to which the emergency certificate relates, it "shall, at the end of that period, be deemed to have been

"revoked." The extended period having expired, and no other certificate having taken its place, it was deemed to have been revoked on March 10. Regulation 12 (1) provides: "Subject to "the provisions of this regulation, a person whose certificate is "revoked shall be deemed never to have been an assisted person "in the proceedings to which the certificate related, and a person "whose certificate is discharged shall, from the date of discharge, "cease to be an assisted person in those proceedings."

The application of that regulation to an expired emergency certificate came before this court in *Greenwood* v. *Sketcher*.[1] It could have been argued that regulation 12 (1) should not be read as necessarily applying to a revocation which was merely deemed to have taken place by expiration of time under regulation 10 (9). That possible construction was rejected by this court in the case to which I have referred. It was held, in effect, that where an emergency certificate expired, as did this one, by effluxion of time, it could not be put right again ex post facto by the granting of a normal certificate at a later date. The summary, in the headnote, of what was decided states: "A certificate "issued in respect of proceedings to which an emergency certifi- "cate related to be valid must be issued within the period during "which the emergency certificate remained in force, namely, "either six weeks or such longer period not exceeding three "months as might have been allowed by way of extension under "regulation 10 (9); the certificate in the present case had not been "issued within a period of three months from the date of the "emergency certificate and so was not valid; no valid certificate "having been issued, under regulation 10 (9) the emergency certi- "ficate must be deemed to have been revoked; and, therefore, the "appellants were not 'assisted persons' and were liable to pay "the costs of the appeal." I think that that case covers what happened here.

Mr. Berry submits, in the first instance, that this court has power under Ord. 64, r. 7, which relates to extensions of time under the Rules of the Supreme Court, to deal with the matter by extending the time during which a valid full certificate could be issued. A notice of motion in respect of the matter is not before us, but the point was left open in *Greenwood* v. *Sketcher*,[1] and it falls, therefore, to this court to consider it. I am of opinion that Ord. 64, r. 7, is inapplicable. In the first place, it is restricted to the doing of any act or the taking of any proceedings within "the time appointed by these rules"—that is, the Rules of the Supreme Court. I would have thought that those words did not include the Legal Aid (General) Regulations. I also think that it is a misconception to regard what is asked for as an extension of time, although from one point of view it may be put in that way. We have here a regulation dealing with a particular subject-matter which gives the certificate force for a

[1] [1951] 1 All E.R. 750; [1951] W.N. 190; [1951] 1 T.L.R. 638.

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certain period and goes on to say that a body—not this court—may give it an extended life for a further period. I think that the manner in which this particular subject-matter is dealt with in this regulation takes it out of any general power which this court has under Ord. 64, r. 7, to extend the time, or which it may have for certain purposes under its inherent jurisdiction. I therefore think that that point fails.

In the second place, Mr. Berry asks us to exercise our discretion so as in effect to deal with the costs in the same way as if the defendant had become a legally assisted person. That, I think, must be wrong. People are either legally aided persons or they are not. If they are, the court, in dealing with the costs, applies the provisions of the Legal Aid Regulations. If they are not assisted persons, the court must deal with the matter on that basis. Although there is a discretion, it is well known that in the absence of very special circumstances an appellant whose appeal has failed has the ordinary order as to costs made against him. In my opinion the court has no option in this case but to take that course.

JENKINS L.J. I agree, and have nothing to add.

HODSON L.J. I agree.

SOMERVELL L.J. The appeal will be dismissed with costs, including the costs of today.

Solicitors: *Flint & Co., Southend-on-Sea; H. Maxwell Lewis, Southend-on-Sea.*

A. W. G.

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[CHANCERY DIVISION.]

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*May* 12, 13, 14; *June* 18.
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## * BOARLAND (INSPECTOR OF TAXES) *v.* MADRAS ELECTRIC SUPPLY CORPORATION (IN LIQUIDATION).

*Revenue—Income tax—Crown—Sale of electricity undertaking to Crown —"Person succeeds to any trade . . ."—Whether "person" includes the Crown—Income Tax Act*, 1918 (8 & 9 *Geo.* 5, *c.* 40), *Sch. D, Rules applicable to Cases I and II, r.* 11 (2).

The word "person" in the phrase "if . . . any person succeeds "to any trade" in rule 11 (2) of the Rules applicable to Cases I and II of Sch. D of the Income Tax Act, 1918, must be construed in its ordinary meaning as a word of widest import, and as such it is apt to include the Crown.

The undertaking of an electricity supply company in India was purchased by the Madras Government, acting as a branch of the Crown, on August 29, 1947. The company received an assessment to income tax for the year 1947–48 on its profits from April 5 to August 29, 1947, under rule 11 (2), which included an estimated balancing charge of £850,000. The assessment was discharged by the Commissioners for the Special Purposes of the Income Tax Acts

on the ground that the word "person" in rule 11 (2) did not include the Crown, and that the rule did not therefore apply. It was not disputed that the assessment was correctly made if rule 11 (2) applied. On appeal from the Commissioners:—

*Held*, that the Commissioners had come to a wrong conclusion since rule 11 (2) was applicable to succession to a trade by the Crown, since there was no ground for placing any limitation on the natural and ordinary meaning of the word "person"; in its ordinary meaning it was a word of widest import and apt to include the Crown.

*Fry* v. *Burma Corporation* [1930] A.C. 321; 15 T.C. 113, 136, applied.

*Inland Revenue Commissioners* v. *Barr* [1953] T.R. 7; 46 R. & I.T. 217, not followed.

APPEAL by case stated from a decision of the Commissioners for the Special Purposes of the Income Tax Acts.

The case stated provided: The respondent company was incorporated on January 27, 1906, under the Companies Acts, 1862–1900, with the object of carrying on in India and elsewhere the business of an electric light and power company. The company did so under three licences granted by the Government of Madras, each of which provided that on August 29, 1947, the local authorities, whom failing the local government, should have the option of purchasing the electricity undertaking.

The option was duly exercised by the local government, and on August 29, 1947, the company sold and the local government purchased the undertaking for 215 lakhs of rupees, the sterling equivalent actually received being £1,611,437. The company went into voluntary liquidation on September 29, 1950. From the date of the sale the company ceased to trade, and its former undertaking continued to be carried on without interruption under the management of a department of the Government of Madras. Substantially all the company's former staff continued to work in the undertaking. The company received an assessment to income tax under Case I of Sch. D for the year 1947/48 which included an estimated balancing charge of some £850,000.

The Commissioners found as a fact that the trade or undertaking in Madras was not discontinued on August 29, 1947, but continued to be carried on without interruption under a department of the Madras Government. They held, however, that rule 11 (2) [1] of the Rules applicable to Cases I and II of Sch. D of

[1] Rules applicable to Cases I and II of Sch. D of the Income Tax Act, 1918, r. 9: "(1) If a person charged "under this schedule ceases within "the year of assessment to carry on "the trade . . . in respect of which the "assessment is made, and is succeeded "therein by another person, the sur- "veyor shall . . . certify to the general "commissioners for the division in "which the assessment is made the "particulars thereof. . . . (2) On "receipt of the certificate the commis- "sioners shall cause notice to be given "to the respective persons of a meet- "ing of the commissioners to consider "it, and after examination of the "said persons, if they attend, or on "other satisfactory proof of the facts, "the commissioners shall adjust the "assessment by charging the succes- "sor with a fair proportion thereof "from the time of his succeeding to "the trade . . . and relieving the

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the Income Tax Act, 1918, did not apply to the Crown, and they discharged the assessment.

The Crown appealed from that decision. For the purposes of the appeal it was conceded that the Madras Government was a branch of the Crown, and that the purchaser of the undertaking was therefore the Crown.

*Sir Lionel Heald Q.C.*, *A.-G.*, *J. H. Stamp* and *Sir Reginald Hills* for the Crown.

*J. Millard Tucker Q.C.* and *John Clements* for the company.

Cases referred to in argument: *Attorney-General* v. *Hancock* [2]; *Bank voor Handel en Scheepvaart N.V.* v. *Slatford* [3]; *Coomber* v. *Berkshire JJ.* [4]; *In re D'Avigdor-Goldsmid* [5]; *Fry* v. *Burma Corporation* [6]; *In re Hartland* [7]; *In re Henley & Co.* [8]; *Inland Revenue Commissioners* v. *Barr* [9]; *Inland Revenue Commissioners* v. *Reid* [10]; *Inland Revenue Commissioners* v. *West* [11]; *Income Tax Commissioners for City of London* v. *Gibbs.* [12]

*Cur. adv. vult.*

June 18. UPJOHN J., reading his judgment:—The principal point in this case is whether in rule 11 (2) of the Rules applicable to Cases I and II of Sch. D of the Income Tax Act, 1918, the word "person" includes the Crown. The Special Commissioners have held that it does not. There is also a subsidiary point not raised before the Commissioners, but to be raised before me. The steps that lead to that first point are fully set out in the case stated and I need only recapitulate them very shortly.

[His Lordship stated the facts, and continued:] So far as the principal point is concerned, it is also conceded that prima facie upon the sale of the company's plant and machinery a balancing charge of some £850,000 or thereabouts fell to be made upon the company under section 17 of the Income Tax Act, 1945. The relevant year of assessment in respect of that charge is to be ascertained by finding out the company's "basis period," which is defined in section 57 (2) of the Act.

"person originally charged from a "like amount."

R. 11: "(2) If at any time . . . "any person succeeds to any trade ". . . which until that time was "carried on by another person . . . "the tax payable for all years of "assessment by the person succeeding "as aforesaid shall be computed as if "he had set up or commenced the "trade . . . and the tax payable for "all years of assessment by the person "who until that time carried on the "trade . . . shall be computed as if it "had then been discontinued."

[2] [1940] 1 K.B. 427; 56 T.L.R. 286; [1940] 1 All E.R. 32.

[3] [1953] 1 Q.B. 248; [1952] 2 T.L.R. 861; [1952] 2 All E.R. 956.

[4] (1883) 9 App.Cas. 61; 2 T.C. 1.

[5] [1951] Ch. 1038; [1951] 2 T.L.R. 381; [1951] 2 All E.R. 543.

[6] [1930] A.C. 321; 15 T.C. 113, 136.

[7] [1911] 1 Ch. 459.

[8] (1878) 9 Ch.D. 469; 1 T.C. 209.

[9] [1953] T.R. 7; 46 R. & I.T. 217.

[10] (1950) 31 T.C. 402.

[11] Ibid.

[12] [1942] A.C. 402; [1942] 1 All E.R. 415; 24 T.C. 221.

I need not consider that section, for it is conceded by the company that if rule 11 (2) of the rules applicable to Cases I and II of Sch. D of the Income Tax Act, 1918, is applicable, then having regard to section 31 (1) (*a*) of the Finance Act, 1926, the company would fall to be assessed to income tax for the year 1947/48 on its profits from April 5 to August 29, 1947, and it would be subject to assessment upon the balancing charge for the same period. The company, however, submit that rule 11 (2) has no application because the Crown is not a person, and that the balancing charge fell to be assessed pursuant to rule 9 in respect of the following year when the company, having ceased to trade, was not in fact assessable at all under Case I.

In view of the submissions made to me, it will be convenient to trace the history of the relevant rules in tax legislation before reading the vital rule 11 (2) itself.

In the Income Tax Act, 1842, in the fourth rule dealing with Cases I and II of Sch. D, it was provided that whenever there was any change in any partnership by death, dissolution or the admission of a new partner or whenever any person succeeded to any trade, tax was to be computed according to normal principles (then the three-year average) notwithstanding such change or succession. There was no provision for apportionment of the profits as between predecessor and successor in that Act, but by section 134 it was provided in effect that where there was a succession both the predecessor and the successor should be liable, presumably at the option of the Crown.

The first provision for apportionment of tax between predecessor and successor is to be found in section 62 of the Taxes Management Act, 1880, where it is provided that where one ceases to carry on business and there is a succession, a certificate is to be given to the Commissioners, and then subsections (2) and (3) provide: "(2) On receipt of such certificate the Commissioners shall cause notice to be given to the respective parties of a meeting of Commissioners for considering the same; and the Commissioners shall, on the examination of the respective parties, if in attendance, or on other satisfactory proof of the facts, adjust the assessment by charging the successor with a fair proportion thereof from the period of his succeeding to the concern and relieving the person originally assessed from a like amount. (3) The determination of the Commissioners on any such certificate shall be final, and the assessment so adjusted shall be recoverable from the respective parties in like manner as an original assessment; and if either of the parties has paid in respect of an assessment so certified more than the proportion which appears by the determination of the Commissioners to be chargeable on him, the amount so overpaid shall, when recovered from the party liable, be paid to the person by whom the overpayment was made."

These provisions were consolidated in the Income Tax Act, 1918, the earlier fourth rule and section 62 of the Act of 1880

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appearing as rules 11 and 9 respectively of the Rules applicable to Cases I and II of Sch. D, and section 134 of the Act of 1842 as rule 3 of the Miscellaneous Rules applicable to Sch. D. Then, by the Finance Act, 1926, drastic alterations were made.

Section 31 provided that where a trade was permanently discontinued profits for the last year were to be charged on the profits from the last April 6 to the date of discontinuance, with a right on the part of the Crown to reopen the previous year's assessment.

Section 32 repealed the existing rule 11 and re-enacted the following, which is the present rule 11: "11.—(1) If "at any time after the fifth day of April, nineteen hundred "and twenty-eight, a change occurs in a partnership of "persons engaged in any trade, profession or vocation, "by reason of retirement or death, or the dissolution of the "partnership as to one or more of the partners, or the admission "of a new partner, in such circumstances that one or more of "the persons who until that time were engaged in the trade, "profession or vocation continue to be engaged therein, or a "person who until that time was engaged in any trade, profession "or vocation on his own account continues to be engaged in it, "but as a partner in a partnership, the tax payable by the person "or persons who carry on the trade, profession or vocation after "that time shall, notwithstanding the change, be computed "according to the profits or gains of the trade, profession or "vocation during the period prescribed by the Income Tax Acts: "Provided that, where all the persons who were engaged in the "trade, profession or vocation, both immediately before and "immediately after the change require, by notice signed by all "of them or, in the case of a deceased person, by his legal repre-"sentatives, and sent to the surveyor within twelve months after "the change took place, that the tax payable for all years of "assessment shall be computed as if the trade, profession or "vocation had been discontinued at the date of the change, and "a new trade, profession or vocation had been then set up or "commenced, and that the tax so computed for any year shall "be charged on and paid by such of them as would have been "charged if such discontinuance and setting up or commencement "had actually taken place, the tax shall be computed, charged, "collected and paid accordingly. (2) If at any time after the "said fifth day of April any person succeeds to any trade, profes-"sion or vocation which until that time was carried on by another "person and the case is not one to which paragraph (1) of this "rule applies, the tax payable for all years of assessment by the "person succeeding as aforesaid shall be computed as if he had "set up or commenced the trade, profession or vocation at that "time, and the tax payable for all years of assessment by the "person who until that time carried on the trade, profession or "vocation shall be computed as if it had then been discontinued.

" In this paragraph references to a person include references to a " partnership."

There was no alteration to rule 9, which remained, and gave rise to much discussion as to how far rule 9 remained effective having regard to the new form of rule 11. The history of these rules and the conflict, if I may so describe it, between rules 9 and 11, were the subject of elaborate opinions delivered in the House of Lords in *Income Tax Commissioners for City of London* v. *Gibbs*,[1] but the brief outline I have given is, I hope, sufficient to make clear the submissions made to me based on the historical development of the relevant taxing provisions.

The case for the appellants can be stated concisely. It is submitted and not disputed that the Crown is a corporation sole and therefore a person: see section 19, Interpretation Act, 1889. Therefore it is said the case where the Crown purchases a business or trade is within rule 11 (2).

It is submitted that the true approach to the rule is that throughout the Act the word " person " must be given its ordinary wide meaning. Thus it is said that a person resident outside this country who does not carry on business in this country is not taxed for the reason that, although he is a " person " for the purposes of the Act, he is not a person who is within the class of persons mentioned in any of the sub-headings in sub-paragraph (*a*) of paragraph 1 of Sch. D. So, to give another example, a charitable trustee is not taxed, not because he fails to fulfil the definition of a person for the purposes of the Act, but because, although such a person, he is exempt from taxation by section 37 of the Income Tax Act, 1918.

Finally, it is said that the Crown is not taxed, not because it fails to fulfil the definition of person for the purposes of the Act, but because not being expressly mentioned in the Act the rights of the Crown cannot be prejudiced by anything in the Act: *Bank voor Handel en Scheepvaart N.V.* v. *Slatford*.[2]

It is pointed out that, if the contrary view be right, namely, that the Crown is exempted from tax because upon the true construction of the Act it is not a " person," the wealth of learning to be found in the authorities on the immunity of the Crown from taxation was quite unnecessary. A number of authorities were cited to me on this point. I do not propose to review them all at length, for the exact point I have to consider was never raised; it is sufficient to refer to one passage in *Coomber* v. *Berkshire JJ.*[3] In the House of Lords Lord Blackburn said[4]: " It seems to me " that it is not material whether the assessment statute imposing " any tax does so, like the Poor-rate Acts, for a local purpose, or " like the statute imposing a duty on post-horses, considered in " *Rex* v. *Cook*,[5] or the income-tax, for an imperial purpose. In

[1] [1942] A.C. 402.
[2] [1953] 1 Q.B. 248.
[3] 9 App.Cas. 61.
[4] Ibid. 71.
[5] (1790) 3 T.R. 519.

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" each there is an implied exemption on the ground of prerogative. " And if the property is so held as to bring it within the ground " of exemption for the one statute, it must surely be brought " within the ground of exemption for the other." That seems inconsistent with the view that the Crown is immune from taxation because it is not a person for the purposes of taxing Acts.

Then, again, in *Bank voor Handel en Scheepvaart N.V.* v. *Slatford*,[6] already mentioned, it is said that the illuminating judgments in the Court of Appeal on " Crown status " and " Crown " purposes " would have been quite unnecessary if the short answer was that as a matter of construction the Crown and therefore its servant, the Custodian of Enemy Property, was not a person for the purposes of the Income Tax Acts, and the decision must have been the other way. I think that there is much force in the contention of the Crown upon this point.

It was next submitted that it would be a most strained and unnatural construction of the Act to hold that the principles of taxation of a vendor of a business should vary according to the apparently irrelevant circumstance whether the vendor should happen to sell to another subject of the Crown or to the Crown itself.

On the other hand, Mr. Millard Tucker for the respondent company submits that the only safe guide is to consider the necessary construction which must be placed on the word " person " in a taxing Act. He points out that in every taxing Act going back for many years there is a preamble in the following form: " Most Gracious Sovereign, We, Your Majesty's most dutiful " and loyal subjects, the Commons of the United Kingdom in " Parliament assembled, towards raising the necessary supplies to " defray Your Majesty's public expenses, and making an addition " to the public revenue, have freely and voluntarily resolved to " give and grant unto Your Majesty the several duties hereinafter " mentioned; and do therefore most humbly beseech Your Majesty " that it may be enacted, and be it enacted by the Queen's Most " Excellent Majesty, by and with the advice and consent of the " Lords Spiritual and Temporal and Commons, in this present " Parliament assembled, and by the authority of the same, as " follows:—" then follow the substantive taxing provisions.

It is said with force, having regard to that preamble, that the Crown as the grantee of the taxes cannot be a person for tax purposes, and that in the charging provisions in the Income Tax Act, 1918, charging tax upon " persons " cannot sensibly include the Crown.

In support of that argument Mr. Tucker points to the history of the relevant rules which I have already summarized. He points out that until the Finance Act, 1926, at all events, the relevant rule would be rule 9, re-enacting section 62 of the Act of 1880, and he said that the Crown could never be a " person " for the

[6] [1953] 1 Q.B. 248.

purposes of subsections (2) and (3), for Parliament cannot possibly have intended that the Crown should be summoned to appear before the Commissioners. In further support of his argument Mr. Tucker drew my attention to certain rules applicable to Sch. A. By rule 7 (1) income tax is charged upon the occupier. By rule 8 (1) the occupier is entitled to deduct such tax out of the next rent payable by him to the landlord. A special provision is made in the rule that the right to deduct is available against a receiver of Crown lands. Therefore, it is said, that prima facie shows that the Crown is, as a matter of construction of the Act, not a landlord. I do not find this argument very convincing because a special provision entitling a subject to deduct rent against the Crown is necessary whichever of the contending views is right. The argument is also somewhat double-edged, for the rule refers in terms to a "receiver on behalf of the Crown "or *other* person receiving the rent."

Mr. Tucker's next main point is that rule 11 (2) contemplates a predecessor and a successor both subject to tax. It is pointed out that in *Income Tax Commissioners for City of London* v. *Gibbs*,[7] already referred to, Lord Macmillan, considering rule 9, points out[8] that the word "person" denotes an entity of assessment. Therefore, it is said, for the rule to apply there must be found two entities of assessment, a predecessor and a successor, both of them subject to tax. Lord Macmillan, however, was dealing with quite a different problem. The sole question was whether rule 9 applied to the case of admission of a new partner to a firm of stockbrokers carrying on business in the City of London, having regard to the new rule 11 introduced by the Act of 1926. Lord Macmillan was not in any way concerned with the position of the Crown, and it would be contrary to every principle of construction to lift his words out of their context and try to apply them to the case before me.

The question ultimately comes to a very short point of construction as to the meaning of the word "person" in rule 11 (2), and to paraphrase the words of Lord Dunedin, delivering his opinion in *Fry* v. *Burma Corporation*,[9] another taxing case although on quite a different point, it is safest to go by the ordinary meaning of words. There is here no context which compels me to give some special meaning to the word "person." In its ordinary meaning it is a word of widest import and apt to include the Crown. If some limitation is to be placed upon the ambit of that word, difficulties arise, as the Commissioners appear to recognize in their finding in the case stated; is the word limited to "all persons other than the Crown" or to "all taxable "persons." As a matter of construction, I see no ground for placing any limitation upon the ordinary and natural meaning of the word.

[7] [1942] A.C. 402.
[8] Ibid. 418, 419.
[9] [1930] A.C. 321, 327.

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In my judgment, in rule 11 (2) the word "person" includes the Crown, persons resident abroad, or charity trustees and others who for different reasons may be found to be exempt from tax. Consequently, in my judgment, the Commissioners came to a wrong conclusion upon this point.

I must now turn to the subsidiary point briefly mentioned at the beginning of my judgment. In an undated letter sent after the hearing before the Commissioners the respondents gave notice that they would rely on a recent decision in the Court of Session, *Inland Revenue Commissioners* v. *Barr*.[10] In reply to that letter the Crown stated that they would rely on proviso (ii) to section 17 (1) of the Income Tax Act, 1945.

The point arose in this way. In an earlier case of *Inland Revenue Commissioners* v. *Reid*,[11] reported together with *Inland Revenue Commissioners* v. *West*,[11] a fishing vessel, the *Girl Eileen*, was sold, and although the purchaser continued to use the vessel for fishing there was nothing in the nature of a purchase of the vendors' business and goodwill or undertaking as fishermen but only of the ship, and it was found as a fact that on the sale of the ship there was a simultaneous permanent discontinuance of the trade. On these facts the Court of Session naturally held that on the true construction of section 17 (1) of the Income Tax Act, 1945, a claim to a balancing charge failed, though both the Lord President and Lord Keith expressed the view that a balancing charge could only be recovered from persons still carrying on the trade.

That decision has, however, no application to the facts of the present case, having regard to the finding of fact that there was no discontinuance of the trade or undertaking though it was carried on by another. The present case is clearly one where (apart from the argument on "person") one person succeeds to a trade of another within the meaning of rule 11 (2). The proviso at the end of section 17 (1) is, therefore, relevant. It is in these terms: "Any reference in this subsection to the permanent discontinu-" ance of a trade does not include a reference to the happening of " any event which, by virtue of any of the provisions of rule 11 " of the Rules applicable to Cases I and II of Schedule D, is to " be treated as equivalent to the discontinuance of the trade."

In the subsequent case of *Inland Revenue Commissioners* v. *Barr*,[12] however, the facts were similar to those before me. A business was sold as a going concern, but the Court of Session held that no balancing charge was leviable. They did so, as it appears from the very brief judgment, because counsel for the appellant, in opening the appeal, admitted that the ratio of *Inland Revenue Commissioners* v. *West*[13] (it was not disputed before me that in fact *Inland Revenue Commissioners* v. *Reid*[13]

[10] [1953] T.R. 7; 46 R. & I.T. 217.
[11] 31 T.C. 402.
[12] [1953] T.R. 7; 46 R. & I.T. 217.
[13] 31 T.C. 402.

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was the relevant case) covered the case then under appeal. That admission overlooked the relevant provision in section 17 (1) I have already read, which does not appear to have been drawn to the court's attention. Counsel for the company candidly did not endeavour to support the decision by independent reasoning, but he invited me to follow it.

Normally I should feel it my duty to follow a unanimous decision of the Court of Session (see *In re Hartland* [14] and *In re D'Avigdor-Goldsmid* [15]), but in the circumstances I have mentioned I do not feel compelled to do so. Nor do I think this is a case in which I ought to send the case back to the Commissioners in order that the company may invite the Commissioners to express new findings upon this matter.

It seems to me that the concluding words of section 17 (1) govern this case on the findings of the Commissioners, and I cannot treat this case as one where there has been a simultaneous discontinuance of the trade; a balancing charge is therefore leviable.

The appeal must be allowed and the original assessment must be remitted to the Commissioners for adjustment of the figures. The respondents must pay the appellant's costs of the appeal.

*Appeal allowed.*

Solicitors: *Sanderson, Lee & Co.; Solicitor of Inland Revenue.*

I. G. R. M.

[14] [1911] 1 Ch. 459. [15] [1951] Ch. 1038.

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[PROBATE, ETC., DIVISION.]

## * THE ASSUNZIONE.

1953
*June* 9, 10, 11.

Willmer J.

*International Law—Contract—Proper law—Law of flag—Lex loci contractus—Shipping—Charterparty—Bill of lading—Goods shipped at French port on Italian vessel—Italian destination—Charterparty on English form—Bill of lading made in Paris in French language—Mutual intention—Business efficacy.*

In pursuance of a charterparty dated "Paris, October 7, 1949," negotiated between brokers in Paris and Genoa respectively, cargo was shipped at Dunkirk on board an Italian vessel for conveyance to Venice under a bill of lading issued under the charterparty. The charterparty was made between French charterers and the Italian shipowners on a uniform general charter form in the English language, but neither party contended that English law was intended to govern the contract. The freight was to be paid in Italy in Italian currency. The bill of lading was in the French language. On a preliminary point whether the law to be applied to the contract was French or Italian:—

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*Held*, that the mutual intention of the parties to the contract was the fundamental consideration in determining which law was to be applied; that the nationality of the ship's flag and the place where the contract was made were no more than considerations which the court must take into consideration in inferring what intention ought to be imputed to the parties; and that in inferring that intention it was necessary to consider what intention reasonable business men would have been likely to have had—which was very much what was convenient or would give business efficacy to the contract.

*The Adriatic* [1931] P. 241, and *The Njegos* [1936] P. 90 considered.

The circumstances of the present case were such that there was no cogent reason for imputing to the parties an intention to make French law the proper law of the contract. The indications were more powerful in favour of Italian law, and the order would be accordingly.

PRELIMINARY POINT OF LAW.

The French charterers of the Italian vessel *Assunzione*, who were also the holders of a bill of lading made in Paris in respect of a cargo of grain shipped at Dunkirk for delivery at Venice, sued the owners of the *Assunzione* for short delivery and damage to the cargo and, on a preliminary point of law, applied for an order that the French law was to be applied to the contract of affreightment. The Italian shipowners resisted the application, contending that Italian law was the proper law of the contract.

The following facts appeared from an agreed statement: The plaintiff charterers are a French organization called Office National Interprofessionnel des Cereales. The defendant shipowners are an Italian partnership comprising two brothers carrying on business in Genoa and Naples. The *Assunzione* at all material times was of Italian registry and flew the Italian flag.

On May 21, 1949, a written exchange agreement was made between the High Commissioner for Food of the Italian Republic, acting through Federazione Italiana dei Consorzi Agrari (hereinafter called "Federazione") of the one part and the High Commissioner for Food of the French Republic acting through the charterers of the other part, whereby it was agreed, inter alia, as follows: (*a*) That the High Commissioner for Food of the Italian Republic should put at the disposal of the High Commissioner for Food of the French Republic certain quantities of grain and flour to be delivered in France by July 15, 1949. (*b*) That the charterers should subsequently make restitution of such grain and flour by delivering like quantities to Italian ports by January 1, 1950. (*c*) That the guiding principle of the agreement should be that it should bring no profit and cause no loss to the Italian Government. The agreement was drawn up in the French and Italian languages.

On October 7, 1949, in Paris the charterers, in pursuance of their obligation to make restitution under the exchange agreement, entered into a charterparty with the shipowners whereby they

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chartered the defendants' s.s. *Assunzione* to carry a cargo of wheat from Dunkirk to Italy. The charterparty was negotiated through brokers in Paris and in Genoa by cables, telephone and correspondence. The defendants were not at any material time aware of the terms of the exchange agreement. The charterparty was drawn up in the English language using the printed form of Uniform General Charter of the Documentary Council of the Baltic and White Sea Conference; code name "GENCON." The operative part was headed "Paris, 7th October 1949." An addendum, in the French language, stated that the nominal charterers named in it "agit pour le compte" of the plaintiff charterers. Freight and demurrage was expressed to be payable in Italian lire in Naples.

On October 21, 1949, at Dunkirk there were issued two bills of lading signed on behalf of the master of the *Assunzione* in respect of a quantity of wheat shipped on board the said vessel at that port by French cargo superintendents as agents for the charterers, who were the owners of the cargo. The bills of lading were drawn up in the French language and provided, inter alia, for carriage to Venice and delivery to order on payment of freight "suivant charte-partis datée de Paris du 7.10.49."

At some time between October 21, 1949, when the *Assunzione* sailed from Dunkirk, and December 10, 1949, when she arrived at Venice, the bills of lading upon presentation of which the cargo was ultimately delivered were indorsed in blank by the French cargo superintendents and sent through the post to Italian cargo superintendents. Thereafter they were transmitted by those cargo superintendents to Federazione and indorsed by the latter in Venice before presentation to the ship.

*Sir Robert Aske Q.C.* and *H. V. Brandon* for the plaintiff charterers.

*A. A. Mocatta Q.C.* and *R. P. Colinvaux* for the shipowners.

The following cases were cited in argument on the preliminary point whether the contract of affreightment was governed by French or Italian law: *Lloyd* v. *Guibert* [1]; *Peninsular and Oriental Steam Navigation Co.* v. *Shand* [2]; *The Wilhelm Schmidt* [3]; *The Express* [4]; *Chartered Mercantile Bank of India, London and China* v. *Netherlands India Steam Navigation Co. Ltd.* [5]; *In re Missouri Steamship Co.* [6]; *The Industrie* [7]; *The Njegos* [8]; *Rex* v. *International Trustee for the Protection of Bondholders A/S* [9]; *The Metamorphosis* [10]; *Blanchet* v. *Powell's Llantivit Collieries Co. Ltd.* [11]; *The*

[1] (1865) L.R. 1 Q.B. 115.
[2] (1865) 3 Moore's (N.S.) 272.
[3] (1871) 25 L.T. 34.
[4] (1872) L.R. 3 A. & E. 597.
[5] (1883) L.R. 10 Q.B.D. 521.
[6] (1889) 42 Ch.D. 321.
[7] [1894] P. 58.
[8] [1936] P. 90.
[9] [1937] A.C. 500; 53 T.L.R. 507; [1937] 2 All E.R. 164.
[10] [1953] 1 W.L.R. 543; [1953] 1 Lloyd's Rep. 196.
[11] (1874) L.R. 9 Exch. 74.

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*Adriatic* [12]; *Mount Albert Borough Council* v. *Australasian Temperance and General Mutual Life Assurance Society Ld.* [13]; *Kadel Chajkin* v. *Mitchell Cotts & Co. (Middle East) Ld. (The Stensby)* [14]; *Akt. August Freuchen* v. *Hansen.* [15]

WILLMER J., stating the facts, said: The charterparty is in the English language; it is in the form of the Uniform General Charter approved by the Documentary Council of the Baltic and White Sea Conference, and known by the code name of "GENCON." But neither side has advanced any argument to show that any inference is to be drawn from the use of the English language, and neither side contends for the application of English law. Perhaps I may add that I agree with both sides in thinking that there is nothing in this charterparty, even paying regard to the fact that it is written in the English language, to indicate an intention to apply the English law to it.

His Lordship continued: Summarizing the salient facts, there are French charterers on the one hand, Italian shipowners on the other hand, and a ship flying the Italian flag; the voyage was from a port in France to a port in Italy, in pursuance of a charterparty signed in Paris and drawn up in the English language; the bills of lading were issued in Dunkirk and couched in the French language. On top of that, I think that one may add that there was at least the likelihood that the bills of lading might, and probably would, be presented in Italy by Italian holders—and that was what in fact did subsequently happen.

I have been assisted in this case by the citation of a great deal of authority. I do not, however, think that it is necessary for me to burden this judgment with the citation of extracts from all the authorities to which my attention has been drawn. Any statement of the principles to be applied must, as it seems to me, start with the statement made by Lord Atkin in the House of Lords in *Rex* v. *International Trustee for the Protection of Bondholders A/S* [1]: "The legal principles which are to "guide an English court on the question of the proper law of a "contract are now well settled. It is the law which the parties "intended to apply. Their intention will be ascertained by the "intention expressed in the contract if any, which will be con-"clusive. If no intention be expressed the intention will be "presumed by the court from the terms of the contract and "the relevant surrounding circumstances." In coming to its "conclusion the court will be guided by rules which indicate "that particular facts or conditions lead to a prima facie infer-"ence, in some cases an almost conclusive inference, as to the "intention of the parties to apply a particular law: *e.g.*, the "country where the contract is made, the country where

[12] [1931] P. 241; 47 T.L.R. 638.
[13] [1938] A.C. 224; 54 T.L.R. 5; [1937] 4 All E.R. 206.
[14] (1948) 81 Ll.L.Rep. 124; 64 T.L.R. 89; [1947] 2 All E.R. 786.
[15] (1919) 1 Ll.L.Rep. 393.
[1] [1937] A.C. 500, 529.

"the contract is to be performed, if the contract relates to "immovables the country where they are situate, the country "under whose flag the ship sails in which the goods are con- "tracted to be carried. But all these rules but serve to give "prima facie indications of intention; they are all capable of "being overcome by counter indications, however difficult it "may be in some cases to find such. The principle of law so "stated applies equally to contracts to which a sovereign state is "a party as to other contracts." Then a little further on, Lord Atkin, after considering two other authorities, summed up that latter point by adding [2]: "The circumstance that a government "is a party is entitled to great weight in drawing the appropriate "inference, but it is not conclusive and is only one factor in the "problem."

Bearing in mind that intention of the parties is the fundamental consideration in questions of this kind, I think that it is useful to supplement what Lord Atkin said in that case by some words of Lord Wright in giving the judgment of the Judicial Committee of the Privy Council in *Mount Albert Borough Council* v. *Australasian Temperance and Mutual Life Assurance Society Ld.*[3]: "It may be that the parties have in terms in their agree- "ment expressed what law they intend to govern, and in that "case prima facie their intention will be effectuated by the court. "But in most cases they do not do so. The parties may not have "thought of the matter at all. Then the court has to impute an "intention, or to determine for the parties what is the proper law "which, as just and reasonable persons, they ought or would have "intended if they had thought about the question when they "made the contract. No doubt there are certain prima facie rules "to which a court in deciding on any particular contract may turn "for assistance, but they are not conclusive. In this branch of "law the particular rules can only be stated as prima facie "presumptions."

In this case the plaintiffs have fastened on the place where the contract was made, and it has been contended on their behalf that that is the governing consideration: it is urged that because this charterparty was made in France, and expressed to be so made (because it was dated "Paris, October 7, 1949"), that at least is enough to raise a strong prima facie inference to show that the parties intended the contract to be governed by French law. I am invited to say that this consideration overrides all other indications which may be present as to the law which was intended to apply.

The defendants, on the other hand, invite me to say that the overriding consideration, when one is dealing with this particular kind of contract, namely, a contract of affreightment, is the law of the ship's flag: that is to say, I am invited to regard the fact that this was an Italian ship (and, it is fair to add, a bona fide

[2] Ibid. 531.

[3] [1938] A.C. 224, 240.

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Italian ship) as being the most important circumstance to be taken into consideration, and, indeed, as being enough to raise a presumption in favour of Italian law in the absence of indications to the contrary. In support of that proposition I was referred to a number of the text-book writers; in particular, to Dicey, Conflict of Laws, and I was instructed on the rather interesting change of wording in the text of Dicey which has taken place between the 5th and the 6th editions.

As stated now, the rule propounded by the editors of Dicey (6th ed., p. 665) is: "*Rule 147.* The validity, interpretation and "effect of a contract of affreightment are governed by the proper "law of the contract. If, from the terms or objects of the "contract, or from the circumstances under which it was made, "no inference can be drawn as to the law which the parties "intended to apply, the law of the flag is the proper law of the "contract." Although some comment was made on the change of wording, particularly having regard to the fact that the wording of the previous editions had been expressly approved by Langton J. in *The Adriatic*,[4] it seems to me that the change in wording is really no more than a change of emphasis. What is said in the present edition is that if there are no other indications from which the proper law of the contract can be inferred, then it is to be inferred from the law of the ship's flag. In the previous editions the effect was to say substantially the same thing, but it was put the other way round: that is to say, that the law of the flag would normally govern the contract, but that would not be so if there were contrary indications. It seems to me, therefore, whether the present text be right or wrong, there is no substantial difference, except in emphasis, between the earlier and the later editions of Dicey.

A large number of cases were cited to me by both sides. Counsel on both sides were able to point to a considerable body of authority which appeared to destroy the other side's proposition. But neither of them was able to achieve any considerable measure of success with regard to authorities in support of his own proposition. The plaintiffs, I think, relied principally on *Chartered Mercantile Bank of India, London & China* v. *Netherlands India Steam Navigation Co. Ltd.*[5] In that case in the result the law which the Court of Appeal held to apply was the law prevailing in the place where the contract was made, which happened to be Singapore. There are undoubtedly in the report of that case dicta by very eminent judges to the effect that that is at least the first consideration to be taken into account in approaching this problem. As Lindley L.J. said[6]: "The lex "loci contractus was here English and ought to prevail unless "there is some good ground to the contrary." But it has been pointed out that when one comes to examine the real facts of

[4] [1931] P. 241.
[5] (1883) L.R. 10 Q.B.D. 521.
[6] Ibid. 540.

that case it becomes manifest that there was not really room for any other decision but that English law applied—and for this reason, that although the ship wore the Dutch flag, she was in fact the property of a company composed of English nationals, and, since the charterers were also English, the result was, that the contract with which the court was concerned was in effect a contract between English people in respect of a ship which, in spite of her flag, was really an English ship, and was a contract negotiated and concluded in a place where English law prevailed, namely, Singapore.

The plaintiffs also strongly relied on dicta of members of the Court of Appeal in *In re Missouri Steamship Co.*,[7] and in *The Industrie*.[8] Those were both cases in which the ultimate decision turned on quite other considerations. Although some at least of the members of the Court of Appeal in the *Missouri* case [7] referred to the importance to be attached to the place where the contract was made, the ultimate decision was to the effect that the law of a different country applied having regard to the particular circumstances of the case. Again, *The Industrie* [8] was useful to the plaintiffs insofar as it militated against the doctrine that the law of the flag was the most powerful factor to be considered; but, to my mind, it does not contain very much in support of the plaintiffs' proposition that the primary inference is to be drawn from the place where the contract was made.

The defendants' best case was the well-known case of *Lloyd* v. *Guibert*.[9] That was a case of unusual complication, and I do not propose to deal with the particular facts with which the court was concerned. But it is important to observe that the question which gave rise to the dispute in that case arose out of an act of the master when his ship was lying damaged in a port of distress. It is fair to say that, amongst the numerous cases which were cited as authorities in support of the doctrine that the law of the flag was the prime consideration, the great majority were cases which arose out of the authority of the master to act when in a foreign port in circumstances of distress; and it is said, and quite fairly said, by the plaintiffs that such matters arise, not out of the contract of affreightment, but out of the authority of the master.

In addition to *Lloyd* v. *Guibert*,[9] the defendants claim the decision of the Court of Appeal in *In re Missouri Steamship Co.*[10] as an authority in support of their contention; at least, they claim the powerful authority of Lord Halsbury in support of their contention. In the *Missouri* case Lord Halsbury said [11]: "Now this is a contract for the conveyance of cattle from Boston "to England by sea on board a British ship by a British com- "pany whose domicile is in England. Those circumstances, "though very strong, would perhaps not be conclusive." Those

[7] (1889) 42 Ch.D. 321.
[8] [1894] P. 58.
[9] (1865) L.R. 1 Q.B. 115.
[10] 42 Ch.D. 321.
[11] Ibid. 336.

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words of Lord Halsbury are seized upon by the defendants as showing the importance to be attached to the circumstance of the ship's flag. But the ultimate decision in that case in favour of English law was due to the inferences to be drawn from the form of the contract and the other particular circumstances of the case.

I do not propose to consider in detail *The Wilhelm Schmidt* [12] and *The Express*,[13] which were referred to in argument, and which, I think, were regarded by both sides as, in effect, cancelling out. Those two cases were tried by the same judge in successive years and arose out of events during the course of the Franco-Prussian war; but although the facts of the two cases were surprisingly similar the decisions were diametrically opposite. In one case the judge ruled in favour of the law of the flag, and in the other he took the opposite view. I do not think, therefore, that I can derive much help from a consideration of those two cases.

I have mentioned *The Industrie*,[14] which was much relied on by the plaintiffs, because there Gorell Barnes J. in this court had applied the law of the flag, but the decision of the Court of Appeal was adverse to that view. The ship concerned was a German ship, but the Court of Appeal held that, in view of the particular circumstances of the case, it was to be inferred that English law was intended to apply.

Coming to more modern decisions—(and, in parenthesis I would like to add that from the date of the decision in *The Industrie* [14] there is a striking gap in the authorities on this subject until one comes to recent years)—the most important cases to be considered, and to which I was referred by both sides, are *The Adriatic*,[15] decided by Langton J., and *The Njegos*,[16] decided by the President, but neither of them is an authority in support of either the plaintiffs' or the defendants' proposition. They were both cases of foreign ships, which were chartered for what were substantially foreign voyages, but on the terms of English charterparties on well-known conference forms. In the end, after much discussion, and, I think I am right in saying as to both cases, not without some hesitation, both Langton J. in *The Adriatic* [17] and the President in *The Njegos*,[18] came to the conclusion that the proper inference to be drawn was that English law was intended to be the law applicable. Langton J. put it—and, in fact, both judges put it—on grounds which were, if not new, at any rate stated in new words as compared with the historic grounds referred to in the textbooks. Langton J. based his decision on the ground of "convenience," and the President put his decision on the ground of giving "business "efficacy" to the contract. I propose to return to those cases

[12] (1871) 25 L.T. 34.
[13] (1872) L.R. 3 A. & E. 597.
[14] [1894] P. 58.
[15] [1931] P. 241, 242.
[16] [1936] P. 90.
[17] [1931] P. 241.
[18] [1936] P. 90.

to discuss the words " convenience " and " business efficacy," on which those decisions were based. For the moment it is enough to say that in each of those cases both the law of the flag and the law of the place where the contract was made were negatived.

I was also referred to two other modern decisions—*The Stensby* [19] and *The Metamorphosis*.[20] I do not, however, propose to pause over those two cases, because I do not think that they are relevant to the question which I have to decide. They both arose out of applications to set aside ex parte orders which had been made for service of a writ out of the jurisdiction. It was not necessary in either case for the judge to decide affirmatively what was the proper law of the contract; all that had to be decided was whether or not it was shown that the case came within the terms of R.S.C., Ord. 11, r. 1 (*e*), so as to be a proper subject for service out of the jurisdiction. I do not think, therefore, that very much help is to be derived from the negative conclusion arrived at in those two cases, that the contracts there concerned were not English contracts.

Giving the best consideration I can to the various authorities to which I have been referred, it seems to me that both parties, in putting forward their respective contentions, have stated their case too high. It is undoubtedly the fact that the place where a contract is made is a point of very great importance in considering any contract, whether it be a contract of affreightment or any other kind of contract. It is equally clear, I think, that the nationality of the ship concerned (and by that I mean the real nationality of the ship) is a matter which is obviously of considerable importance in considering the proper law governing a contract of affreightment. But it seems to me that it is putting it too high to say that the place where the contract is entered into is the fact which promotes the " primary inference," which was the expression used by Sir Robert Aske in his argument on behalf of the plaintiffs. Equally, I doubt whether it is possible to say in these days that the flag of the ship, or, indeed, the nationality of the ship, raises anything in the nature of a presumption. The authorities in support of any such proposition are old, and, as I have said, they are mostly concerned with cases arising from acts of the ship's master in a port of distress. Clearly the latest editors of Dicey view the doctrine with some suspicion.

It seems to me, therefore, that the ship's flag of nationality, and the place where the contract is made, are no more than circumstances which the court must take into consideration, together with all the other circumstances of the case, in order to arrive at the right inference as to what intention ought to be imputed to the parties. But there are many cases in which

[19] (1948) 81 Ll.L.Rep. 124.

[20] [1953] 1 W.L.R. 543; [1953] 1 Lloyd's Rep. 196.

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neither the place where the contract was made nor the country of the ship's flag is a matter of any particular significance. There are many cases (and, indeed, it was suggested that this case was one) in which the place where the contract was ultimately made would be quite fortuitous. There are instances in the books of such cases, where, for instance, in the old days a master entered into a contract of affreightment at the particular port where his ship happened to be lying at the time, which might or might not be a contract for the carriage of goods from that port. Equally, it seems to me that there may very well be cases in which the nationality of the ship is a matter of no significance at all. Indeed, I think it is worth mentioning, what one knows to be the fact, that in these modern times there are a number of ships sailing the seas wearing the flags of countries with which their owners have really no association at all. Bearing that in mind, it seems to me to be saying too much to assert that the ship's flag is a circumstance which must necessarily be given great weight in every case. In every case all the circumstances have to be considered, and the provisions of the contract have to be looked at as a whole.

Coming to this case, it follows from what I have said that the two special facts relied on respectively by the two sides, namely, on the one side the fact that the contract was made in France, and, on the other side, the fact that the ship was Italian, are merely two circumstances—two important circumstances, I agree —which have to be considered in relation to the totality of the facts. This, I think, is clearly a case in which the parties to the charterparty never had, and certainly they never expressed, any actual intention, and it was because I held that view that I thought it right to cite the words of Lord Wright in *Mount Albert Borough Council* v. *Australasian Temperance and General Mutual Life Assurance Society Ltd.*,[21] which indicate that in such circumstances it is for the court to impute an intention to the parties. This view is contrary to that which Sir Robert Aske in his very forceful argument invited me to take. He stressed that the fact of writing into the charterparty "Paris, October 7, 1949," amounted to an express declaration that this was a French contract, and I was invited to say that the only inference to be drawn was that it was intended to be interpreted according to French law.

I do not find it possible to draw that inference from the mere fact that the words "Paris, October 7, 1949," are written in the charterparty, nor from the fact that "Paris, October 7, 1949," is again referred to in the bills of lading, where reference is made to the charterparty. It seems to me that if the parties had any real intention that this should be regarded as a French contract there would have been much clearer ways than that of saying so. It is not for me to speculate on the customs of business men, and I am

[21] [1938] A.C. 224, 240.

not going to say that the writing in of the place, Paris, together with the date of the charterparty, is mere common form. At the same time, it is not without significance that amongst the authorities which have been cited to me, Mr. Mocatta was able to point to three, at any rate, in which a similar thing had been done, and he was able to add the comment that in none of those three cases did the court appear to attach any importance to the fact that it was done.

If I am to impute an intention to the parties in all the circumstances of the case, it seems to me that that involves considering what intention ordinary, reasonable and sensible business men would have been likely to have had if their minds had been directed to the question. And it is in this connexion, as it seems to me, that the decisions in *The Adriatic* [22] and *The Njegos* [23] are particularly helpful, because what an ordinary, reasonable and sensible business man would be likely to intend seems to me to be very much that which is " convenient," or, equally, that which will give " business efficacy " to the contract. It appears to me that, in using those expressions, Langton J. and the President were giving a very helpful indication of the sort of matters to be taken into consideration when the court is called upon to do what Lord Wright said, namely, to impute an intention to business men who have entered into a contract.

What, then, is the sum total of circumstances from which an intention one way or the other may be inferred in the present case? There is first the fact that the charterparty was made in Paris. I have already considered the additional fact that it was so expressed to be made, and, for reasons which I have given, it does not appear to me that that adds anything to the fact that the charterparty was made in Paris. I have already stated that it was written in the English language; but that is subject to this qualification, that there was one addendum to it which was written in the French language. Certainly, there is no Italian used in connexion with the charterparty. The bills of lading were issued in France, and were couched in the French language; they refer specifically to the charterparty which had been made in Paris. The cargo was loaded in France, and both the charterers and the actual shippers were French. Some reliance was placed on the fact that the charterparty provided that at the port of loading the French charterers were to appoint the agents. I do not think that it was intended to put that forward as a very strong point, but it was tendered as one indication showing a leaning towards the application of French law.

Lastly, reliance was placed on a matter referred to in the extract from Lord Atkin's speech in *Rex* v. *International Trustee for the Protection of Bondholders A.S.*,[24] which I have read, because it was suggested that the charterers were in a sense the

[22] [1931] P. 241.
[23] [1936] P. 90.
[24] [1937] A.C. 500, 529.

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French Government, or were at least acting for the French Government. It was contended in those circumstances that that assisted to raise the inference that French law was intended to be applied. With regard to that latter point, I am not satisfied as to what in fact the status of the actual charterers was; and if it was intended to rely on their being in effect the French Government, it seems to me that that is a fact which ought, if not agreed, to have been proved before me. Nor am I impressed by this point when I bear in mind that, according to the agreed statement of facts, the whole of the background of circumstances, of which this contract of affreightment merely forms a small part, was quite unknown to the defendant shipowners. I refer to the fact that this was all part of an international transaction providing for a loan of grain between the French and Italian Governments. But, as I say, that was entirely unknown to the defendant shipowners, and I do not see, if it be the fact that the charterers are in a sense some organ of the French Government, how the shipowners were to be expected to know that; and if they did not know of it I do not see how that fact can have had any influence at any rate on their intentions. In this connexion it seems to me that it is not enough to inquire what must have been the intention of the charterers. In deciding what law must be applied, I must approach the matter on the basis of what was the mutual intention of the parties.

On the whole, it does not seem to me that the indications in favour of French law are particularly strong. In the circumstances of this case the fact that the charterparty happened to be entered into in Paris was not, as it seems to me, a circumstance of major importance. The negotiations which led to the charterparty were conducted between brokers in Genoa and brokers in Paris, and they were conducted by telephone, telegram and letter. As a result of those negotiations agreement was arrived at and that agreement was put into writing in the charterparty which was prepared and signed in France. I do not think that there is anything more than that in the point that this document was of French origin. The fact of the loading of the cargo being done in France is largely cancelled out by the facts that the discharge would be in Italy, probably to an Italian receiver, and that, according to the terms of the charterparty, the ship's agency in Italy was to be in the hands of the Italians. I do not think, therefore, that there is any very cogent reason for imputing to the parties an intention to make French law the proper law of the contract.

Let me examine the indications to the contrary. The ship was undoubtedly wearing the Italian flag, and—and this is a fact to which I attach more importance—she was a bona fide Italian ship, owned by a firm carrying on business in Naples and Genoa, consisting of Italian nationals; she was commanded by a master who, to judge by his name at any rate, appears to have been an Italian, and I am prepared to assume, until the contrary is proved, that

she was manned by an Italian crew. She was, therefore, an Italian ship in every sense of the word. The voyage on which she was engaged in pursuance of the charterparty was to an Italian port, and, by the charterparty, freight and demurrage (if any) were to be paid in Italy in Italian lire. I have already referred to the likelihood that on the arrival of the ship at Venice the bills of lading would be presented by Italian holders, as in fact happened. It must have been, I think, in the contemplation of the parties that the property in the cargo would probably pass to Italians at some time in the course of the voyage; at any rate, it must have been contemplated that the bills of lading would be presented to the ship by some Italian organization upon her arrival in Italy. In those circumstances, any claims which were likely to arise in Italy; they would most probably be claims by Italian holders of the bills of lading against an Italian ship. The ship is, of course, subject to a liability in rem, which could be enforced anywhere, and that is no doubt why proceedings have been brought here. But one cannot get away from the fact that Italy is the country where the actual shipowners are to be found, and where it might be that they could most conveniently be sued, especially if the ultimate holders of the bills of lading turned out, as would be probable, to be Italian nationals.

All those things, it seems to me, are circumstances which must have been in the minds of the parties if they had given any thought to the matter at the time when the charterparty was entered into; that is to say, these are the considerations which the hypothetical sensible business man would, in my view, have had in mind if his mind were directed to the question whether he was intending the contract to be governed by French law or Italian law. It seems to me, therefore, whether one talks about "convenience" or "business efficacy," to use the expressions which I have already discussed, the sensible business man, if I may put myself in his place, would almost necessarily have come to the conclusion on those grounds that this contract should be governed by Italian law. Upon the choice which is before me, between French and Italian law, my decision is in favour of the latter, because it seems to me that the indications are much more powerful in favour of Italian law than they are in favour of French law. I do wish to make it clear, however, that I am not deciding this case on the ground that the law of the flag necessarily applies, or on the ground that the law of the flag raises any presumption. I hope that I have made it clear that I have considered that merely as one of the circumstances to be taken into consideration, together with the totality of the other circumstances.

*Judgment accordingly.*

Solicitors: *Clyde & Co.; Crawley & de Reya.*

H. G.

[COURT OF APPEAL.]

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*May* 15, 18, 19;
*June* 12.

Lord Goddard C.J., Birkett and Hodson L.JJ.

## * ROBERTS *v.* DORMAN LONG & CO. LD.

[1951 R. No. 450.]

*Building—Accident to employee—Safety measures—Absence of secure handhold or foothold—Meaning of "foothold"—"Availability" of safety belt — Breach of statutory duty — Defendants' reliance on evidence contrary to pleaded particulars—Building (Safety, Health and Welfare) Regulations,* 1948 (*S.I.* 1948, *No.* 1145), *reg.* 97.

By regulation 97 of the Building (Safety, Health and Welfare) Regulations, 1948, if the special nature or the circumstances of building work being done render impracticable compliance with the provisions of the regulations designed to prevent the fall of any persons engaged on that part of the work, the provisions shall be complied with as far as practicable "and except for persons for "whom there is adequate handhold and foothold . . . there shall be "available safety belts . . . which will so far as practicable enable "such persons who elect to use them to carry out the work without "risk of serious injury":—

*Held*, first, that "foothold" in the regulation meant something on which a person could safely stand so as to give him a stable position, and that the requirement of the regulation was not complied with if a workman who was seated on a girder suspended from a crane was able to wrap his legs underneath it and obtain some support from a diagonal bracing below.

*Held*, secondly, that a safety belt was not "available" within the meaning of the regulation if it was kept at a distance of half a mile from the place where a workman who might elect to use one was working.

*Per* Lord Goddard C.J.: Considering that the regulation, while requiring that safety belts should be available, left it to the workman to elect whether he would use one or not, his employers were not under a duty at common law to insist on a safety belt being used.

Decision of Streatfeild J. reversed.

APPEAL from Streatfeild J.

The plaintiff, Catherine Roberts, was the widow and administratrix of her husband, Oliver Eddis Roberts, a steel erector employed by the defendants, Dorman Long & Co. Ld. On June 11, 1950, the defendants were engaged in constructing the steel work of a building at the Abbey Works, Margam, in the county of Glamorgan, to which operation the Building (Safety, Health and Welfare) Regulations, 1948, applied. The deceased man met his death by falling a distance of 70 to 80 feet from a steel frame, known as a Portal frame, which was in course of construction. The deceased was a steel erector of long experience and was a chargehand on the particular job on which he was working at the material time. It had become necessary to place the Portal frame between two upright stanchions which were between 70 and 80 feet high and some 40 or 50 feet apart. The frame had to be raised from the ground by a crane, which carried it over the stanchions, and let it down so that the two ends of the

frame would fall into position between cleats which were already fastened to the stanchions. The ends had then to be centered into the exact position so that the rivets which were to bolt the frame to the stanchions would go through the holes which were provided for the purpose. It sometimes happened that the frame did not fall exactly into position and had to be guided in order to get the holes into apposition. That was done by using a tool called a "podger," one end of which could be used as a lever for levering the frame into position, the other end being an ordinary spanner for tightening the bolts or rivets.

On the day of the accident two men, Davies and Slennet, were working under the deceased man, and when the frame was lowered Slennet was in some difficulty and the deceased went to his help. He first stood on the lower member of the frame and then climbed on to the topmost cross-member and sat astride of it. The cross-member was 12 inches wide and as the man sat across it he could wrap his legs underneath it and get some sort of purchase on a diagonal bracing. He had with him his podger, but it was uncertain whether at the moment of the accident he was holding it with one or both hands. If he was holding with one hand, he could get a handhold by holding on to a flange at the top of the member on which he was sitting. While in that position he gave a signal to the crane driver, who slung the crane slightly to adjust the position of the frame, and as it moved, for some unexplained reason, the deceased appeared to have overbalanced and fallen off.

The plaintiff issued a writ on February 20, 1951, claiming damages under the Fatal Accidents Acts and under the Law Reform (Miscellaneous Provisions) Act, 1934, in respect of the death of her husband, alleging negligence and/or breach of statutory duty on the part of the defendants, their servants or agents. The breach of statutory duty alleged was that the defendants had failed to comply with the requirements of regulation 97 of the Building (Safety, Health and Welfare) Regulations, 1948,[1] in that although the deceased man had no adequate handhold or foothold when doing the work on which he was engaged at the time of the accident, the defendants failed to provide suitable safety nets or safety sheets, nor were there available safety belts or other contrivances which would so far as practicable have enabled the deceased to carry out his work without risk of serious injury.

[1] Building (Safety, Health and Welfare) Regulations, 1948, reg. 97: "Safety nets, sheets and belts.—If "the special nature or circumstances "of any part of the work render "impracticable compliance with the "provisions of these regulations "designed to prevent the fall of any "persons engaged on that part of the "work, then these provisions shall be "complied with so far as practicable "and except for persons for whom "there is adequate handhold and "foothold either there shall be provided suitable safety nets or safety "sheets or there shall be available "safety belts or other contrivances "which will so far as practicable "enable such persons who elect to use "them to carry out the work without "risk of serious injury."

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By their defence the defendants alleged that an adequate supply of safety belts was available for the workmen, and in answer to an application for particulars, dated June 20, 1951, they said that the belts were provided and kept at the defendants' main office on the site and had been available there since the defendants began operations. The office in question was about ten minutes walk, or half a mile, from the place where the deceased man was working. The case proceeded on the footing that the belts were at the place specified, but on the last day of the trial evidence was given by the defendants' engineer, one Rideout, that after the accident he fetched two belts from the main office and placed them in the cold mill office which was adjacent to the place where the accident happened. Evidence was also given that notices which were posted near the work stated that: "All employees are "reminded that a safety belt is available on request for any man "who wishes to use one for a proper and reasonable purpose," but the notice did not say where the belts were to be found. On the last day of the trial, one Rees Price, who had formerly been in the employment of the defendants as a foreman erector, and who was acting in that capacity on the day of the accident, said that on that day there were two belts hanging beside the door in the cold mill office. Evidence was also given that although the position in which the deceased was working would appear to be highly perilous, the operation on which he was engaged was regarded as being all in the day's work of a steel erector who was accustomed to working at great heights.

Streatfeild J. was of opinion (1) that there was an adequate handhold and foothold on the work for the workman, and (2) on the assumption that he was wrong in so holding, accepting the evidence of the witness Rees Price, he was of opinion that safety belts were "available" within the meaning of regulation 97. He accordingly gave judgment for the defendants, provisionally assessing the damages to which the plaintiff would have been entitled, if successful, at £4,528.

The plaintiff appealed.

*Edmund Davies Q.C.* and *Geraint Rees* for the appellant.

*H. V. Lloyd-Jones Q.C.* and *Gerwyn P. Thomas* for the respondents.

The following cases were referred to in argument: *Franklin* v. *Gramophone Co. Ld.*[2]; *Clifford* v. *Charles H. Challen & Son Ld.*[3]

The court intimated that they would allow the appeal and that they would put their judgments into writing.

June 12. The following judgments were read.

[2] [1948] 1 K.B. 542; 64 T.L.R. 168; [1948] 1 All E.R. 353.

[3] [1951] 1 K.B. 495; [1951] 1 T.L.R. 234; [1951] 1 All E.R. 72.

LORD GODDARD C.J., after stating the facts:—It is quite obvious, as can be seen from the plan and the photographs, that the work involved the men concerned being in a position which would ordinarily be called highly perilous, but apparently such an operation as this is all in the day's work of a steel erector, who is no doubt accustomed to working at great heights. The resident engineer of the defendants, Rideout, evidently regarded this as a job which was quite normal and usual, and one in which it was quite unnecessary that any particular precaution should be taken for the safety of the men engaged in working at this height. He also regarded the diagonal bracing against which the deceased had rested or locked his feet as giving a perfectly satisfactory foothold, and apparently Streatfeild J. so considered it.

Regulation 97 is in these terms: [His Lordship read the regulation and continued:] On the question of adequate foothold, I am unable to agree with the view of Streatfeild J. I think that the ordinary meaning of the word "foothold" is standing ground, something upon which a person can safely stand, and I cannot see that it can really be said that where a man is astride a 12-inch girder or stanchion, which is suspended in the air, he has any foothold at all, although he may be able to rest his feet against a bracing such as existed in the construction of this frame. If there was no foothold it is really unnecessary to consider whether he had an adequate handhold. The regulation only excepts from its provisions persons for whom there is both adequate foothold and handhold.

The breach of duty which was alleged here was that the defendants had not made available any safety belts or other contrivances. The position with regard to the availability of safety belts is an important feature of this case. [His Lordship referred to the evidence given by the witnesses Rideout and Rees Price and continued:] The evidence given by Rees Price took the plaintiff's advisers entirely by surprise, and the great importance of the matter is emphasized by the fact that when he came to give judgment Streatfeild J. accepted the evidence of Rees Price and found that belts were available in the cold mill office. In my opinion he ought not to have allowed such a complete departure from the particulars, especially as no notice whatever had been given to the plaintiff of this fact spoken to for the first time by Rees Price in the witness box. The plaintiff had come to meet a case in which the defendants had stated perfectly definitely that such belts as had been provided were at the main office, and considering also that the witness Rideout himself spoke of having taken two belts to the cold mill office and did not suggest that there were any others there than those two which he took after the accident, the only inference that can be drawn with regard to Rees Price's evidence, especially in view of the length of time that had elapsed since the accident, is that he was mistaken and was speaking of the same belts as Rideout

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himself had taken to the cold mill office, but not until after the accident. In my opinion, therefore, the case ought to have proceeded on the footing that the only belts which the defendants provided were those at the main office, and in my view it would be impossible to hold that safety belts were "available" so as to comply with the regulation if they were kept at such a distance as that from the site at which the men were working.

Accordingly, it appears to me that there was a breach of regulation 97. It was the duty of the defendants to have belts available so that if a man elected to use one he could do so. There was, however, a good deal of evidence that steel erectors never do use these belts unless they are going to do a particular operation which necessitates them going over the side of a crane. The witness Rees Price, in his evidence, was asked if he had ever seen a man use a safety belt at all. His answer was that he had on such operations as bolting the seating of a crane girder for which it is necessary to go over the side of the crane, and that in the whole of his experience he could only recollect three occasions on which he had seen a belt used, and then it was always for such an operation as he had just described. The witness Slennet, however, said that when he had been working for Sir William Arrol & Co. he had used a safety belt on many occasions, and he gave certain instances of work on which he had been engaged when he had worn one. It may very well be that the judge could form the opinion on the evidence that it was unlikely that if safety belts had been available the deceased would have used one, but, in my opinion, once it was proved that the defendants had not these belts available, it was no answer for them to say: "Even if we "had them available, the deceased would not have used them."

The fact that they were not available gave him no opportunity of exercising his election. Had one been available, and had he elected to use it, while it might not have prevented him meeting with some injury, it would certainly have prevented him from falling to his death. Some actions for negligence are based on the failure of a person to make inquiries when the circumstances are such as to show that he was put on inquiry. If he is put on inquiry, and makes none, it is no answer to say: "Well, if I had "made the inquiry it would have led to no result." That is well established, and I need only refer to the judgment of Bankes L.J. in *A. L. Underwood Ld.* v. *Bank of Liverpool.*[1] It seems to me that the two things are closely analogous. If a person who has to make an inquiry fails to do so, he cannot be heard to say: "But even if I had, it would have led to no useful result." So, I think that if a person is under a duty to provide safety belts or other appliances and fails to do so, he cannot be heard to say: "Even if I had done so they would not have been worn."

For this reason I think that the plaintiff has established a breach of duty causing or contributing to her husband's death, and

[1] [1924] 1 K.B. 775, 789; 40 T.L.R. 302.

that for a breach of the regulation she is entitled to recover. I have more difficulty in holding that she would have been entitled to recover at common law. It is said that there is a common law duty, and undoubtedly there is, for an employer to provide a safe place of working and to take reasonable steps to guard against consequences of his men being in a perilous situation. Considering that there is this regulation made expressly for the protection of persons working at heights or in places where there is no adequate handhold or foothold, and considering also that the regulation, while requiring belts to be provided, leaves it to the employee to elect whether he will use one or not, I do not think that we can say that the employers were under a common law duty to insist on these men using the belts. It was suggested that they ought to be advised or urged to use them. Apart from the fact that the case below seems to have been fought entirely on the failure of the defendants to provide the belts, I do not think that we ought to hold that the defendants were under this duty, more especially having regard to the provisions of the regulation. No doubt it does not follow that because there are regulations dealing with a particular matter, observance of them exonerates the employers from any other common law duty which may not be covered by the regulations. Steel erection is an operation undoubtedly accompanied by considerable risks, and risks which are well known both to employers and workmen, and which must always exist whatever precautions are taken. For my part, I think that it is safer to decide this case entirely upon the breach of the regulation, and on that ground I would enter judgment for the plaintiff for £4,528, the amount assessed by Streatfeild J., who was asked to fix the damages in the event of a successful appeal.

BIRKETT L.J., after stating the facts continued: To the ordinary layman, and I should have thought, myself, to anybody who considered the matter, the position of the deceased at the moment he fell to his death was one of considerable peril. Even assuming that he was familiar with the kind of work and that steel erectors were accustomed to do this kind of work almost daily, nevertheless, a moment's reflection would show that a mere slip, a moment of forgetfulness in doing familiar work, or some quite unforeseen happening of any kind, might result in a sudden overbalancing with serious and, in this case, fatal consequences.

[His Lordship referred to the evidence of the witness Rideout in support of his (the witness's) view that no aids to safety were required in relation to the work being done at the time of the accident, and continued:] It was contended for the defendants that there was adequate handhold and foothold for the deceased, and, therefore, that there was no obligation under the regulation for the defendants to supply safety nets or safety sheets, or to make available safety belts or other contrivances which would

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enable men who elected to use them to carry out their work without risk of serious injury.

Streatfeild J. said that although it was near the line, he thought that there was in fact an adequate handhold and foothold. With great respect to him I do not agree. Whatever may be said about handhold, I am clearly of opinion that this was not a place where there was an adequate foothold, giving plain English words their plain meaning. The definition of "foothold" in the Oxford English Dictionary is: "A hold or support for the feet; a surface "(secure or otherwise) for standing or walking on; firm or stable "position of the feet." Streatfeild J. seems to have relied in some measure upon an unreported Scottish case, the exact facts of which were not before us; but he recognized that his decision on this point was possibly open to question, and, therefore, proceeded to deal with the case as though his decision could not stand. I am clearly of opinion that the facts of this case show that the deceased man had not an adequate foothold, and that the later part of the regulation, therefore, applies.

It was not contended for the plaintiff that the defendants should have provided safety nets or safety sheets, but it was said that they should have had safety belts available for the deceased, so that he could elect whether he would use one or not. It was admitted that had the deceased been wearing a safety belt he would not have fallen to his death. There was also a good deal of evidence that men in the deceased's position did not use safety belts, even when they were available. But what was said by the defendants in the present case was that they had fulfilled their duty under the regulation by having suitable safety belts available.

On this point a most remarkable situation developed on the evidence. [His Lordship referred to the evidence, and continued:] Streatfeild J. came to the conclusion that having safety belts at the main office was not a compliance with the regulation. The words that he used about that were: "Now what is meant by "'making available'? 'Making available,' to my mind, must "mean to make reasonably available to the men who elect to use "them. Quite clearly, if a man desires to use a safety belt, it "is no good telling him that those belts are situated some half-a-"mile or three-quarters of a mile away. That is not, in my "judgment, 'available' within the meaning of these regulations. "In my judgment that duty entails an obligation on the "employers to have available on the site where a man who, in "special circumstances perhaps, makes up his mind that he "desires to use a belt, may get one and get it reasonably quickly." I agree with Streatfeild J. on that matter; but he went on to say that the defendants had complied with the regulation, because safety belts were available in the foreman's office only 40 yards away from the site. He based that conclusion on some evidence that was given by Rees Price, the foreman, right at the very end of the case. He said that he had seen two safety belts behind

the door in his office before the date of the accident. Rideout said that he brought two safety belts to that office after the accident.

The defendants had pleaded in their defence, delivered on May 18, 1951, that safety belts were available, that the deceased man knew that they were available and had neglected to use one, and that his death was due to his own negligence in not providing for his own safety by using a safety belt. When asked to particularise where the belts were available, and the number and type available, and as from what date it was alleged that the safety belts were available, they answered on July 9, 1951, that the safety belts were kept at the main office and had been available there since work began on this site. Nothing could be clearer, and right up to the last moment the case had been conducted on that footing. When the evidence of Rees Price emerged it was clearly a great surprise to Mr. Lloyd-Jones, but no objection was taken to the admissibility of the evidence, Mr. Edmund Davies no doubt thinking that that evidence could not possibly stand against the evidence of Rideout, Davies and Slennet and the earlier repudiation of Mr. Lloyd-Jones of the suggestion that he was relying on belts being available at any place other than that stated in the defendants' particulars.

In my opinion that evidence of Rees Price ought not to have been allowed at that stage of the case, though in the absence of any objection the judge admitted it. It was in flat defiance of the particulars which had been expressly asked for and given; and in any event, in my opinion, it ought not to have been accepted and allowed to be the decisive thing in the widow's action when all the evidence had been considered. When Rideout brought his two belts after the accident because he was afraid of the effect of the accident on the morale of the men, it is a most amazing thing that he should never have mentioned those that were already there, if they were there, as Rees Price suggested, which made his bringing of two belts quite unnecessary. The judge seems to have overlooked the nature of the particulars, the evidence which had already been given, the disavowal by Mr. Lloyd-Jones, and the obvious possibility of mistake.

I am of opinion that the breach of statutory duty was proved, and I do not think that it is any answer to a breach of that duty to say that had it been fulfilled the result would have been the same. The deceased man had no right of election given to him as the regulation provides, and the defendants were guilty of a breach of the regulations which occasioned or contributed to the death of the deceased man. I think, therefore, that this appeal should be allowed and that the plaintiff should have the damages assessed by Streatfeild J.

HODSON L.J. [after stating the facts:] Mr. Edmund Davies, on behalf of the plaintiff, did not contend that safety nets or sheets were appropriate. He based his case on the absence of safety belts, which he said the defendants should have insisted

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on the men using. He did not suggest any other precaution which should have been taken against falling. The case was thus fought on the following questions: (a) whether safety belts were required; (b) whether they were available; (c) whether the defendants should have insisted on their use.

In considering these questions from the common law aspect one cannot, I think, consider them in dissociation from the Building Regulations, of which regulation 97, the one here relied on, deals specifically with safety belts. The provision of safety belts is said to be part of a safe system of work, but as Somervell L.J. said in *England* v. *National Coal Board* [2]: "The reasonable "employer is entitled to assume, prima facie, that the dangers "which would occur to a reasonable man have occurred to Parlia- "ment or the framers of the regulations." This is not to say that the regulations are exhaustive, but it seems to me that regulation 97 is there for the purpose of defining the employers' obligations in what may be described as the ordinary processes of the work. In exceptional circumstances or, as Somervell L.J. said, where some special peril is going to be met with, the common law duty is not to be restricted by the regulations. A case, for example, might arise in which an employer must insist on the use of safety belts. In this case, on the facts as proved and found by the judge, the ordinary practice of steel erection was being followed, the jamming of the frame was not an unusual occurrence, and there was nothing unusual or exceptionally perilous in the methods employed in doing the work. As Lord Tucker said in *General Cleaning Contractors Ld.* v. *Christmas*,[3] speaking of the employers of window cleaners who are employed in what is obviously a hazardous occupation: "Their only duty is to take "reasonable steps to provide a system which will be reasonably "safe, having regard to the dangers necessarily inherent in the "operation.

Bearing these considerations in mind, I am driven to the conclusion that this case falls to be determined on whether or not the employers were in breach of regulation 97. [His Lordship read the regulation and continued:] It will be observed that under the regulation no onus is placed on the employers to insist on the use of safety belts; the election is left to the man. If the defendants were in breach and the breach was the cause of the accident, the defendants are liable but not otherwise.

First: was there adequate handhold and foothold? The judge found that there was adequate handhold, and in this I agree with him notwithstanding the fact that if the workman were using two hands he would not at a given moment have a hand grasping any particular hold. As to foothold, the judge came to the conclusion.

[2] [1953] 2 W.L.R. 1059, 1064; [1953] 1 All E.R. 1194, 1198.

[3] [1953] A.C. 180, 195; [1953] 2 W.L.R. 6, 16; [1952] 2 All E.R. 1110.

though with less certainty, that there was adequate foothold. Here I find myself in disagreement with him. The word "foot-" "hold" in the context in which it appears in the regulation means, in my opinion, some place on which a man can place at least part of his foot so as to give him a stable position. The deceased was not in such a position, being able only to wrap his legs round an upright or diagonal piece of steel underneath the member on which he was seated. Moreover, he was not on a fixed structure at all, being on a frame which at the material time was suspended from the jib of a crane. I would, therefore, find that there was no adequate handhold and foothold.

The next question is: were safety belts available? [His Lordship referred to the evidence, and continued:] I cannot think that the evidence given by the witness Rees Price ought to be allowed to sustain a finding that the belts were in fact available on the cold mill site on the day of the accident. It was contrary to the pleaded case. No questions were put in cross-examination of the plaintiff's witnesses (except unintentionally) to show that there was any issue as to the place where they said the belts were kept, namely, the main office, half a mile away. The issue was first raised when Rees Price went into the witness-box after Rideout had already given the evidence I have mentioned. No amendment was ever made or sought although Rees Price had been seen by the defendants' solicitors a month before the trial. For these reasons I think that his evidence, in so far as it conflicts with the other evidence given on both sides on the point, must be rejected.

I would, accordingly, find that safety belts were not available for such persons who elected to use them. If this is so, I think it cannot lie in the mouth of the defendants to say that this was not the cause of the accident on the ground that the probabilities are that the deceased would never have elected to use a belt. The man having been killed, there is no possibility of finding out whether he would have exercised his election one way or the other, and I must decline to assume that he would not have elected to use a safety belt if one had been available. I would therefore allow the appeal on the ground that the plaintiff has proved that the accident in which her husband was killed was caused by the defendants' breach of the duty imposed on them by regulation 97.

*Appeal allowed.*

Solicitors: *W. H. Thompson; Kenneth Brown, Baker, Baker for Gee & Edwards, Swansea.*

P. B. D.

[COURT OF APPEAL.]

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*June* 23.

Somervell, Jenkins and Hodson L.JJ.

## * DRYDEN *v.* DRYDEN.

*Husband and Wife — Divorce — Desertion — Petitioner's subsequent adultery — Maintenance order discharged — Whether desertion terminated — Summary Jurisdiction (Married Women) Act,* 1895 (58 & 59 *Vict. c.* 39), *s.* 7.

A wife, having been deserted by her husband, obtained an order against him under the Summary Jurisdiction (Married Women) Act, 1895, for maintenance. Subsequently she committed adultery, and on the application of the husband under section 7 of the Act the order was discharged. In due course the wife brought a petition for divorce on the ground of desertion, which the husband did not defend:—

*Held*, that the mere fact of the husband's application to discharge the magistrates' order was not conclusive evidence that the adultery had terminated the desertion, and it was still open to the wife to discharge the burden of proving that desertion still continued notwithstanding the proceedings taken by the husband.

*Herod* v. *Herod* [1939] P. 11; 54 T.L.R. 1134; [1938] 3 All E.R. 722 applied.

APPEAL from Judge Rewcastle Q.C., sitting as a special commissioner.

The parties were married on December 25, 1944, and thereafter lived together at various addresses in Essex. On November 9, 1948, the wife left the husband in circumstances which the commissioner held amounted to desertion by the husband. Three weeks after she had been deserted, the wife obtained from the East Ham magistrates' court an order against the husband under the Summary Jurisdiction (Married Women) Act, 1895, for the maintenance of herself and the child of the marriage. Some 21 months later the wife committed adultery, and on July 13, 1951, the husband, having become aware of this, applied to the magistrates' court under section 7 [1] of the Act to have the order discharged on the grounds of the wife's adultery, and that was done. The wife thereafter petitioned for divorce on the ground of desertion. It was undefended.

The Commissioner, dismissing the petition, held that the wife's adultery had terminated the husband's desertion and, in view of the husband's application to the magistrates' court to discharge the maintenance order, declined to allow an adjournment in

[Reported by NIUL HOGG, ESQ., Barrister-at-Law.]

[1] Summary Jurisdiction (Married Women) Act, 1895, s. 7: "A court "of summary jurisdiction . . . in "which any order under this Act ". . . has been made, may, on the "application of the . . . husband, "and upon cause being shown upon "fresh evidence to the satisfaction of "the court at any time . . . discharge "any such order. . . . If any married "woman upon whose application an "order shall have been made under "this Act . . . shall commit an act "of adultery, such order shall upon "proof thereof be discharged."

order that the husband might be called to give evidence on the point, saying that he did not think that anything the husband could say would make any difference, as he had already taken his action by going to the magistrates' court.

The wife appealed.

*L. I. Stranger-Jones*, for the wife, referred to *Richards* v. *Richards* [2] and to *Church* v. *Church*.[3]

The husband did not appear and was not represented.

SOMERVELL L.J. [having stated the facts]: In the proceedings before the commissioner the principle which was laid down some time ago was referred to—namely, that adultery by a spouse who is alleging that he or she has been deserted prima facie stops desertion running unless the deserted spouse—and the onus is on him or her—satisfies the court that the adultery did not affect the desertion, and that it would have continued whether the adultery had been committed or not. The commissioner was clearly very much impressed by the fact that the husband went to the magistrates' court, and he puts it in this way in his judgment: "Of that adultery the husband became aware and he "took the action of going to the magistrates' court and saying: "'I am no longer in desertion because my wife has committed "'adultery, and I therefore have good cause for living separate "'and apart.'"

Before us, Mr. Stranger-Jones took a point, which was not taken before the commissioner, based on the terms of the Summary Jurisdiction (Married Women) Act, 1895, under which the husband was proceeding when he went to the magistrates and asked them to vary the order. The Act makes it clear that it is not necessary for the husband to establish that he is no longer in desertion because his wife has committed adultery; it is sufficient if he establishes the adultery and that it has not been conduced to by his failure to make payments. If it had been desired to suggest that the proceedings before the magistrates did not damage the wife's case in the way that the commissioner suggested, the proper course would have been to have called evidence before him as to what happened before the magistrates. When this trouble arose the commissioner was asked whether he would grant an adjournment in order that the husband might appear. He refused that, and I think that what was in his mind (and if I may say so, it is very understandable) was that, taking the view which he did of what the husband must have established before the magistrates, it really would not assist him if the husband now came back and said something different.

We were also asked to draw an inference favourable to the wife's case from the fact that the husband did not appear to defend the proceedings. I think that it would be very difficult

[2] [1952] P. 307; [1952] 1 T.L.R. 1321; [1952] 1 All E.R. 1384.

[3] [1952] P. 313; [1952] 2 T.L.R. 557; [1952] 2 All E.R. 441.

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to do that. I do not want to go into the merits of the case on one side or the other more than necessary, because I have come to the conclusion, though it is very near the borderline, that it would be more satisfactory if the wife was given an opportunity of having a new hearing. Though I am not in any way criticizing the commissioner, I think that there was some misunderstanding before him as to what, in effect, the husband had to establish before the justices. I think that it would be more satisfactory if the wife was given an opportunity of having a new trial if, when the matter has been further investigated by those advising her, they think that there is anything to add to the evidence which is at present before the court. Therefore, subject to terms, which can be discussed later, and provisions as to time, I think that the appeal should be allowed to that extent.

JENKINS L.J. I agree.

HODSON L.J. I also agree. I think that the commissioner was right in coming to the conclusion that on the evidence before him the wife had not discharged the burden of proving that her adultery had no effect on her husband's continuing desertion. At the same time, the commissioner seems to have based himself on the view that the husband, having taken proceedings on the ground of the wife's adultery to discharge the order which the wife obtained against him, that had the automatic effect of showing that the desertion was terminated. For myself, I do not think that that is the right view. I think that it was still open to the wife to discharge the burden of proving that desertion still continued, notwithstanding that those proceedings were taken by the husband. The law applicable to that situation was stated by the President in *Herod* v. *Herod* [1] in terms which have been repeatedly approved by this court, namely, that the adultery of the wife does not automatically terminate desertion, but it is an obstacle in the way of proving that it continues. That obstacle is very often removed by the petitioner giving evidence tending to show that in all probability the other party had no knowledge of the adultery at all. But once one gets the position that it is clear that the other party has committed adultery, it is not an easy matter for a petitioner to show that that adultery had no effect on the continuance of the desertion.

No attempt was made in this case before the commissioner to discharge that part of the burden. All that was done was merely to say: "This man took proceedings to discharge the order, "but there is no reason to suppose that the adultery has had any "effect on his mind." The commissioner was asked to draw the conclusion that the husband's determination to desert was fixed and unshakeable and that the adultery had nothing to do

[1] [1939] P. 11; 54 T.L.R. 1134; [1938] 3 All E.R. 722.

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with it. I do not think that the burden is so easily discharged as that. I hesitated long before thinking that the wife could at this stage have an opportunity of reopening the matter, particularly as even now we have not been told that any attempt has been made to get evidence as to what took place before the justices when the husband did obtain the discharge of the order, or what the husband is likely to say if called to give evidence now. The ground for the application for an adjournment, which was refused, was that it might be possible for the husband to give evidence. We know not now what evidence the husband would be likely to give, or whether he would be willing to give any evidence at all or make any statement as to the class of evidence which he could give if called upon to do so.

I have come to the conclusion, however, that in this case an adjournment having been asked for and refused, and the commissioner having based his judgment upon rather too narrow a ground, there ought to be an opportunity for the wife to have a re-hearing. I agree, therefore, that to that extent the appeal should be allowed.

*Appeal allowed. Order to be set aside if the case is set down for re-hearing within two months. Liberty to apply.*

Solicitors: *T. D. Jones & Co. for Hargreaves, Barking, Essex.*

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[CHANCERY DIVISION.]

## * *In re* ADELPHI HOTEL (BRIGHTON) LD. DISTRICT BANK LD. *v.* ADELPHI HOTEL (BRIGHTON) LD.

1953
*June* 8, 17.
Vaisey J.

[1950 A. 2771.]

*Mortgage—Action to enforce—Costs—Provision in mortgage for payment of "all costs charges and expenses incurred or paid by" mortgagee bank "in relation to the negotiation for and preparation completion "realization and enforcement of" mortgage—Effect.*

A mortgagor company executed a mortgage in favour of a mortgagee bank to secure payment to the bank of all moneys which the company might become liable to pay to the bank in respect of advances, with interest and with "all costs charges and expenses "incurred or paid by the bank in relation to the negotiation for "and preparation completion realization and enforcement of" the mortgage. Having obtained judgment (by consent) to enforce the security, the bank claimed to be indemnified against the whole of its costs, charges and expenses as mortgagee and contended that at least some of the items should be taxed on an indemnity basis as between solicitor and own client or, at any rate, as between solicitor and client:—

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*Held*, (1) that, in general, a mortgagee's costs of action to enforce his security should be taxed as between party and party—*The Kestrel* (1866) L.R. 1 A. & E. 78, and *In re Queen's Hotel Co., Cardiff, Ld.* [1900] 1 Ch. 792, applied; (2) that, in general, costs, charges and expenses of a mortgagee, other than costs of action, should also be taxed as between party and party—*Smith* v. *Buller* (1875) L.R. 19 Eq. 473 applied; (3) that the mortgage deed in suit did not by its terms entitle the mortgagee to other than party and party costs—*Malvern Urban District Council* v. *Malvern Link Gas Co.* (1900) 83 L.T. 326 distinguished.

*Per curiam*: as every taxation in which more than one party (in addition to the solicitor) is interested is prima facie a taxation between party and party, any other basis of taxation is only justified when the party asking for it can show that he is entitled to it either upon some well-recognized principle, or under some contract plainly and unambiguously expressed.

MOTION.

This was a motion by a mortgagee bank in an action to enforce its security. The mortgage was expressed to be a security for payment by the mortgagor to the bank of, inter alia, "all costs charges and expenses incurred or paid by the bank in relation to the negotiation for and preparation completion realization and enforcement of this security . . . ."

On April 23, 1953, the registrar made an order on further consideration directing, inter alia, that the costs of the plaintiff of this action (including in such costs any costs, charges and expenses of the plaintiff as mortgagee properly incurred by it) be taxed.

By this motion the bank asked that the registrar's order on further consideration be varied by substituting for the order made thereby as to costs the following order as to costs: Order that the costs of the plaintiff of and in connexion with this action (including in such costs any costs charges and expenses of the plaintiff as mortgagee properly incurred by it) be taxed as between solicitor and own client.

The facts are fully stated in the written judgment of Vaisey J.

*P. J. Sykes* for the plaintiff.
*Denys Buckley* for the defendant.

The cases cited in argument are referred to in the judgment.

*Cur. adv. vult.*

1953. June 17. VAISEY J. read the following judgment: In *The Kestrel*,[1] to which I shall be referring presently, the judge, Dr. Lushington, in a reserved judgment, used these words: "There is no question that can come before the court "which is so disagreeable as that of reviewing the taxation of "costs, because it is manifestly clear that, for the greater part, it "is impossible to find a clear principle whereon to proceed, and

[1] (1866) L.R. 1 A. & E. 78, 79.

"whether the charge be right or wrong depends upon a practice, "and upon a practice with which the court cannot be familiar."

I would apply those observations to the present case, which appears to involve the very important question as to what are the precise rights of a mortgagee in respect of the costs charges and expenses incurred by him in his dealings with the mortgaged property, and the recovery of his money.

This is a motion on the part of the plaintiffs in the action, the District Bank Ld., seeking a variation in that part of an order made on the further consideration of the action on April 23, 1953, which relates to the plaintiffs' costs charges and expenses. The action was brought by the plaintiff bank against the defendant company, Adelphi Hotel (Brighton) Ld. to enforce the plaintiff bank's security constituted by a mortgage and debenture created and issued by the defendant company on March 6, 1947.

The writ was issued on September 8, 1950, and judgment in the action was pronounced by consent on the same day, the usual accounts and inquiries being directed, and the further consideration of the action adjourned. By the certificate filed on December 22, 1951, it appeared that an aggregate sum of £13,475 15s. 7d. was due and owing to the plaintiff bank under its security, together with a sum (stated to be not then ascertained) for its charges and expenses as mortgagee. The relevant part of the before-mentioned order on further consideration directed: That the costs of the plaintiff bank of the action including in such costs any costs charges and expenses of the plaintiff bank as mortgagee properly incurred be taxed, and provision was made for the payment of such costs out of a fund now in court and to the credit of the action, which was and is sufficient not only to meet such costs charges and expenses, but also to leave a surplus for the defendant company (which is now in liquidation) or its creditors.

The direction in that form gave the plaintiff bank only its ordinary so-called party and party costs; and it is now asking that in lieu of such direction the order should provide that the costs of the plaintiff bank of and in connexion with the action (including in such costs any costs charges and expenses of the plaintiff bank as mortgagee properly incurred by it) should be taxed as between solicitor and own client.

At the hearing of the motion the plaintiff bank claimed to be indemnified in respect of the whole of its costs charges and expenses as mortgagee, and argued that some at least of the items should be taxed either on an indemnity basis or (which comes to much the same thing) as between solicitor and own client, or at any rate as between solicitor and client. There are some words in the plaintiff bank's security with which I shall deal later, but I propose first to inquire what the law applicable to this matter is apart from any special provision in the security itself.

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Up to a point, the position seems to me to be entirely free from doubt. In *The Kestrel*,[2] already referred to, it was laid down in clear terms that mortgagees' costs in a mortgage suit would be taxed as between party and party and not as between solicitor and client, that being said in that case to accord with the established practice of the Court of Chancery. There had been a decree that the plaintiffs should receive their costs charges and expenses properly incurred, and it was argued unsuccessfully that those words meant that their costs should be taxed as between solicitor and client. There is also the clear later authority of *In re Queen's Hotel Company, Cardiff, Ld.*,[3] in which it was held that the plaintiff in a debenture holders' action is allowed party and party costs only, Cozens-Hardy J. in his judgment observing that there was no vestige of authority to the contrary. It cannot, therefore, in my opinion, be doubted that so far as regards the costs of the present action they are party and party costs and not costs as between solicitor and client.

But what about the other costs charges and expenses? It would certainly be very strange if they were taxable on any different basis, and I pause here to inquire what is meant by party and party costs. The expression is not perhaps a very happy one, for in my judgment the words do not necessarily imply the existence of a suit or other litigation, and I think that they mean when analysed that the computation has to be made as in a case in which there are two or more parties between or among whom the expenditure has to be apportioned.

A definition of the expression is hard to find. But there is a statement in *Smith* v. *Buller*[4]: "The costs chargeable under a "taxation as between party and party are all that are necessary "to enable the adverse party to conduct the litigation: and no "more. Any charges merely for conducting litigation more con- "veniently may be called luxuries, and must be paid by the party "incurring them." And I think that where there is no actual litigation the definition applies as though it referred to transacting business as well as to conducting litigation.

It must always be remembered that when costs are referred to they are understood to be party and party costs, and not solicitor and client costs; and it is difficult to see in principle why a mortgagor should be called upon to reimburse a mortgagee for anything beyond his necessary expenditure. I think that a mortgagee is entitled, as against a mortgagor and against the mortgaged property, to his "full costs," but that expression means ordinary party and party costs, and not costs as between solicitor and client (see *Avery* v. *Wood*,[5] following *Irwine* v. *Reddish*[6]), apart, of course, from some special bargain.

In Halsbury's Laws of England, 2nd ed., vol. 23, p. 404, it is said that a mortgagee is entitled to be indemnified against all

[2] L.R. 1 A. & E. 78.
[3] [1900] 1 Ch. 792.
[4] (1875) L.R. 19 Eq. 473, 475.
[5] [1891] 3 Ch. 115; 7 T.L.R. 612.
[6] (1822) 5 B. & Ald. 796.

expenses, and *Detillin* v. *Gale* [7] and other authorities are cited; but if this means that he is entitled to costs on an indemnified basis, I think that it is wholly unsupported by authority, nor is *National Provincial Bank of England* v. *Games*,[8] in my judgment any authority for a taxation on the higher scale.

Unfortunately in a useful recent publication (Butterworth's Costs (1951) at p. 70) there is a statement that a mortgagee under the terms of his security is usually entitled to his charges and expenses as between solicitor and own client. I do not understand what "under the terms of his security" means, but if it means that mortgage deeds and other instruments of security usually provide for indemnity costs, I can only say that I find no support for that either from any textbook or from any book of precedents or in my own experience. Normally such deeds and instruments are silent on the matter of costs and provide for redemption on payment of principal and interest only, leaving the costs to be dealt with by analogy, or according to what Dr. Lushington called the established practice of the Court of Chancery. I am told that the editors of that work do not now adhere to that statement as having any general application. In my judgment it is not an accurate statement. My view is that the plaintiff bank in this case is entitled to its costs as between party and party only and not as between solicitor and client, still less as between solicitor and own client, and I so hold.

I should like to add that these various bases of taxation, though conveniently labelled, are difficult to formulate, nor is it easy to discover exactly how they work out in practice. In *Giles* v. *Randall*,[9] Buckley L.J. said: "A practice has grown "up, which I must say I regret, of differentiating between "taxation of costs as between solicitor and client and as between "solicitor and own client. In the former case the taxation is "substantially a party and party taxation on a more generous "scale. In the latter case there is an ascertainment and allow-"ance of the charges properly payable by the client to his "solicitor. . . . I have no doubt that litigants who stipulate "for and by agreement are to receive costs as between solicitor "and client often intend to get an indemnity in respect of "costs." So too, in my judgment, when a mortgagee learns that he is entitled, as he is, to his "full costs," he may be surprised to know that this does not involve the discharge of every item in his solicitor's bill.

I do not doubt that taxing masters exercise their discretionary powers with a due regard to the circumstances of each case with which they are dealing, and it may well be that the taxation of a mortgagee's costs would not usually be on a niggardly or markedly ungenerous scale. I do not know. But what a

[7] (1802) 7 Ves. 583.
[8] (1886) 31 Ch.D. 582.
[9] [1915] 1 K.B. 290, 295.

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mortgagee is entitled to is that which is covered by the words "costs charges and expenses properly incurred," and it is for the taxing masters to say what these are, conformably with the principles to which I have endeavoured to give expression. I may here refer to a recent case, *Reed* v. *Gray*.[10]

There seems to me to be no relevance to the present case in the principle that in a debenture holder's action where the company's assets are insufficient for the payment of the debentures in full, the plaintiff is entitled to his costs as between solicitor and client and not as between party and party only as laid down and explained in *In re New Zealand Midland Railway Co.*[11] Nor do I get any assistance from *Cotterell* v. *Stratton*.[12]

Such in my view are the general principles which regulate the rights of the mortgagee against the mortgaged property, or the mortgagor personally, in respect of his costs charges and expenses. There is here, however, a further point to be considered—whether as between the parties in this case those rights are enlarged by certain words contained in the mortgage and debenture entitling the plaintiff bank to all costs charges and expenses incurred or paid by it in relation to the negotiation for and preparation, completion, realisation and enforcement of the security. These are certainly wide and comprehensive words, and it is argued with some force that they cover more than the "full costs" (the meaning of which I have already explained) and amount either to a complete unlimited and unqualified indemnity, or at any rate to such a measure of indemnity as would be ascertained on a taxation as between solicitor and client. I cannot so construe the words.

I thought at one time that the case of *Malvern Urban District Council* v. *Malvern Link Gas Co.*,[13] gave support to the claim of the plaintiff bank, and certainly the words which were under consideration in that case are very similar indeed to those which I am considering in the present case. But the document in which they appear is of a very different character, namely, a contract of sale and purchase, and not one, like the present, to which a well-established rule normally applies; and it seems to me that if parties desire to depart from such a rule, they must express themselves in plain and unequivocal language. I read the words as indicative of nothing more than an assertion or reminder of the plaintiff bank's ordinary right, upon realizing or enforcing its security, to recover its costs charges and expenses as well as the principal money and interest. Of course the words do confer additional rights in regard to the costs of negotiating, preparing and completing the security, which are matters occurring before the relationship of mortgagor and mortgagee arose. I need not express any definite view as to how the amount of those particular costs ought to have been ascertained.

[10] [1952] Ch. 337; [1952] 1 T.L.R. 114; [1952] 1 All E.R. 241.
[11] [1901] 2 Ch. 357.
[12] (1872) L.R. 8 Ch. 295.
[13] (1900) 83 L.T. 326.

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It suffices for me to say that I put my judgment on this part of the case, involving as it does a point of construction, on the ground that as every taxation in which more than one party (in addition to the solicitor) is interested is prima facie a taxation as between party and party, any other basis of taxation is only justified when the party asking for it can show that he is entitled to it either upon some well-recognised principle, or under some contract plainly and unambiguously expressed.

I can find no such principle nor any such contract here. The relevant part of the order of April 23, 1953, is framed with sufficient aptness. There is no need to use the words "as between "party and party" or any other words to express what is in my judgment implied. I should myself have put the direction slightly differently, thus: Let the costs of the plaintiff of this action together with any other costs charges and expenses properly incurred by it as mortgagee be taxed. But the variation is not of substance, but merely of form, and the order may properly stand as it is without variation. The motion must be dismissed with costs.

*Motion dismissed with costs.*
*Leave to appeal.*

Solicitors: *Bower, Cotton & Bower for Slater, Heelis & Co., Manchester; Solicitor, Board of Trade.*

K. R. A. H.

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[QUEEN'S BENCH DIVISION.]

## *TURNER *v.* JACARANDA CLUBS LD.

1953
*June* 18, 19, 22.

Streatfeild J.

[1950 T. No. 2234.]

*Costs—County court action for over £100 — Action transferred by defendants to High Court—Judgment given for the plaintiff in the High Court for £87—Whether action "commenced in the High "Court"—Whether plaintiff entitled to costs on High Court scale —County Courts Act*, 1934 (24 & 25 *Geo.* 5, *c.* 53), *s.* 47.

By the County Courts Act, 1934, s. 47: "(1) Where an action "is commenced in the High Court which could have been com- "menced in a county court, then . . . (*b*) if the plaintiff recovers— "(i) in . . . an action founded on contract . . . less than £100 . . . "he shall not be entitled to any more costs . . . than those to "which he would have been entitled . . . in a county court."

The plaintiff brought an action founded on contract in a county court. His claim was for £200, and the defendants, exercising their right under section 44 of the County Courts Act, 1934, caused the action to be transferred to the High Court, where it was tried and judgment given for the plaintiff for £87. On the question of costs:—

*Held*, that the action was not an action commenced in the High Court within the meaning of section 47 of the County Courts Act, 1934, but an action commenced in the county court. Section 47,

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therefore, did not apply to disentitle the plaintiff from being awarded costs on the High Court scale, but the court had a complete discretion as to costs under section 73 of the Act.

*Pellas* v. *Breslauer* (1871) L.R. 6 Q.B. 438 distinguished.

ACTION.

An action for breach of contract, in which the plaintiff sued the defendants, his late employers, for arrears of salary and for three months' salary in lieu of notice, was commenced in the county court, the original claim for over £200 being limited to that amount. The defendants exercised their right under section 44 of the County Courts Act, 1934, to have the case transferred to the High Court, and they alleged that there were grounds justifying the summary dismissal of the plaintiff.

The action was tried in the High Court and judgment was given for the plaintiff for £87. Counsel for the defendants then submitted that, as the action was one commenced in the High Court which might have been brought in the county court within section 47 [1] of the County Courts Act, 1934, the plaintiff was not entitled to costs on the High Court scale.

[The case is reported only on the question of costs.]

*Percy Bloomfield* for the plaintiff.
*Frank Whitworth* for the defendants.

The following case was cited in argument: *Pellas* v. *Breslauer*.[2]

STREATFEILD J. The question of costs in this action raises an interesting point. After I had given judgment for the plaintiff for £87, Mr. Whitworth submitted that this was a case within section 47 of the County Courts Act, 1934, being an action which was commenced in the High Court which might have been brought in the county court, and that, therefore, the usual consequences should flow under the Act, because the plaintiff had recovered less than £100. There is, of course, a discretion to the court under subsection (3) to award High Court costs if, in the opinion of the court, there was sufficient reason for bringing the action in the High Court.

In fact this action was not commenced in the High Court; it was commenced in the county court. It was then an action in

[1] County Courts Act, 1934, s. 47: "(1) Where an action is commenced "in the High Court which could have "been commenced in a county court, "then, subject to the provisions of "subsection (3) and subsection (4) of "this section—. . . (*b*) if the plaintiff "recovers—(1) in the case of an action "founded on contract, a sum of forty "pounds or upwards but less than "one hundred pounds; . . . he shall "not be entitled to any more costs of "the action than those to which he "would have been entitled if the "action had been brought in a "county court. . . . (3) In any such "action as aforesaid . . . the High "Court or a judge thereof . . . if "satisfied—(*a*) that there was sufficient reason for bringing the action "in the High Court; or (*b*) that the "defendant . . . objected to the "transfer of the action to a county "court; may make an order allowing "the costs . . . on the High Court "Scale. . . ."

[2] (1871) L.R. 6 Q.B. 438.

which, by abandoning a slight excess, the plaintiff confined his claim to £200, which is the extended jurisdiction of the county court, and the defendants exercised their right under section 44 of the Act of 1934 of having the case transferred to the High Court. Mr. Whitworth submitted that, although in fact commenced in the county court and then transferred under those circumstances to the High Court, it nevertheless was an action to which section 47 applied, and he cited as authority for that proposition *Pellas* v. *Breslauer*,[1] in which the corresponding provision, section 5, of the County Courts Act, 1867, was considered. The court held that that section applied to an action which had been removed from the county court to the High Court by way of certiorari. I think that Mr. Whitworth was misled by a note in the County Court Practice, 1949,[2] at pp. 53 and 54, in which it is stated: "The enactment"—that is referring to the present section 47—"applies . . . to an action . . . which has been "removed from the county court by certiorari." It is interesting to observe that precisely the same note, quoting *Pellas* v. *Breslauer*,[3] likewise appears in the notes to Halsbury's Statutes of England, 2nd ed., vol. 5, p. 43.

With the greatest respect to the editors of both those works, I am of opinion that those notes are wrong, because the wording of the Act of 1867 is quite different from that of the Act of 1934 or any of the intermediate County Courts Acts. The wording of section 5 of the Act of 1867 was: "If in any action commenced "after the passing of this Act in any of Her Majesty's Superior "Courts of Record the plaintiff shall recover a sum not exceeding "£20," and so on. In *Pellas* v. *Breslauer*[3] the court, consisting of Blackburn and Hannen JJ., ruled that the words "commenced "after the passing of this Act" must be regarded as being in parenthesis and referring only to the time at which the action had commenced. Hannen J. put it in this way[4]: "It is only "necessary to read the words, 'commenced after the passing of "'this Act' as if in a parenthesis, and the section then applies "to all actions in the Superior Courts, however they may have "got there, whether originally commenced there or brought there "by certiorari"; that is that it applied essentially to all actions in any of the superior courts, the only saving being that they must be actions in the superior courts which had been commenced after the passing of that Act.

The corresponding section, section 116, of the County Courts Act, 1888, was quite different; as it originally appeared it read: "With respect to any action brought in the High Court which "could have been commenced in a county court, the following "provisions shall apply." The County Courts Act, 1919, s. 11, and the Administration of Justice Act, 1925, where the words

[1] (1871) L.R. 6 Q.B. 438.

[2] County Court Practice, 1953, p. 55: "The section applies . . . to "an action . . . which has been "removed from the county court by "certiorari."

[3] L.R. 6 Q.B. 438.

[4] Ibid. 440.

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read a little differently but were materially the same, amended section 116 of the Act of 1888, which was made to read: "Where "an action is brought in the High Court which could have been "commenced in a county court," and so on.

In the present Act of 1934 the words, again, are: "Where "an action is commenced in the High Court which could have "been commenced in a county court," and certain consequences follow. It seems to me quite impossible to put the same construction on those words as the court did in *Pellas* v. *Breslauer*.[5] If I was to treat the word "commenced" in the way in which it was treated in that case, I should in effect be omitting those words from the section altogether. I should not only be omitting the words "commenced in the High Court," but I should also be omitting the words "which could have been commenced in "a county court." Therefore it seems to me clear, on the construction of the Act of 1934 as well as its predecessors since the Act of 1867, that section 47 applies to actions which have been commenced in the High Court which could have been commenced in the county court.

This action was commenced in the county court even though it got to the High Court. For those reasons, therefore, I am of opinion that section 47 does not apply, and that the jurisdiction of this court over the question of costs is governed by section 73 of the County Courts Act, 1934, which gives the court a complete discretion.

With regard to the exercise of the discretion, it is true that the plaintiff, by including in his claim, as though it was part of his salary, what I have held to be expenses, in fact brought his claim for an amount which was over £100, limiting it to £200, which gave the defendants the right, which they exercised, to have the action transferred to the High Court. The ground for removal was not solely the question of amount. Indeed, the amount as such was not challenged in the original defence. It was challenged, however, to the extent that it was said that only one week's notice was requisite, whereas I have held that three months' notice would have been appropriate. The real ground of the transfer, I think, was that it was alleged that there were grounds justifying the summary dismissal of the plaintiff and, as time went on, those grounds were added to and finally ended up as a charge of dishonesty, which has been completely refuted.

Under those circumstances, it seems to me that this is a case where the court ought to exercise its discretion in favour of the plaintiff. I should say that on the merits of the case alone; but, in my opinion, it ill fits the defendants, who have had an action transferred to the High Court and have alleged that there were grounds justifying summary dismissal for various reasons (including a charge of dishonesty), to say in this court that the action was really all along a county court action which ought not

[5] L.R. 6 Q.B. 438.

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to have been brought in the High Court. Under those circumstances, it cannot be said that it is improper for this action to have been heard in the High Court. If the defendants had not themselves taken the step of having the action removed into the High Court no doubt the same issues would have been fought out in the county court; but it was the defendants, although they were exercising a statutory right, who chose the particular tribunal; and I think that they must pay for that luxury.

In conclusion, I would say that, even if section 47 had applied, I would have been prepared to make an order under that section that there were sufficient reasons for bringing the action in the High Court; but for the reasons which I have already stated, I do not think that arises.

For those reasons, I have come to the conclusion that the plaintiff in this action ought to have his costs on the High Court scale.

*Order accordingly.*

Solicitors: *Goodman, Monroe & Co.; Mawby, Barrie & Letts.*

J. F. L.

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[QUEEN'S BENCH DIVISION.]

## * A. E. FARR LD. *v.* ADMIRALTY.

1953
*June* 24.

Parker J.

[1952 A. 3799.]

*Contract—Building—Construction of jetty for Admiralty—Contractor liable for damage to works "arising from any cause whatsoever"—Jetty damaged by negligent navigation of Admiralty vessel—Jetty repaired by contractor—Whether cost of repairs recoverable.*

The plaintiffs entered into a contract with the Admiralty for the construction of a destroyer jetty. The contract incorporated the General Conditions of Government Contracts for Building and Civil Engineering Works. Work was proceeding under the contract when an Admiralty vessel, due to admittedly negligent navigation by an Admiralty servant, collided with certain of the piles of the jetty. The plaintiffs were instructed under the contract by the Admiralty superintending officer to repair the damage, which amounted to £2,038 12s. 5d. They claimed that sum from the Admiralty under the contract, which provided that the contractors could recover any expenses properly incurred in complying with the superintending officer's instructions, or alternatively, as damages for breach of contract. The Admiralty relied on condition 26 (2) of the General Conditions, which provided that "the contractor shall be respon-"sible for . . . any loss or damage [to the works] . . . arising from "any cause whatsoever . . ." :—

*Held*, that the words "any cause whatsoever" were as wide as they could be, and should be read as including negligent navigation of a ship by an Admiralty servant, and that once that construction

[Reported by Miss C. J. ELLIS, Barrister-at-Law.]

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was applied to the condition there was no room for any implied term which would limit the effect of those words. The plaintiffs were accordingly not entitled to recover the sum claimed.

*Joseph Travers & Sons Ld.* v. *Cooper* [1915] 1 K.B. 73; 30 T.L.R. 703 applied.

ACTION.

The plaintiffs, A. E. Farr, Ld., a firm of civil engineering contractors, entered into a contract with the Admiralty for the construction of a destroyer jetty at Her Majesty's Naval Base at Portland. The contract took the form of an acceptance by a letter dated May 17, 1950, by the civil engineer-in-chief of a tender made by the plaintiffs on February 9, and the contract was made on, and included, the General Conditions of Government Contracts for Building and Civil Engineering Works (Form CCC/Wks/1 (Edition 5)). Condition 3 provided that the works and all materials, plant and buildings brought on the site should immediately vest in the Admiralty. By condition 7, the superintending officer was given a number of powers to direct the contractors to suspend or execute the works, and to vary, add to or omit from the works. Sub-clause (2) of condition 7 provided: "... If in compliance with any other of the S. O.'s instructions "the contractor properly incurs any expense beyond that provided "for in or reasonably contemplated by the contract ... the "contract sum shall be increased by the amount of any such "expense ..." Sub-clause (1) of condition 26 having dealt with the plant and equipment, sub-clause (2) provided: "Save as "above the works and all materials and things whatsoever includ-"ing such as may have been provided by the authority on the site "in connexion with and for the purposes of the contract shall "stand at the risk and be in the sole charge of the contractor, "and the contractor shall be responsible for, and with all pos-"sible speed make good, any loss or damage thereto arising "from any cause whatsoever other than the accepted risks and "shall deliver up all the works to the S. O., in a clean state, "complete in every particular." By condition 1 (2) (*h*): "'The "'accepted risks' shall mean the risks of fire, storm, tempest, "flood, earthquake, riot, civil commotion, civil war, rebellion, "revolution, insurrecton, military or usurped power, aircraft and "King's enemy risks."

Work proceeded under the contract. On August 4, 1951, an Admiralty vessel using Portland Harbour collided with certain piles of the jetty and damaged it. As a result of that damage the superintending officer gave the plaintiffs instructions to repair the damage. That was done at a cost of £2,038 12s. 5d. The plaintiffs claimed that they were entitled to recover that sum from the Admiralty in accordance with condition 7 (2) of the General Conditions, or alternatively, that the defendants were in breach of an implied term in the contract that they would not by their servants interfere with or obstruct the execution of the

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works by the plaintiffs, and that the plaintiffs were accordingly entitled to recover the money claimed for breach of contract.

The defendants admitted that the collision was due to the negligent navigation of an Admiralty servant and that the costs of the repairs amounted to £2,038 12s. 5d., but denied that they were liable to the plaintiffs for that sum.

*J. Stuart Daniel* for the plaintiffs.
*Eustace Roskill* for the Admiralty.

The following cases were cited in argument: *Canadian Steamship Lines* v. *Reg.**; *London and North-Eastern Railway Co.* v. *Furness Ship-Building Co. Ld.*†; *Joseph Travers & Sons Ld.* v. *Cooper*‡; *Mona Oil Equipment and Supply Co.* v. *Rhodesia Railways.*§

PARKER J., stating the facts, said that the instructions by the superintending officer to the plaintiffs to repair the damage were clearly comprised by the words "any other of the S. O.'s instruc-" tions" in condition 7 (2). He continued: The sole question is whether the plaintiffs are entitled to the sum of £2,038 12s. 5d. under the contract or as damages for breach of contract. From the outset there was a dispute under the contract; in particular, as to the meaning and effect of condition 26 (2). [His Lordship referred to the material conditions as set out above and continued:] However one approaches this matter, one always gets back to what is the true construction of condition 26 (2). It was argued forcibly by Mr. Daniel that if a party desired to be free of liability for negligence, he must say so in express words. That is undoubtedly true, and at first sight when one looks at the facts of this case it does seem as if very clear words are needed to make contractors liable for damage caused by the negligent navigation of an Admiralty ship which knocks down part of the works which they have constructed; but it all comes back to the meaning of the words in that clause, and in particular to what is meant by "any cause whatsoever."

A number of cases were cited to me. I do not propose to refer to any of them, because they all depend on their own particular wording, except *Joseph Travers & Sons Ld.* v. *Cooper*,[1] a decision of the Court of Appeal which has been often quoted and approved. There a lighterman had inserted a clause seeking to protect himself from liability "for any damage to goods however caused "which can be covered by insurance." Phillimore L.J. said[2]: "This then is the distinction. It is a fine one, and I am sorry to "think that it is so fine; but it seems to be this. If you say 'any "'loss' you are directing attention to the kinds of losses and not

* [1952] A.C. 192; [1952] 1 T.L.R. 261; [1952] 1 All E.R. 305.
† (1934) 48 Ll.L.Rep. 1.
‡ [1915] 1 K.B. 73; 30 T.L.R. 703.
§ [1949] 2 All E.R. 1014; 83 Ll.L.Rep. 178.
[1] [1915] 1 K.B. 73; 30 T.L.R. 703.
[2] [1915] 1 K.B. 101.

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" to their cause or origin, and you have not sufficiently made it " plain that you mean ' any and every loss ' irrespective of the " cause, and therefore you have not brought home to the person " who is entrusting the goods to you that you are not going to be " responsible for your servants on your behalf exercising due care " for them, or possibly even for your own personal want of care. " But if you direct attention to the causes of any loss, if you say " ' any loss,' ' however caused ' or ' under any circumstances,' " you give sufficient warning, and it is not necessary to " say in express terms ' whether caused by my servants' " ' negligence' . . . ."

It seems to me, therefore, that the words in the present case are about as wide as they can be, and that I must read " any " cause whatsoever " as if it included and expresssly said " including damage caused by the negligent navigation of a ship " by an Admiralty servant." If, then, one reads it in that way, there is no possibility of the contractor recovering under condition 7 (2) of the contract the sum expended, because by condition 26 (2) he is responsible for the damage and has to make it good, and therefore the expense which he has incurred in so doing is not an expense beyond that provided for in or reasonably contemplated by the contract.

It is said, however, that nevertheless there is an implied term in this contract that the contractor should have uninterrupted undisturbed possession of the site, and that accordingly the building owner must not come, either negligently or deliberately, and knock down the works. It is said that there is such an implied term, and that if there is, " any cause whatsoever " must be read subject to that implied term. It seems to me that that is the wrong approach to the matter. Once one realizes that condition 26 (2) must be given the wide construction which I think it must be given, then there is really no room for any implied term, however it is worded, which in effect destroys the construction ordinarily given to those words.

It was faintly argued by Mr. Daniel that, even if he was wrong, it might be a possible view that the provision in condition 26 (2) that the contractor was to make good was merely machinery and that, having made good, it would be possible for him to obtain the sum which he had expended against the Admiralty for breach of contract or in negligence. It seems to me, however, that condition 26 is plain beyond words that not merely as a matter of machinery has he had to repair and bear the cost, but that he is wholly responsible for the loss or damage.

In my view, therefore, this claim, however hard it may be on the contractors, must fail.

*Judgment for the defendants*

Solicitors: *Williams Charles Crocker; Treasury Solicitor.*

[CHANCERY DIVISION.]

## * STERN *v.* FRIEDMAN.

1953
*June* 26.

[1940 S. No. 2609.]

Danckwerts J.

*Practice and Procedure—Leave to enter appearance after final judgment —Motion to set aside judgment obtained by fraud—R.S.C. Ord.* 12, *r.* 22; *Ord.* 27, *r.* 15; *Ord.* 39, *r.* 6; *Ord.* 55, *r.* 74A—*Supreme Court of Judicature (Consolidation) Act*, 1925 (15 & 16 *Geo.* 5, *c.* 49), *s.* 62.

In the Chancery Division a defendant who seeks leave to enter appearance after judgment must do so on special motion or summons, notice of which must be served on the plaintiff.

It is not the correct practice for the master to make an order on an ex parte application giving leave for a defendant to enter an appearance after final judgment is signed, and entered. Statements in note to Ord. 12, r. 22, the Annual Practice (1953), p. 141, and Daniell's Chancery Practice, 8th ed., pp. 295, 296, approved.

Where it is desired to have a judgment in an action set aside on the ground that it was obtained by fraud, the correct procedure is to raise the issue in a separate action in which proper pleadings will have to be delivered, and not by way of notice of motion in the former action.

Statement in note to Ord. 39, r. 6, in the Annual Practice (1953), p. 699, approved.

MOTIONS.

In 1940 the plaintiff, Fritz William Stern, brought an action against the defendant, Hermann Friedman, in the Chancery Division for dissolution of partnership in respect of a business carried on by them in this country as importers of foodstuffs. The action was commenced by writ dated July 18, 1940, notice of which was duly served on the defendant, who lived in New York, on October 23, 1940. The defendant, thinking that the war had terminated the business, did not enter an appearance and on February 18, 1941, upon a motion for judgment in default of defence, judgment was given dissolving the partnership as from December 31, 1939, with the usual consequential accounts, inquiries and directions made in partnership actions. By a further order made in chambers on January 22, 1943, approval was given to the sale of the goodwill of the partnership to the plaintiff for the sum of £10. On November 19, 1943, the final order as upon further consideration in the action was made, directing payment into court of the defendant's share of the partnership assets.

In 1953 the defendant sought leave to enter an appearance to the action on the ground that the plaintiff in obtaining the order

[Reported by J. A. GRIFFITHS, Esq., Barrister-at-Law.]

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of the court for the sale of the goodwill of the partnership for the nominal sum of £10 had failed to disclose to the court material information, known to him at the time, in respect of the partnership assets, and that accordingly the order of January 22, 1943, should be set aside.

On June 4, 1953, the master granted ex parte leave to the defendant to enter an appearance, and, on June 15, 1953, the defendant served on the plaintiff a two-day notice to set aside the order of January 22, 1943.

The plaintiff thereupon served notice of motion on the defendant that it was proposed to move the court for an order under R.S.C. Ord. 70, r. 1, that the appearance entered by the defendant to the action on June 4, 1953, might be struck out on the grounds that such appearance was entered after judgment in the action and no notice of any application for leave to enter an appearance had been given to the plaintiff.

On June 19, 1953, the matter came before Danckwerts J. who directed the plaintiff's motion to stand over for seven days and granted the defendant leave to serve notice of motion on the plaintiff that it was proposed to move the court for an order that notwithstanding any previous judgment or order given or made by the court the defendant be at liberty to enter an appearance to the writ of summons in the action.

The three motions came before Danckwerts J. on June 26, 1953.

*T. A. C. Burgess* for the plaintiff.
*Charles Lawson* for the defendant.

DANCKWERTS J. This is a case of some difficulty in which there are three motions before the court, either by the plaintiff or the defendant in an action which is in form an action for dissolution of partnership begun by writ on July 18, 1940. [His Lordship stated the facts, and continued:] In regard to the plaintiff's motion the practice is not entirely clear. Ord. 12, r. 22, of the Rules of the Supreme Court states: "A defendant may "appear at any time before judgment. If he appear at any time "after the time limited by the writ for appearance, he shall not, "unless the court or a judge shall otherwise order, be entitled to "any further time for delivering his defence, or for any other pur-"pose, than if he had appeared according to the writ." In the Annual Practice, 1953, there is a note to Ord. 12, r. 22, in these terms, at p. 141: "Appearance after judgment.—In Chancery "Division leave to enter appearance after judgment is obtained on "special motion or summons: D.C.P. 295; D.C.F., p. 129. Order, "Seton, p. 23. In Queen's Bench Division appearance tendered "after judgment signed will be accepted if the defendant desires "to enter it. Such appearance would stand in the event of the "judgment being set aside."

In Daniell's Chancery Practice (8th ed.), pp. 295, 296, the

practice is stated thus: "After judgment an appearance cannot "be entered by a defendant except by leave of the court, which "may be granted either with discharge of the judgment leaving "the defendant free to defend on payment of costs thrown away, "or without setting aside the judgment on defendant's submit- "ting to be bound by it. The application for leave may be made "by petition of course if the plaintiff will consent, and if he will "not by special motion or summons, notice of which must be "served on him"—that is, the plaintiff. "In the latter case the "notice of motion or summons asks that the defendant on sub- "mitting to be bound by the judgment and proceedings already "had may be at liberty to enter an appearance to the writ of "summons, and may have the like benefit of the judgment, and "may be at liberty to attend the subsequent proceedings as if he "had appeared at the hearing. On production of the order to "the proper officer an appearance for the defendant may be "entered in the usual way, and notice thereof must be given on "the same day to the plaintiff or his solicitor, and the action "thenceforth proceeds against such defendant in the ordinary "manner."

It is suggested that a practice has grown up whereby a master will make an order giving leave ex parte for a defendant to enter an appearance after final judgment has been signed and entered. In my view, if any such practice has grown up, that practice is not correct. It seems to me that the correct practice is as stated in the passage which I have quoted from Daniell's Chancery Practice; in the present case it would be very undesirable that an appearance should be allowed to be entered on an ex parte application after judgment because the matter is very much out of time, in any event, and the plaintiff would have a right to put forward submissions as to why appearance should not be allowed to be entered at such a late stage, or, if it was allowed to be entered, that certain terms should be put upon the defendant. In those circumstances it seems to me quite wrong that he should be allowed to obtain leave ex parte to enter an appearance, and accordingly in my opinion in the present case the order made by the master was irregular and the appearance must be set aside.

I must now consider the question whether I should accede to the defendant's application for leave to enter appearance in this action, and for that purpose I must consider the circumstances to some extent. The first point, which is very much against the defendant, is that it is ten years since the order was made, and that is itself a circumstance which naturally causes some surprise at his application. He does, however, explain in an affidavit why he has not made an application previously or has not entered appearance in the proper way, and there is some justification for the delay. It was because of the outbreak of war in 1939. He was living in the United States and had supposed that the business in England had come to an end, and further he alleges that he was unaware, until 1951, of a circumstance which he now says was

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of the greatest importance, namely, that a body formed under the Companies Act, 1929, and called the National Egg Distributors Association Ld., was formed on June 30, 1941, and that the plaintiff, by virtue of having previously been in the business of importing food before the war in partnership with the defendant, was able to become a member of this association and thereby obtain dividends which the defendant alleges amounted, over the period in which that company operated, to a considerable sum. The defendant alleges that the fact that the plaintiff was entitled, by virtue of the partnership business, to acquire membership in the company was not disclosed to the court when the order of January 22, 1943, was made approving the sale of the goodwill of the business to him, and that therefore it was obtained by fraud. Of course, if that is a substantial point it is a matter of considerable importance which would, one would think, give the defendant some ground for claiming that he ought to have the right to reopen the matters which have been dealt with in this action.

Then there arises a question which is again a matter of very great difficulty, whether the defendant has adopted the correct procedure. Can he merely on a motion, if he is allowed to enter appearance now, reopen this matter in an action which came to an end as long ago as November 19, 1943? It is to be observed that he is not desirous of setting aside the order for dissolution of partnership made in 1941, nor, indeed, the order on further consideration made on November 19, 1943. He simply desires the setting aside of the order for the approval of the sale of the goodwill on January 22, 1943. It seems to me that that is not a proper way of proceeding. If there is an allegation of fraud which can be substantiated, it can be pursued and should be pursued, in another way. Fraud is a serious matter. It has always been regarded by the court as a matter so serious that precise allegations should be laid before the court in the form of pleadings, and that it should not be decided on a summary application such as a notice of motion. I find on page 699 of the Annual Practice, 1953, this note to Ord. 39, r. 6: "Fraud.—It is the settled practice "of the court that the proper method of impeaching a completed "judgment on the ground of fraud is by action, in which the "particulars of the fraud must be exactly given and the allegation "established by strict proof. Although there is jurisdiction in "special cases to set aside a judgment for fraud on a motion for "a new trial, if for any special reason departure from the estab-"lished practice is permitted, the necessity for stating the "particulars of the fraud and the burden of proof are in no way "abated and all the strict rules of evidence apply." It would appear, therefore, that notwithstanding the orders which have been made in this action, the defendant is in a position, if his claim of fraud is justified, to bring an action to set aside the sale—which was not a sale by the court, but merely a sale to which the approval of the court was obtained in the order of January 22, 1943. Therefore it is really unnecessary that the defendant

should be given leave now to enter appearance in the action, and it seems to me very inconvenient that he should be allowed to enter appearance and demand to bring the matter of fraud before the court merely on notice of motion.

I should perhaps refer to two other orders upon which reliance was placed by the defendant. First of all I will refer to Ord. 27, r. 15. "Any judgment by default, whether under this order or "under any other of these rules, may be set aside by the court or "a judge, upon such terms as to costs or otherwise as such court "or judge may think fit, and where an action has been set down "on motion for judgment under rule 11 of this order, such setting "down may be dealt with by the court or a judge in the same way "as if judgment by default had been signed when the case was set "down." It would appear that the order approving the sale was not a judgment, which is something different from an order, and consequently that rule is not relevant in the present case.

The other provision to which I should refer is section 62 of the Supreme Court of Judicature (Consolidation) Act, 1925, which provides: "Subject to the provisions of this Act with respect to "appeals in matters of practice and procedure, every order made "by a judge of the High Court in chambers, except orders as to "costs only which by law are left to the discretion of the court, "may be set aside or discharged upon notice by any divisional "court, or by the judge sitting in court, according to the practice "of the Division to which the cause or matter in which the order "was made is assigned." It is perfectly true, of course, that the order of January 22, 1943, was an order made by a judge in chambers, but this does not seem to me the appropriate method of proceeding when the action has come to an end and an order on further consideration is made. One is quite familiar with the practice which is referred to in section 62. Cases constantly occur where a party wishes to appeal against an order of the judge in chambers to the Court of Appeal, and then he has to move the judge formally in open court to discharge the order made in chambers, or a certificate is obtained that no further argument is required by the judge. [See note in the Annual Practice under Ord. 55, r. 74A, "Appeal from and application to discharge orders made in chambers."] But in my view section 62 of the Judicature Act, 1925, is of no assistance in regard to the present problem, and therefore I come to the conclusion that the correct practice, as mentioned in the Annual Practice, and stated in *Jonesco* v. *Beard*,[1] is that, in a case of an allegation of fraud of this kind, the proper method of raising the matter is by a separate action in which proper pleadings will have to be delivered, and the proper rules of evidence obeyed, and the matter regulated by oral evidence in a satisfactory manner. As I have pointed out, the order of January 22, 1943, was not an order for the sale, but merely an order approving the sale to the plaintiff; and

[1] [1930] A.C. 298.

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it seems to me that the proceeding which the defendant would naturally bring to attack that sale is an action asking that the sale of the goodwill to the plaintiff be set aside; and that if an answer was made that that sale was authorized or approved by the court, it would then be said by the defendant by way of reply that that order was obtained by fraud. If, therefore, the defendant wishes to raise an issue of that kind, he must do so by a separate action, and he cannot be allowed to do it merely on notice of motion in the action that is now at an end. Accordingly, I come to the conclusion that I ought not to accede to the defendant's application for leave to enter appearance now, and that his notice of motion must be dismissed.

The third notice of motion was one which went to the merits of the question of the order approving the sale, and asked that that order be discharged. As I have already indicated, I do not think that that is the right procedure, and in any event, if appearance is not allowed to be entered in this action by the defendant, that notice of motion cannot be made effective, and accordingly, it must be dismissed also.

On the other hand, the plaintiff's notice of motion asking for the discharge of the appearance which had been entered by the defendant on June 4, 1943, succeeds, and an order must be made accordingly.

*Orders accordingly.*

Solicitors: *Field, Roscoe & Co.; Forsyte, Kerman & Phillips.*

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[COURT OF APPEAL.]

C. A.

1953
*June* 24.

* GREGORY *v.* FEARN.

[Plaint No. H. 2701.]

Evershed M.R., Birkett and Romer L.JJ.

*Principal and Agent — Estate agent — Agency agreement signed on Sunday—Whether estate agent a "tradesman"—Sunday Observance Act,* 1677 (29 *Car.* 2, *c.* 7), *s.* 1.

An estate agent signed an agency contract on a Sunday for the sale of certain property. In an action for a commission which he claimed to have earned in accordance with that contract, it was held by the county court judge that as the agency contract had been signed on Sunday it was within the prohibition of section 1 of the Sunday Observance Act, 1677,[1] as having involved the doing of

[1] Sunday Observance Act, 1677, s. 1: "... no tradesman, artificer "workman labourer or other person "whatsoever shall do or exercise any "worldly labour, business, or work "of their ordinary callings upon the "Lord's Day or any part thereof "(works of necessity and charity only "excepted): ..."

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work in the ordinary course of business by a "tradesman." On appeal:—

*Semble*, an estate agent was not a "tradesman" or sufficiently like a tradesman so as to fall within the provisions of section 1 of the Act of 1677.

*Palmer* v. *Snow* [1900] 1 Q.B. 725; 16 T.L.R. 168 considered.

Decision of Judge Caporn affirmed on another ground.

APPEAL from Judge Caporn sitting at Nottingham County Court.

The plaintiff, A. R. Gregory, acting in the course of his normal business as an estate agent, on April 20, 1952, which was a Sunday, signed a contract of agency for the sale of a house, whereby the vendor, the defendant, George Fearn, agreed to pay to the plaintiff £100 when the property was sold, the property to be deemed to have been sold "and the commission payable on "the receipt of a deposit or a purchase agreement being entered "into by a purchaser." Subsequently, the estate agent brought proceedings to recover the commission, alleging that he had introduced a purchaser, one Owen, who had entered into a purchase agreement, but had subsequently refused to complete because he found that he would not be able to use the premises for business purposes. Owen alleged that the plaintiff had misrepresented to him that it could be so used.

Judge Caporn held that as the contract appointing the plaintiff agent for the vendor had been made on a Sunday and involved the doing by the plaintiff of his ordinary business as an estate agent, it offended against section 1 of the Sunday Observance Act, 1677,[1] and, consequently, that the plaintiff could not rely on it. He further decided, on other grounds which are not material to this report, that the plaintiff would not have been able to establish his claim to the commission even if the contract had been valid.

The plaintiff appealed.

*T. R. Heald* for the plaintiff.

The respondent did not appear and was not represented.

In addition to the case cited in the judgment, *Reg.* v. *Sylvester*[2] was referred to in argument.

EVERSHED M.R., after referring to the facts: Judge Caporn concluded against the plaintiff on the ground, among others, that the agreement fell within the prohibition of section 1 of the Sunday Observance Act, 1677, as having involved the doing on the Lord's Day of business or work by a tradesman, that is, an estate agent, in his ordinary calling.

On the view which I take, it is not strictly necessary to decide that point. But it seems to me, as at present advised, that Mr. Heald is right when he says that an estate agent is not a "tradesman" within the contemplation of that section, even if

[2] (1864) 33 L.J.M.C. 79.

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the execution by him of a contract of this kind was the doing of business or work in his ordinary calling. At first sight, Mr. Heald's argument appeared to be difficult, because the formula in section 1 of the Act of 1677 is "no tradesman, "artificer workman labourer or other person whatsoever"; and assuming that an estate agent is not a tradesman, he would be, prima facie, within the formula "other person whatsoever." It has, however, long been established that those words "other "person whatsoever" are to be construed ejusdem generis with those which precede it: so that, for the defendant to succeed on this point, it must be shown that an estate agent is a tradesman or something sufficiently like a tradesman to be covered by the ejusdem generis rule. *Palmer* v. *Snow*,[1] which has the added force of being a decision of Channell J., shows that a person who carried on the profession of a barber was not a tradesman, since a barber (so it was there said) did not commonly buy or sell things. If that be the kind of criterion to be applied, it would appear to exclude an estate agent from the formula in the Sunday Observance Act; but, as I have said already, it is not strictly necessary to express a concluded view on that matter, since there is another ground on which Judge Caporn decided against the plaintiff, and against that part of the decision it seems to me that Mr. Heald battles in vain.

[His Lordship then considered other matters which do not call for report and concluded:] On those grounds, it seems to me that this appeal must fail and be dismissed, and it becomes unnecessary for me to say anything about the possible third problem of the construction of the contract itself.

BIRKETT L.J. I am of the same opinion. Although it is not strictly necessary for a decision of the appeal in view of our decision on the second point raised and argued, I should like to say that I agree with the observations of my Lord on the Sunday Observance Act, and that an estate agent, in my opinion, could not be a "tradesman" within the meaning of the statute of 1677 and the interpretation in the decided cases.

With regard to the second point, I regard it as entirely a question of fact which has been rightly and properly decided by Judge Caporn, and the conclusions of law follow. I agree that the appeal should be dismissed.

ROMER L.J. I also agree, and I should like to associate myself with the view that an estate agent is not within the purview of section 1 of the Act of 1677 at all. On the other point, I have nothing I wish to add.

*Appeal dismissed. No order as to costs.*

Solicitors: *Corbin, Greener & Cook for Huntsman, Donaldson & Tyzack, Nottingham.*

E. D.

[1] [1900] 1 Q.B. 725; 16 T.L.R. 168.

[CHANCERY DIVISION.]

## * *In re* ENGALL'S AGREEMENT.

1953
*June* 19.

[1953 E. 524.]

Vaisey J.

*Land Registration—Estate contract—Vacation of register—Vendor and purchaser—Contract for sale of land—Notice by vendor to purchaser to complete—Registration of land charges by purchaser against vendor—No completion by purchaser—Summons by vendor to remove land charges from register—Inappropriate procedure—Land Charges Act*, 1925 (15 *Geo.* 5, *c.* 22), *s.* 10 (1) (8).

By a contract dated July 31, 1952, the vendors agreed to sell certain freeholds to the purchasers. The purchasers did not complete on the date fixed, September 30, and on October 21 the vendors gave them notice to complete by November 5. On November 4, the purchasers caused to be registered against the name of each vendor an estate contract of Class C (iv), under the Land Charges Act, 1925, s. 10 (1),[1] in respect of each of the properties. Completion did not take place on November 5 and, by letter dated February 5, 1953, the vendors' solicitors asked the purchasers' solicitors to withdraw the registration of the land charges. They did not do so and, by this summons, issued under section 10 (8) of the Land Charges Act, 1925, the vendors asked for a separate order in respect of each charge that the registration of it should be vacated, and for an order that the costs and expenses of this application and of the vacation of the registrations be paid by the purchasers:—

*Held*, dismissing the summons but making no order as to costs, that the application under section 10 (8) was not the appropriate method of dealing with the matter, which was to take such proceedings as raised the substantive issue, namely, the existence or non-existence of a contract.

*Pedigree Stock Farm Developments Ld.* v. *R. Wheeler & Co.* (1950) Estates Gazette, vol. 155, p. 66 followed.

ADJOURNED SUMMONS.

The summons, issued under section 10 (8) of the Land Charges Act, 1925, asked for an order that two registered land charges be removed from the register. The applicants were the owners of certain freehold houses at Woking and, by a contract dated July 31, 1952, they agreed to sell those properties to the respondents for £5,875. The contract was in writing and the

[1] Land Charges Act, 1925, s. 10 (1): "The following classes of "charges on, or obligations affecting "land may be registered as land "charges in the register of land "charges, namely . . . Class C:—A "mortgage charge or obligation "affecting land of any of the follow- "ing kinds, created either before or "after the commencement of this Act, ". . . namely . . . (iv) Any contract "by an estate owner or by a person "entitled at the date of the contract "to have a legal estate conveyed to "him to convey or create a legal "estate, including a contract con- "ferring either expressly or by statu- "tory implication a valid option of "purchase, a right of pre-emption or "any other like right (in this Act "referred to as an 'estate contract') ". . ."

Subs. (8): "The registration of a "land charge may be vacated pur- "suant to an order of the court or "a judge thereof."

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property was sold subject to the Law Society's Conditions of Sale of 1934 (1949 revision) with certain exceptions, so far as the same were applicable to a sale by private treaty and were not inconsistent with or varied by the remaining conditions in the contract. There was a condition as to title and the property was sold subject to the covenants and conditions contained in the respective conveyances forming the respective roots of title, to any local land charges registered or required to be registered before the date of the contract, to any requirement of any local council or any county council whether registered, registrable or otherwise and to the respective tenancies of the properties. A deposit of £587 10s. was payable by the respondents as purchasers to the vendors' agents and completion was to take place on September 30, 1952. Condition 24 (1) of the Law Society's Conditions of Sale provided that the conveyance to a purchaser should be prepared by him at his own expense, and that the draft thereof should be delivered at the office of the solicitors of the vendor at least ten days before the date fixed for completion, for perusal and approval on behalf of the vendor and other necessary parties (if any). Condition 32 provided: "(1) If a purchaser "shall fail to perform his part of the contract, the vendor may "give to the purchaser or his solicitor at least fourteen days' "notice in writing specifying the default and requiring the pur- "chaser to make good the same before the expiration of the "notice. (2) If the purchasesr does not comply with the terms "of the said notice—(*a*) the deposit money, if any, shall be "forfeited to the vendor . . . (*b*) the vendor may resell the "property without previously tendering a conveyance to the pur- "chaser; (*c*) the contract shall, without prejudice to the vendor's "right to resume possession (if given up) and recover documents "belonging to him, become void, save and except that the "following provisions shall apply. . . ."

The abstract of title was delivered, the deposit of £587 10s. was paid and requisitions on title were made and replied to. The respondents did not submit any draft conveyance ten days before the date fixed for completion and on October 8, 1952, the applicants' solicitors wrote to the respondents' solicitors: "We write "to point out that although completion of this matter was "fixed for the 30th ultimo you have not yet submitted a draft "conveyance and we should be obliged if you would do so "without any further delay. In anticipation of completion on "September 30, the vendors have given notice of their intention "to discharge the mortgage on that day which was accepted and "now that time has passed a fresh six months' notice will have "to be given and the vendors will have to hold the purchasers "responsible for any future interest which is payable as a result "thereof." On October 20 they wrote: "We cannot understand "why you do not submit the draft conveyance to us herein. "Completion is now three weeks overdue and we have today "had to take our client's instructions as to whether he wishes us

"to institute proceedings for specific performance or take the "appropriate steps to lead to forfeiture of the deposit." On the next day they sent a notice to complete and, on October 29, the respondents' solicitors did submit a draft conveyance. The notice to complete required that completion should take place on or before November 5, 1952. On November 4 the respondents caused to be registered against the name of each applicant a land charge of Class C (iv) in respect of the properties. Completion did not take place on or before November 5 and the applicants wished to sell the properties elsewhere. Accordingly, by letter dated February 25, 1953, their solicitors requested the respondents' solicitors to withdraw the registration of the land charges, but they did not do so: and by this summons, issued under section 10 (8) of the Land Charges Act, 1925,[1] the applicants ask for a separate order in respect of each charge that the registration of it should be vacated and for an order that the costs and expenses of this application and of the vacation of the registrations be paid by the respondents.

*G. C. Raffety* for the applicant vendors.
*S. A. Stamler* for the purchasers.

VAISEY J. The notice to complete served by the applicants was to some extent complied with by the purchasers, because on October 29 they submitted draft conveyances which the applicants' solicitors approved and returned. On October 31 there was a dispute about amendments which had been made, by November 5 nothing further had happened and in due course the deposit was forfeited.

In the circumstances it is open to some doubt whether the notice to complete was long enough. It might have been long enough had it been a twenty-one days' notice to pay the purchase-money, served after the conveyance had been agreed. When it was served, however, the draft conveyances had not been submitted and the notice required that all this should be done, and the purchase-money paid, within fifteen or sixteen days after service of the notice. It may well be that the notice was too short. There is a good deal to be said for the fact that the purchasers have behaved unsatisfactorily in preventing the vendors from reselling and in attempting to use, possibly wrongly, the procedure under the Land Charges Act, 1925, for the purpose of putting pressure on them.

It may well be open to comment that the purchasers never expected to be able to complete. The difficulty that I feel, however, is that an application under section 10 (8) of the Act is not the appropriate method of approaching the matter. When the agreement of July 31 was signed, that, in equity, made the purchasers the owners of the property subject only to the payment of the purchase-money. The existence or non-existence of a contract at any relevant time is of the utmost importance and

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is a matter which ought to be considered carefully and in an appropriate manner. This summons is an attempt to use the machinery of the Land Charges Act, 1925, to obtain adjudication on the existence or non-existence of the contract at the time when the notice was served, or when it expired, or at the present time. In my judgment, it is not an appropriate or correct way to approach the solution of what, in my view, is a somewhat difficult question. Under the contract for sale either party could bring an action for specific performance or for rescission. The existence of the charges is the shadow of the matter, not the substance of it—which is the existence of the contract—and I am being asked to deal with the shadow, not with the substance. That is not the proper way of dealing with the matter, nor the proper procedure to ascertain the existence or non-existence of the contract. To ask that the charges be removed from the register before the point has been decided by an action is wrong. The charges register is only a record.

Before the notice to complete was served, the vendors' solicitors stated, accurately, that an action for specific performance was the appropriate remedy. It does not follow that because the deposit has been forfeited the entry on the register ought to be vacated.

I do not propose to decide the question one way or the other. There is much to be said for the view that the notice to complete was deficient in point of time. The purchasers might receive little sympathy in an action for specific performance. I think that the profession ought to realize that, when one is dealing with the question whether there is or is not a contract, it is not right to start at the wrong end. The matter will have to be resolved at some time or other, in the proper proceedings. The only case which is of any assistance is *Pedigree Stock Farm Developments Ld.* v. *R. Wheeler & Co. Ld.*[1] In that case I called attention to an important point, namely, that the procedure which is before me in the present case is not the proper procedure to ascertain the existence or non-existence of a contract. To ask that a charge be removed from the register, before the substantive point has been decided by the appropriate means of an action, seems to me to be putting the cart before the horse. It is not the right method. The register of charges, in my view, is merely a record: and whether that record of an alleged contract should remain or not depends on the question whether the contract purported to be recorded exists or does not exist. To obtain an order removing a charge from the register is merely the consequence of deciding either that there is no contract, in which case the entry will be removed, or that there is a contract, in which case the entry in the register will be allowed to remain. To ask merely that a charge be removed, without a preliminary

[1] (1950) Estates Gazette, vol. 155, p. 66.

decision whether the charge purported to be registered exists or not, seems to me to be the wrong method of approach.

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I do not propose to decide whether the charges ought to remain on the register or not. It may well be that the deposit has been rightly forfeited, and that the charges should not remain on the register, but I do not have the material before me to decide that. There are no pleadings, there is no evidence save two short affidavits setting out the bare facts and an agreed bundle of correspondence. I do not think that that is the appropriate way of dealing with the matter. I think that the profession should realize that when the question is whether there is or is not a contract, one ought not to start at the wrong end and ask whether the contract should be or remain registered or not, but ought to take such proceedings as raise the substantive issue—the existence or non-existence of the contract.

I dismiss the summons, but I make no order as to costs.

Solicitors: *Champion & Co. for Cozens & Moxon, Hampton; C. Butcher & Simon Burns.*

K. R. A. H.

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[QUEEN'S BENCH DIVISION.]

* KNIGHT *v.* DEMOLITION AND CONSTRUCTION CO. LD. RANSOM *v.* THE SAME.

1953 *June* 17, 18, 19, 22.

Parker J.

[1951 K. 1496.] [1952 R. 758.]

*Building—Demolition—Gas retorts surrounded by brick arches—Archways demolished — Collapse of adjoining wall — Fatal accident — Meaning of "building"—Precautions "where necessary" to be taken "as far as practicable" against possibility of accidental collapse — Construction — Building (Safety, Health and Welfare) Regulations*, 1948 (*S.I.* 1948, *No.* 1145), *regs.* 79, 94.

The plaintiffs' husbands were engaged, in the course of their employment with the defendants, in the demolition of three blocks of gas retorts. Each block consisted of a series of retort tubes situated in vertical columns, surrounded by brick work, which in turn was surrounded by brick arches which acted as a heat-resisting screen. The second block had been demolished except for two arches. The outer wall of one of the remaining arches was pulled down by means of a cable and winch and the plaintiffs' husbands were clearing away the debris from the archway when the adjoining wall of the arch collapsed, killing them.

*Held*, that the defendants were liable for a breach of regulation 79 (7) of the Building (Safety, Health and Welfare) Regulations, 1948, which provided that "precautions shall, where necessary, be "taken by adequate shoring or otherwise to prevent, as far as prac-"ticable, the accidental collapse of any part of a building"; the gas retorts in question were buildings to which regulation 79 applied,

[Reported by Miss C. J. ELLIS, Barrister-at-Law.]

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and bearing in mind the object of the Building Regulations, part of a plant could be a building, notwithstanding that it could also be described as plant.

The words in regulation 79 (7) "where necessary" covered a case where, if the danger which should have been appreciated had in fact been appreciated, any reasonable person would say that precautions were necessary; the taking of precautions "as far as "practicable" had nothing to do with whether they were reasonably practicable but referred to precautions which were possible to be accomplished with known means or known resources.

*Adsett* v. *K. and L. Steelfounders and Engineers Ld.* [1953] 1 W.L.R. 773; [1953] 2 All E.R. 320 and *Lee* v. *Nursery Furnishings Ld.* (1945) 61 T.L.R. 263; [1945] 1 All E.R. 387 referred to.

Reading regulation 94 as a whole, the reference in regulation 94 (2) to "any part of any existing building" was a reference to an alteration in an existing building as opposed to the demolition of it, and accordingly regulation 94 did not apply to demolition work.

ACTIONS.

The plaintiffs' husbands, Knight and Ransom, were employed by the defendants, a company specializing in demolition work, in the demolition of three blocks of gas retorts. Each block consisted of a series of retort tubes situated in vertical columns surrounded by brick work, which in turn was surrounded by brick arches, which acted as a heat-resisting screen. The method of demolition was by means of a cable and winch. On April 4, 1951, one block had been demolished and all but the last two arches of the second block. The outer wall of one of the remaining arches was pulled over and the debris from the wall fell in the archway. One Hartnoll and Knight and Ransom, all top-men, were engaged in clearing the debris, Ransom being in charge of the gang. The men were all in the charge of a foreman who, although not actually there during the whole time, was in constant attendance. By the afternoon of April 6, nearly all the debris had been removed. Hartnoll had moved away from the archway, when the adjoining wall of the arch at which the other two were working, collapsed, falling on top of them. Both men died almost immediately.

The plaintiffs brought actions under the Fatal Accidents Acts and the Law Reform Act, alleging that their husbands' deaths were due to breach by the defendants of their duty at common law by failing to ensure that the work was carried out under adequate supervision. They further alleged that the foreman had failed to inspect the wall and that the defendants knew, or ought to have known, that the wall was dangerous. Alternatively, the plaintiffs alleged that the defendants were in breach of regulations 79 [1] and 94 [2] of the Building (Safety, Health and

[1] Building (Safety, Health and Welfare) Regulations, 1948, reg. 79: "(1) This regulation shall apply to "the demolition of any building or "substantial part of a building. (2) "The demolition and operations incidental thereto shall be specifically "placed under the supervision of a "competent person experienced in "demolition operations and appointed

Welfare) Regulations, 1948, by failing to place the demolition work under the supervision of a competent person, and in failing to take all reasonable precautions to prevent danger through collapse of the building.

The defendants denied the allegations at common law, or, alternatively, relied on the defence of volenti non fit injuria. They also denied that the Building Regulations pleaded applied to the operation.

The two actions were not consolidated, but were tried together for convenience.

The cases are only reported on the points relating to the alleged breach of statutory duty arising under the Building Regulations.

*R. F. Levy Q.C.* and *Rudolph Castle-Miller* for the plaintiff Knight.

*Gerald Gardiner Q.C.* and *G. C. Dare* for the plaintiff Ransom.

*F. W. Beney Q.C.* and *Martin Jukes* for the defendants.

The cases cited in argument material to the points on which the decision is reported are referred to in the judgment.

PARKER J. stated the facts and found that the work was adequately supervised by the foreman, that he had visually inspected the wall, but that the defendants, if they had consulted qualified engineers, would have known that the demolition had produced a real instability in the remaining walls, and accordingly, having found that the defence of volenti non fit injuria failed, held that both plaintiffs succeeded on their claim for breach of duty at common law. His Lordship continued:

That being so, it is really unnecessary to consider the case of statutory duty raised under the Building Regulations, but in case

" for the purpose whose name shall " be posted up in a prominent posi- " tion on the site of the operations, " . . . (5) The following operations " shall be carried out only (i) under " the immediate supervision of a com- " petent foreman or chargehand with " adequate experience of the particu- " lar kind of work, or (ii) by work- " men experienced in the kind of " work . . . (*b*) the actual demolition " of any part of a building where " there is a special risk of a collapse, " whether of that or of any other part " of a building, in the course or as a " result of the said demolition, so as " to endanger any person employed; " . . . (7) Before demolition is com- " menced and also during the progress " of the work precautions shall, where " necessary, be taken by adequate " shoring or otherwise to prevent, as " far as practicable, the accidental " collapse of any part of the build- " ing or any adjoining building the " collapse of which may endanger any " person employed: . . ."

[2] Reg. 94: " (1) All practicable " precautions shall be taken by the " use of temporary guys, . . . or other- " wise where necessary to prevent " danger to any person employed " through the collapse of any part of " a structure during any temporary " state of weakness or instability of " the structure or part before the " structure is completed. (2) Where " any work is carried on which is " likely to reduce so as to endanger " any person employed the security " or stability of any part of an " existing building or of a building " in course of construction all prac- " ticable precautions shall be taken " by shoring or otherwise to prevent " danger to any person employed " from the collapse of the building " or the fall of any part thereof."

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Parker J.

I am wrong, I think that it is only right to consider the matter. The plaintiffs rely on regulations 79 and 94 of the Building (Safety, Health and Welfare) Regulations, 1948. [His Lordship read regulation 79 (1) (2) (5) and (7) and regulation 94 (2) and continued:] As regards regulation 79 (2), I am satisfied that the work was under the supervision of the foreman and that he was a competent person experienced in demolition. It is true that his name was not posted up in a prominent place; it was in fact put on the inside of a little office which he had on the site, but that can have no causative effect whatsoever in regard to this accident. With regard to regulation 79 (5), again I am satisfied that these were competent workmen and that they were working under the immediate supervision of a competent foreman.

It is clear that the provision in regulation 94 (2) prima facie applies to the facts of this case if it is applicable to demolition work. In my view, however, regulation 94 does not apply to the work of demolition, which is specifically dealt with in Part V of the regulations, whereas regulation 94 appears in Part VII under the heading "Miscellaneous." That, of course, is by no means a conclusive argument, if it is plain that regulation 94 is intended to apply to demolition work.

If one looks at the regulation as a whole, it is plain that the first paragraph has nothing to do with demolition at all, and could not have. It is concerned with new constructional work and the condition of the work before the structure is completed. Then comes paragraph (2), which applies not only to a building in course of construction, but to any part of an existing building. It seems to me, however, that reading that regulation as a whole, the reference there to any part of an existing building is really a reference to an alteration in an existing building as opposed to the demolition of it. In other words, but for that provision, if instability were produced in a building which was not going to be pulled down, employers might be free from any such duty as is imposed by regulation 79 in the case of demolition. In my view, regulation 94 does not apply, so that so far as statutory duty is concerned, the plaintiffs' case must be based on regulation 79 (7).

The defendants' first answer to that is that none of the Building Regulations apply in this case because what was being demolished was not a building. By regulation 2 the regulations are to apply to a number of operations, one of which is the demolition of a building, and regulation 79 itself provides by paragraph (1): "This regulation shall apply to the demolition of "any building or substantial part of a building." It is urged on behalf of the defendants that these regulations do not apply to plant, and they say that these brick arches were merely part of the plant. As Mr. Martin Jukes put it, they were really a heat-resisting screen, and they might just as well have been made of iron or asbestos as of brick.

Reference was made in that connexion to *Hutchison* v.

*Cocksedge & Co. Ld.*[1] where it was held that a steel platform some 16 or 17 feet above the floor of the plant was part of the plant and not a building. Reference was also made to *Street* v. *British Electricity Authority*,[2] where Sellers J. had held that again there was no breach of statutory duty, in that what was there in question was not a building.

On the other hand, the plaintiffs referred to *Aylward* v. *Matthews*,[3] where for the purposes of the Workmen's Compensation Act, 1897, a temporary wooden structure, which was to be used to support a steam crane, was held to be a building within that Act. It was held in that case that it was a question of fact whether a structure in any particular case was a building, and in particular, in deciding whether a structure was or was not a building, it was only right and proper to take into consideration the Act in question. In that case it was pointed out that the Workmen's Compensation Act appeared to contemplate the risks which would arise in the case of the erection or repair of buildings exceeding 30 ft. in height, that those risks would be incident to the erection by means of a scaffolding of a structure of the kind with which the court was then concerned.

In my view each case must depend on its own facts, bearing in mind the object of the Act. Here it seems to me that one would in ordinary language describe these retort blocks as buildings. Bearing in mind the object of the regulations, it seems to me that it is enough to say that a part of the plant may be a building, notwithstanding that it can also be described as plant. Moreover, it is to be observed that regulation 2 itself contains in the proviso a number of structures which are not deemed to be buildings for the purposes of the regulation. It is clear, if one reads that proviso, that but for it the regulations would apply to a great number of structures which might well be thought in ordinary language not to be buildings. For example, it was thought necessary to exclude, in the proviso, pole or lattice work structures designed solely for the support of machinery, plant or electric light. In other words, it was an intention, but for that proviso, that even those structures should be treated as buildings. Accordingly, I hold that these retort houses were buildings and that regulation 79 (7) applies.

That paragraph contains two phrases of some difficulty, namely, "where necessary," and secondly, "as far as practicable." It is urged on behalf of the defendants that "where necessary" means only where found necessary by experience, as opposed to being found necessary, for example, in the light of after events as a result of some latent defect not reasonably anticipated. I do not think that it is necessary for me in this case to go further than to say that it seems to me that it must at any rate cover a case where, if the dangers had been

[1] [1952] 1 All E.R. 696n.
[2] [1952] 2 Q.B. 399; [1952] 1 T.L.R. 799; [1952] 1 All E.R. 679.
[3] [1905] 1 K.B. 343; 21 T.L.R. 196.

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Parker J.

appreciated, as I have held they should have been, any reasonable person would say that precautions were necessary. In the present case I am satisfied that, if men were to be sent to work under this wall, precautions were necessary.

As regards the phrase "as far as practicable," this has been considered, first in *Lee* v. *Nursery Furnishings Ld.*,[4] where Lord Goddard adopted a definition in the Oxford Dictionary of "Practicable": "capable of being carried out in action," and secondly, in *Adsett* v. *K. and L. Steelfounders and Engineers Ld.*,[5] where the Court of Appeal referred with approval to the definition in Webster's Dictionary of "Possible to be accomplished with known means or known resources." In other words, the test here has nothing to do with whether it is reasonably practicable, but merely whether it is possible and practicable in that sense.

I am satisfied that in this case it was practicable to take some precautions by way of shoring or otherwise, if men's lives were to be in danger. I am not altogether satisfied with the method proposed by Mr. Galbraith, a constructional engineer called by the plaintiffs, but something, I am sure, could be done: possibly a girder fastened to the buck stays, as in fact was done by the defendants as a trial method after the accident when working at East Greenwich. Such a method—the provision of a girder—would, no doubt, not meet every case, but it is relevant to observe that its presence in this case would, it is agreed by all witnesses, have prevented the total collapse of this wall in one piece on to these two men. Be that as it may, again it is to be observed that there was no necessity whatsoever in this case to send men under this wall to remove debris. I accordingly hold that there is also a breach of a duty imposed on the defendants under regulation 79 (7).

[His Lordship then assessed the damages to be awarded.]

*Judgment for the plaintiffs.*

Solicitors: *Darracotts & Tringhams; Hepburns; Tideman, Coules & Co.*

[4] (1945) 61 T.L.R. 263; [1945] 1 All E.R. 387.

[5] [1953] 1 W.L.R. 773, 779; [1953] 2 All E.R. 320.

[QUEEN'S BENCH DIVISION.]

## * VINALL *v.* HOWARD.

1953
*June* 29.

Streatfeild J.

*Contract—Illegality—Sale of motor vehicle—Mechanical defects—Not fit for use on the road—Whether sale unlawful—Road Traffic Act*, 1934 (24 & 25 *Geo.* 5, *c.* 50), *s.* 8; *Road Traffic Act*, 1930 (20 & 21 *Geo.* 5, *c.* 43), *s.* 3; *Motor Vehicles (Construction and Use) Regulations*, 1951 (*S.I.* 1951, *No.* 2101).

Section 8 (1) of the Road Traffic Act, 1934, provides that "subject to the provisions of this section it shall not be lawful to "sell . . . a motor vehicle . . . in such a condition that the use "thereof on a road in that condition would be unlawful by virtue of "the provisions of section 3 of the principal Act" (the Road Traffic Act, 1930) and section 8 (3) provides that any person who sells a motor vehicle in contravention of the provisions of the section shall be guilty of an offence. Section 8 (4) provides "that a person shall "not be convicted for an offence . . . if he proves . . . that he had "reasonable cause to believe that the vehicle . . . would not be used "on a road in Great Britain, or would not be so used until it had "been put into a condition in which it might lawfully be so used."

The plaintiff sold to the defendant a second-hand car which was unroadworthy as it infringed several of the provisions of the Motor Vehicles (Construction and Use) Regulations, 1951, made under section 3 of the Road Traffic Act, 1930. The defendant paid for the car by a cheque which was dishonoured and the plaintiff sued the defendant on the cheque, claiming alternatively the price of the car.

*Held*, that, subject to the provisions of the section, section 8 of the Road Traffic Act, 1934, read in conjunction with section 3 of the Road Traffic Act, 1930, imposed an absolute prohibition on the sale or on the use of a car which was unroadworthy, whether the seller or the user knew of its condition or not; that, on the facts, the plaintiff had no defence under section 8 (4) of the Act of 1934; and that, therefore, the sale was in contravention of section 8 (1) and unlawful, and the plaintiff was not entitled to succeed.

*Commercial Air Hire Ltd.* v. *Wrightways Ltd.* [1938] 1 All E.R. 89 applied.

ACTION.

In February, 1952, the plaintiff, Thomas Washington Vinall, advertised for sale a Morris eight horse-power saloon motor car. The defendant, Henry Thomas Howard, replied to the advertisement and the plaintiff arranged to drive the car round to the defendant's house after 6 o'clock on the evening of February 27. When the parties met, the plaintiff pointed out certain defects in the brakes of the car and then took the defendant for a short drive. The defendant noticed that the speedometer was not working and pointed this out to the plaintiff, who replied that it needed a new cable, but that otherwise it was in working order. When they returned to the defendant's house, the defendant inspected the car by the light of a torch and agreed to buy it for £310, giving the plaintiff a cheque for that sum. The defendant drove the

[Reported by Mrs. E. M. WELLWOOD, Barrister-at-Law.]

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plaintiff back to his home, a distance of some 10 miles and drove back to his own home. The following morning he examined the car in daylight and found that the chassis was so badly defective as to be fractured. On February 29 he stopped payment of the cheque and on March 1 had a telephone conversation with the plaintiff in which he told him of the defect in the chassis and said that the car was not roadworthy. The plaintiff refused to cancel the contract. He presented the defendant's cheque for payment, but it was dishonoured, and he thereupon sued the plaintiff on the cheque or, alternatively, for the price of the car.

By his defence the defendant pleaded (1) that there was an implied warranty that the car was in a fit condition for use on the road and free from mechanical defects; (2) that it was an agreed express term between the parties that the cheque should be regarded as having been delivered as an escrow pending the defendant's proper examination of the car in daylight and that, having examined the car and discovered further defects, the defendant was entitled to cancel the cheque; and (3) that the plaintiff, in selling or agreeing to sell the car to the defendant was in breach of section 8 of the Road Traffic Act, 1934, in that the condition of the car was such that its use on the road was unlawful by virtue of the provisions of section 3 of the Road Traffic Act, 1930, and several of the Motor Vehicles (Construction and Use) Regulations, 1951.

It was agreed that the burden of proof lay on the defendant.

The first two grounds of the defence turned on conversations which took place between the plaintiff and the defendant and do not call for report. On the first head of the defence his Lordship found that there was no implied warranty, and on the second head his Lordship found that there was no ground for the defendant's contention that the cheque had been delivered merely as an escrow.

*Dudley Collard* for the plaintiff.
*John Gazdar* for the defendant.

The following cases were cited in argument: *Marles* v. *Philip Trant & Sons Ld.*[1]; *Brightman & Co. Ld.* v. *Tate*[2]; *In re Mahmoud and Ispahan*[3]; *Commercial Air Hire Ld.* v. *Wrightways Ld.*[4]

STREATFEILD J. As I have listened to the facts in this case, I have been reminded of two sayings, one of which is a legal one, that seem to me applicable. The first one is the two words which the Romans had by way of warning purchasers to beware, and the other one is a more modern one whereby people are warned against the unwisdom of choosing fine linen by candlelight. It

[1] [1953] 2 W.L.R. 564; [1953] 1 All E.R. 645.
[2] [1919] 1 K.B. 463; 35 T.L.R. 209.
[3] [1921] 2 K.B. 716; 37 T.L.R. 489.
[4] [1938] 1 All E.R. 89.

might be that those purchasing old motor cars should not choose them by torch-light. [His Lordship, having stated the facts and considered the first two issues, continued:] With regard to the third issue which the defendant has raised, namely, whether this contract was tainted with illegality, reliance is placed upon section 8 of the Road Traffic Act, 1934. Section 8 (1) provides: "It shall not be lawful to sell or to supply . . . a motor vehicle "... for delivery in such a condition that the use thereof on a "road in that condition would be unlawful by virtue of the pro- "visions of section 3 of the [Road Traffic Act, 1930]." Section 3 of that Act provides: "It shall not be lawful, to use on any road "a motor vehicle . . . which does not comply with the regulations "applicable to the class or description of vehicles to which the "vehicle belongs, as to the construction, weight and equipment "thereof," and it is said that, by virtue of several of the regulations contained in the Motor vehicles (Construction and Use) Regulations, 1951, which are applicable, this vehicle was sold in such a condition that the use of it on the road in that condition would be unlawful by virtue of the provisions of section 3 of the Act of 1930.

The words which state that to sell a vehicle in such a condition shall be unlawful are governed by the opening words of the section: "Subject to the provisions of this section." It is to be observed that it is not laid down in an unqualified way simply that it shall be unlawful to sell a vehicle in this condition, but only that it is unlawful to do so "subject to the provisions of this section." Therefore it becomes necessary to look at the rest of the section in order to see what the conditions are which make a sale unlawful. Subsection (2) applies to alteration and is not applicable. Subsection (3) states: "If a motor-vehicle . . . "is sold, supplied, offered or altered, in contravention of the "provisions of this section, any person who so sells, supplies, "offers or alters it . . . shall be guilty of an offence." Therefore, if a person in fact sells a vehicle in such a condition that it infringes the provisions of the regulations in question, an offence is committed. By subsection (4), "A person shall "not be convicted for an offence under this section in respect "of the sale, supply, offer, or alteration of a motor vehicle . . . if "he proves . . . he had reasonable cause to believe that the "vehicle . . . would not be used on a road in Great Britain"— which obviously applies to the case of a vehicle which is sold as scrap. Then come these words "or would not be so used until it "had been put into a condition in which it might lawfully be so "used." In other words a man may commit an offence by selling a vehicle in an unroadworthy condition, but he cannot be convicted for that offence, if, amongst other things, he shows to the court that he had reasonable cause to believe that the vehicle would not be so used until it had been put into a proper, roadworthy condition. If he does not prove that, he commits an offence, and if he commits an offence, then it seems that the

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words of section 8 (1) apply in full force, because if he has committed an offence for which he has no defence, which is embraced by the words "Subject to the provisions of this section," the section then says: It shall be unlawful to sell a vehicle in an unroadworthy state.

I have to decide whether this sale was illegal in the sense that it was an offence under the Act, for which the plaintiff would not have had a defence had he been prosecuted for such an offence. The particulars pleaded, under which it is said that this motor car was illegally sold because it was unroadworthy refer first to the speed indicator, and it is admitted by the plaintiff that in fact the speedometer was in breach of regulation 12 of the regulations of 1951. Secondly, it is said that the silencer of the car was not in good and efficient working order, and was not suitable for reducing the noise caused by the escape of gas from the engine, and it is admitted likewise that that is in fact in breach of regulation 20. With regard to the stop-light, that in any event is a small matter, and having read the regulation in question, I am quite satisfied that that item disappears from this case. Lastly, it is said that the car was not equipped with an efficient braking system, and it is admitted that that is the case, and that it was in breach of regulation 44. The plaintiff in reply to this submission says that, so far as the speedometer and the braking system were concerned, those matters were both pointed out by him to the defendant before the sale was concluded, either before or immediately after he received the cheque. He told me that he had no reason to suppose that the defendant would use the car on a road until he had rectified those defects.

On the facts it is clear that the plaintiff knew that the defendant wanted the car to use on the road. They set out together in the car for a journey of almost ten miles in the direction of the plaintiff's home, and the plaintiff knew that the defendant would have to use it on the return journey. Under those circumstances, although I accept the evidence of the plaintiff as a perfectly honest and accurate witness in every respect, it is impossible for me to hold that the plaintiff did not know that the defendant would be using the car on the road before the defects were remedied. So far as that journey is concerned, quite obviously the plaintiff knew that the defendant was going on that journey with a car which had a defective speed indicator and, worse still, a car with defective brakes. I do not believe he knew that it had a defective chassis, and rather surprisingly there is no regulation dealing with a broken chassis, which I should have thought was almost the worst feature of all. It is because of that that there is no written reference to the broken chassis in these particulars. With regard to the silencer, the evidence is somewhat vague; the plaintiff himself says that he did not realize that the silencer was defective, but it is admitted on his behalf that such was the case, and therefore,

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whether he knew it or not, it would in fact amount to a breach of section 8 of the Act of 1934.

I agree with Mr. Gazdar's submission that, subject to the provisions of that section, section 8 (1) does in fact impose an absolute prohibition upon the sale of vehicles, and section 3 of the Road Traffic Act, 1930, imposes an absolute prohibition upon the use of vehicles in an unroadworthy condition, and I do not think that that has to happen with the knowledge of the user or the seller. I think Mr. Gazdar is also right in saying that the only defence in section 8 (4) which would have been open to the plaintiff had he been prosecuted, would in fact not have been open on the facts of this case. He did not satisfy me that he had reasonable cause to believe that the car would not be so used until its necessary repairs had been effected.

Under those circumstances, the sale of this car was an unlawful sale in contravention of section 8 (1) of the Road Traffic Act, 1934, and although I am in the plaintiff's favour with regard to the other two issues, the court must give effect to an illegality. The authorities to which Mr. Gazdar has drawn my attention, perhaps in particular *Commercial Air Hire Ld.* v. *Wrightways Ld.*,[1] make it quite clear that, if in such circumstances a contract is tainted with illegality, the court must take cognizance of it, and it means that the party who has entered into such a contract cannot recover in respect of it. On that ground, therefore, in my judgment the defendant is entitled to succeed, and, accordingly, there must be judgment for the defendant.

*Judgment for the defendant.*
*No order for costs.*

Solicitors: *Curwen, Carter & Evans; Vanderpump & Sykes.*

[1] [1938] 1 All E.R. 89.

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[CHANCERY DIVISION.]

1953
*June 25.*

Vaisey J.

**In re* DARGIE, DECD.
MILLER *v.* THORNTON-JONES AND OTHERS

[1951 D. 271.]

*Costs—Solicitor and client—Hostile litigation between trustees and beneficiaries—Whether trustees entitled to costs on basis of an indemnity.*

In an action brought by beneficiaries under a will to assert a personal pecuniary claim against the trustees, it was ordered that the costs of the defendant trustees be taxed as between solicitor and client and that those costs when taxed "be retained and paid

[Reported by J. A. GRIFFITHS, Esq., Barrister-at-Law.]

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"by the defendants in the action as trustees of the . . . will "out of the estate of the . . . testator."

Certain disbursements, including a portion of counsels' fees, amounting to £437 were disallowed on taxation.

The present summons was taken out to ascertain whether the trustees were entitled to pay and retain out of the residuary estate all or any part of the sum of £437 or ought to account for and refund to the residuary estate the whole or some part of this sum:—

*Held*, that the trustees were not entitled to retain the disallowed items amounting to £437, but that they ought to account and refund to the residuary estate the whole of the amount so paid and retained over and above the taxed costs.

*Poole* v. *Pass* (1839) 1 Beav. 600 distinguished.

*In re Robertson, decd.* [1949] 1 All E.R. 1042 applied.

ADJOURNED SUMMONS.

By his will dated April 5, 1940, Thomas Frederick Dargie, who died on April 8, 1942, appointed the defendants to be his executors and trustees. In 1950, the plaintiff to the present summons and other beneficiaries under the testator's will, brought a hostile action against the defendants, the trustees. In that action [1950 D. 670] the beneficiaries sought (a) to have accounts taken of the remuneration actually received by the defendants from payments made to them by a certain limited company in which the testator had held large interests, and repayment of what might be found due on the account for the benefit of the testator's estate; (b) certain other relief; and (c) that the defendants be ordered to pay the costs of the action.

The action was tried by Wynn-Parry J., who during the course of the hearing directed that an originating summons be issued to cover certain of the issues raised in the writ. Judgment was delivered on July 5, 1951, and there followed a full argument on the question of cost. At the end of the discussion Wynn-Parry J. said: "I have listened to counsel on the question of "costs, and if I make what might be called a strict order it "would be of the utmost complication and I think that it would "result in nothing but more expense. The view I take is that "part of the trouble has been caused by this action being started "by writ instead of being brought before the court on an origina-"ting summons. On the other hand, there are certain costs— "I do not know how much or what percentage they represent— "which have been incurred by the defendants which, in the "course the case took . . . need not have been incurred. On "the whole it appears to me that so far as the defendants are "concerned, they as trustees ought to have their costs as between "solicitor and client out of the estate. So far as the plaintiffs "are concerned, I think that, on the whole, as they are the "persons interested in income and contingently interested in "capital and it is extremely difficult to analyse their costs, the "best thing to do is to make a similar order as regards their "costs. So, in effect, I shall order the costs of all parties as "between solicitor and client to be taxed and paid out of the

"estate." The order as finally drawn up provided: "And this "court doth order that it be referred to the Taxing Master to "tax as between solicitor and client the costs of the plaintiffs "and the defendants both of this action and of the said applica- "tion by originating summons and it is ordered that all the said "costs when taxed be retained and paid by the defendants in "the said action as the trustees of the said will out of the estate "of the said testator."

Certain disbursements, including a portion of counsel's fees, amounting to £437, were disallowed on taxation.

The plaintiff took out the present summons to ascertain whether having regard to the order of Wynn-Parry J., dated July 5, 1951, the defendants as trustees of the testator's will (a) were entitled to pay and retain out of the residuary estate the sum of £437 the amount by which the sum of £2,523 paid or retained by the defendants in respect of the costs of the proceedings exceeded the sum of £2,086 at which the costs were taxed pursuant to the order or any and if so what part of the sum of £437; or (b) ought to account for and refund to the residuary estate the sum of £437 or any and if so what part thereof with interest from the date of payment or retention.

*Lionel Edwards Q.C.* and *W. A. Bagnall* for the plaintiff.
*E. I. Goulding* for the defendant.

The following cases were cited in argument in addition to those contained in the judgment: *Amand* v. *Bradbourne* [1]; *Fearns* v. *Young* [2]; *Walters* v. *Woodbridge* [3]; *In re Dunn.* [4]

VAISEY J. The question which arises in this case is whether the defendants were entitled to withdraw from the trust estate, and to retain as they have done, the sum of £437. It is put on this ground that the defendants, being trustees, are prima facie entitled to have their costs provided to such an extent and in such manner as to afford them a complete indemnity.

Several questions arise on that. First, did the judge, who tried the action, intend them to have a full indemnity for their costs? If this had been an action which was concerned solely with the benefits accruing, or intended to accrue, to the trust estate, in which the trustees had adopted a wholly disinterested and independent attitude, which is the normal attitude of trustees in such cases, I feel little doubt that Wynn-Parry J., if he had been asked, would, at any rate, have considered whether it was his intention to give the trustees full indemnity, though I am bound to say that, on reading the passages in his judgment which are relevant on the point, I am inclined to think that the order for the taxation of the defendants' costs—not on an indemnity basis—between solicitor and client, was something in the nature of a

[1] (1682) 2 Chan.Cas. 138.
[2] (1804) 10 Ves. 184.
[3] (1878) 7 Ch.D. 504.
[4] [1904] 1 Ch. 648.

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compromise, something in the nature of an adjustment, and perhaps rather a rule of thumb regulation of the position.

I think that although this was an action which was to some extent for the benefit of the estate, it was still more an action which was concerned with the rights of the trustees personally to retain moneys for their own personal use. I am very doubtful whether the judge would have allowed them costs on a higher scale than solicitor and client, and I find no indication whatever in the words which he used, or, at any rate, no sufficient indication, that he ever meant them to have more than that which the order stated, which was drawn up in conformity with the words which he used and in conformity with the interpretation of his intentions by the junior counsel who by the judge's direction settled the minute.

The order of Wynn-Parry J. dated July 5, 1951, was perfectly plain in its terms. The costs of all the parties to that action were to be taxed as between solicitor and client; it must always be remembered that a taxation as between solicitor and client is not a taxation on an indemnity basis, but is, as was described by Buckley L.J. in *Giles* v. *Randall*,[1] "substantially a party and "party taxation on a more generous scale."

I know that it is generally considered that trustees are always entitled to their costs on an indemnity basis, and there is a certain amount of truth in that, provided always that the costs in question have been incurred solely for the purpose of benefiting the trust estate. There is no such rule—certainly I can find no trace of there being any such rule—where the litigation, for it is litigation that we are speaking of in this case, was designed to define and secure the personal rights of the trustees as individuals, and I I cannot see on what ground it could be said that it would follow as a natural consequence that if the judge was asked, he would have said that as trustees they were entitled to be fully indemnified.

In the old case of *Poole* v. *Pass*,[2] counsel was very careful to ask for some additional words to be put in the order to entitle his clients to something more than the solicitor and client costs of an action, something for the extra costs and expenses incident to and arising out of the action. In the action before Wynn-Parry J. the order was drawn up by junior counsel and no suggestion was ever made that the trustees ought to have had anything more than their costs as between solicitor and client.

It is submitted, however, on their behalf, that when they obtain their costs as between solicitor and client and then incur expenses in connexion with the action over and above those costs as so taxed, they are entitled to reimburse themselves by resorting to the trust capital and by taking out the difference between what was allowed on taxation and what they think ought to have been allowed, or what they would have liked to have been allowed.

[1] [1915] 1 K.B. 290, 295.

[2] (1839) 1 Beav. 600.

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I do not think that is a matter to which I ought to give the slighest approval. See what it amounts to. It amounts to this, that the defendants would then be saying to the taxing master: "Tax our costs as between solicitor and client. Disallow anything "you like. It does not matter to us in the very least how you "tax these costs because we shall, as a matter of right, take out "of the trust estate and put into our own pockets the whole of "our bill of costs whether you allow it or disallow it." I am quite certain that the trustees never realised that that was what they were doing; but I very much hope now that they do realise it, that they will see at once that it was extremely improper to allow the taxing master to tax their costs when they had the intention, possibly then not wholly formed, of disregarding the taxation altogether, and considering themselves as being entitled not only to the taxed costs, but to the costs which had been taxed off.

Moreover, I am very doubtful whether the trustees have adopted the right course if they wished seriously to make this claim. I think that their proper course would have been to have referred the question to Wynn-Parry J., and asked him to make some amendment to his order and endeavoured to persuade him—I find no trace to suggest that such an attempt would have been successful—that there had been a slip in the order, and that he meant the plaintiff's costs to be taxed as between solicitor and client and that the defendants' costs should be taxed on an alternative basis; that is to say, whatever they chose to pay to their counsel was to be allowed without any question, subject always to any contention that the amount was wholly extravagant, or that the services paid for were not in fact rendered at all. They did not take that step.

There was another way. The defendants might have argued that "taxing masters being human and always taxing, not "mechanically and without regard to the exact circumstances "of the case, the taxing master might conceive that there would "be an application to review the taxation, asking for the restora-"tion of some of the disallowed items on the ground that the "taxing master, if he had really considered he was taxing the "costs of trustees, would have dealt with the bill in a more "generous spirit." I am not suggesting that the taxing master would have acceded to that argument, because I think that he would have been met with the same difficulty as has faced me, viz., the terms of the order itself. But I do think that there would have been some ground for saying that as it was a solicitor and client taxation, the costs of the beneficiaries would be on one kind of footing but those of the trustees would be on a wider basis, having regard to the well founded and well grounded principle that trustees ought not to be put to any expense within reason.

That course was not taken. There was neither an application to amend the order of Wynn-Parry J., nor any other application to review the taxation. For the defendants to put the money in

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their pockets and then to inform the plaintiff that they had done so and not offering to submit that further sum to any further taxation but claiming to take it and keep it as of right, I think was not the correct method to adopt.

I have been referred to a number of authorities but I need only refer to two of them. One starts with the general proposition that a trustee is entitled to be reimbursed out of trust property all expenses which he has properly incurred having regard to the circumstances of each particular case, and in my view, one of the circumstances of this case is the order of Wynn-Parry J. which the trustees allowed to be made without protest on July 5, 1951.

In *Poole* v. *Pass*,[3] there was an order for the payment of the costs of the suit by a mortgagor who was calling upon the mortgagee, a trustee, in whom a satisfied mortgage term was vested to transfer the legal estate to him. At the end of the judgment of Lord Langdale M.R. counsel for the defendant asked: "As trustee he will have trustee's costs, as between "solicitor and client, and the costs of opinion taken." The Master of the Rolls replied: "Yes; I think no trustee would be "safe unless such costs were allowed." Then the note is: "The defendant was decreed to execute to the plaintiff, or as "he should direct, a surrender or assignment of the term, and "the Master was ordered to tax the defendant his costs of this "suit, as between solicitor and client, and to tax him his charges "and expenses, properly incurred, to be paid by the plaintiff."

It is the absence of those latter words from the order of Wynn-Parry J. which in my opinion is fatal to the defendants' claim to this sum of £437.

I must refer, briefly, to my own decision in *In re Robertson, decd.*,[4] which concerned the disallowance of a sum of £2 1s. which had been taxed off the shorthand writers' account in respect of the note which had been taken of a judgment of Uthwatt J. The taxing master had reduced the charge for that work from £7 13s. to £5 12s. In that case the taxation had been directed as between solicitor and client. If the defendants in the present case had been able to present an argument which I could accept, my decision in *In re Robertson*[4] would have been wholly unnecessary because the trustee in that case—and it was the Public Trustee—could have said: "You have allowed me "for my shorthand note £5 12s., reducing the charge of £7 13s. "to that amount, and the £2 1s. I am entitled to," on the same grounds as have been advanced before me by Mr. Goulding, on behalf of the present defendants.

In my opinion *In re Robertson*[4] shows conclusively that if any sum is disallowed from a solicitor and client taxation on a trustee's bill of costs, and he desires more, he must ask for it. He must not put the disputed amount in his pocket and think

[3] 1 Beav. 600, 604, 605.

[4] [1949] 1 All E.R. 1042.

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that he is entitled to have it on some principle of higher equity, which I confess I fail to understand.

I think that this proceeding instituted by originating summons must succeed. In my judgment the proper course for me to adopt is to declare that, having regard to the order of July 5, 1951, in the other proceedings, the defendants, as trustees of the will, were not entitled to retain the disallowed items amounting to £437. The amount of the costs taxed off they ought to account for and refund to the residuary estate; that is to say, the whole of the amount so paid and retained over and above the taxed costs. The costs of this application must be paid by the defendants personally as between party and party.

*Declaration accordingly.*

Solicitors: *Ballantynes; Jaques & Co.*

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[COURT OF APPEAL.]

## *LONDON COUNTY COUNCIL *v.* CATTERMOLES (GARAGES) LD.

C. A.

1953 *April* 17, 20.

Evershed M.R., Birkett and Romer L.JJ.

*Master and Servant—Negligence of servant—Garage hand employed to move cars by hand—Car driven by him on to highway causing accident—Accident in course of employment—Unauthorized mode of doing authorized act—Liability of master.*

The defendants, who owned a garage, employed a man as a general garage hand. Part of his duty was to assist in getting motor cars out of the way of other motor cars. This he was instructed to do by pushing them by hand. He was expressly forbidden to drive since he did not hold a driving licence. He was instructed to move a van which was obstructing the access to the defendants' petrol pumps. He got into the van and drove it on to the highway with a view to driving it back into the garage. While on the highway the van came into collision with the plaintiffs' van and damaged it. In these proceedings the plaintiffs claimed damages. The county court judge dismissed the action, holding that in driving the van the man was doing an act wholly outside the scope of his employment and the defendants were not liable:—

*Held*, that in driving the van the garage hand was not doing something outside the scope of his employment, but what he did was merely a wrongful, improper and unauthorized mode of doing an act which was authorized by his masters, the defendants, and that accordingly they were liable for his negligence.

Principles in *Goh Choon Seng* v. *Lee Kim Soo* [1925] A.C. 550 and *Canadian Pacific Railway Co.* v. *Lockhart* [1942] A.C. 591; [1942] 2 All E.R. 464 applied.

APPEAL from Judge Done sitting at Clerkenwell County Court.

C. A.
1953
LONDON COUNTY COUNCIL v. CATTERMOLES (GARAGES) LD.

In this action the plaintiffs, the London County Council, claimed damages from the defendants, Cattermoles (Garages) Ld., in respect of damage received by one of their vans when it came into collision with a van driven by one Preston, a servant of the defendants.

The county court judge held that when the accident occurred the defendants' servant, in driving the van, was doing an unauthorized act outside the scope of his employment for which the defendants were not liable and he dismissed the action.

The plaintiffs appealed.

The facts are fully stated in the judgment of Evershed M.R.

*E. W. Eveleigh* for the plaintiffs.

*F. C. Coningsby* for the defendants.

*Bayley* v. *Manchester, Sheffield and Lincolnshire Ry.** and *Smith* v. *W. H. Smith & Sons Ld.*† were cited in argument, and also the cases referred to in the judgments.

EVERSHED M.R. This appeal involves an illustration of the principle (not difficult to state but by no means always easy to apply) which is found in Salmond on Torts, 11th ed., p. 105, 10th ed., p. 89, 9th ed., p. 95. I refer to that passage because in the recent case of *Canadian Pacific Railway Company* v. *Lockhart* [1] it was expressly approved. It runs as follows: "It is clear that the "master is responsible for acts actually authorized by him: for "liability would exist in this case, even if the relation between "the parties was merely one of agency, and not one of service at "all. But a master, as opposed to the employer of an indepen- "dent contractor, is liable even for acts which he has not "authorized, provided they are so connected with acts which he "has authorized that they may rightly be regarded as modes— "although improper modes—of doing them. In other words, a "master is responsible not merely for what he authorizes his "servant to do, but also for the way in which he does it. . . . On "the other hand, if the unauthorized and wrongful act of the "servant is not so connected with the authorized act as to be "a mode of doing it, but is an independent act, the master "is not responsible, for in such a case the servant is not acting "in the course of his employment, but has gone outside of it."

The facts before the board in the *Lockhart* case [1] were briefly these: the railway company provided for the use of some of their employees certain cars, known as "speeders" or "track "motors," or hand cars, which proceeded on the company's rails, to enable their employees to get conveniently from one place of work to another. It appeared, however, that certain of the employees had motor cars of their own, and found it more

* (1873) L.R. 9 C.P. 148.
† [1952] 1 All E.R. 528.
[1] [1942] A.C. 591; [1942] 2 All E.R. 464.

convenient in getting from one job to another to use their own motor cars on the road rather than the track motors of the railway company. The defendant company, who had experienced some difficulties because their employees' own cars had not always been properly insured, put up notices expressly prohibiting employees from using their own motor cars in connexion with the company's business unless they were properly insured against, among other things, what we call third party risks. One of the employees, one Stinson, had used his own motor car for the purpose of getting from one job to another, he being a carpenter in the employ of the company. In disregard of the notice, he used his car although it was not properly insured. An accident occurred, and the question was whether the railway company were liable. The Privy Council, in a judgment delivered by Lord Thankerton, held that the company were liable, applying that passage from Salmond on Torts.

Their Lordships took the view that Stinson was doing an authorized act, namely, proceeding in the company's service from one job to another in his motor car, but doing it in an unauthorized way, namely, using his car when it was not properly insured, in disregard of the prohibition. At the close of the judgment, Lord Thankerton used this language, which has been quoted to use and relied upon by Mr. Coningsby[2]: "If the "prohibition had absolutely forbidden the servant to drive his "motor-car in course of his employment it might well have been "maintained that he was employed to do carpentry work and not "to drive a motor-car, and that, therefore, the driving of a "motor-car was outside the scope of his employment, but it was "not the acting as driver that was prohibited, but the non-"insurance of the motor-car, if used as a means incidental to the "execution of the work which he was employed to do." Lord Thankerton (as I read the judgment) is not there expressing a final conclusion, but suggesting the possibility of the argument. Indeed, it is said in the present edition of Salmond, 11th ed., p. 105, that that passage, if it professed to state the law, might go too far. I do not think that it is necessary for me to express any view on that matter.

I have, however, read the passage because it leads conveniently to the substance of Mr. Coningsby's argument for the defendants, which is that the job which the employee in this case was employed to do was something quite different in its nature and character from the driving of motor cars, and that the accident which occurred arose from the fact that he was then engaged in the latter capacity and, therefore, not in the course of his employment. I think that the county court judge took the same view, for in the brief note of his judgment it is stated: "I "found that Preston was employed as a general garage hand. It "was part of his duties to assist in the movement of cars on the "defendants' premises by pushing them or by giving guidance

[2] [1942] A.C. 591, 601.

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" to the driver, e.g., when reversing. But he was not authorized " to drive, i.e., to control the movement of vehicles under their " own power. He was not competent to drive and had, in fact, " been expressly forbidden to do so. I held that this was not a " case where the defendants' servant was doing an unauthorized " act in a manner which was unauthorized, but that the act in " question, viz., the driving of a car, was outside the scope of " what he was employed to do and was wholly unauthorized." In my judgment it necessarily follows from that passage that the view of the judge was in accordance with the argument which Mr. Coningsby had addressed to him, namely, that the driving of the motor car was an activity in character and kind distinct from the activity which Preston was employed to perform. I have myself come to a different conclusion. I must, therefore, state a little more closely what were the facts of the case and, in particular, what was the precise employment for which Preston was engaged.

The accident which has given rise to the present proceedings happened, as I understand it, in the following way: somewhere between 8 and 9 o'clock in the morning there was a van stationary in front of the petrol pumps which are themselves in front of the defendant's garage and between the garage itself and the Pentonville Road in London. Two large lorries approached the defendant's premises, both desirous of obtaining petrol. There was a man named " Bob " in charge of the petrol pump, who, seeing Preston, asked him to move the van. Preston proceeded to get into the van, start the engine and drive it past the petrol pump into the Pentonville Road with a view to turning round there and coming back again to the garage behind the lorries and thus getting out of the way of the lorries. In the course of that manœuvre he came into collision with another motor van belonging to the plaintiffs. The damage was not very great, £20 odd, but the plaintiffs sued the garage company. The answer of the garage company was that Preston was doing an act wholly outside the scope of his employment and that they, therefore, were not liable.

In stating the circumstances in which the accident occurred I have, it is true, drawn my information from the evidence given by Preston himself, and I do not forget that, on the matter of the terms of his engagement, the judge, who saw Preston, preferred the evidence of the defendants' manager, Mortimer. But I cannot conclude that nothing that Preston said should be believed, and this part of his story was not challenged in cross-examination. Indeed, unless that is substantially what occurred, there seems to me no point in, or basis for, these proceedings at all. The question then remains, was Preston, when he executed this manoeuvre, doing an authorized act, that is, something within the scope of his employment, in an unauthorized manner? Or was he doing something quite independent of his employment

and altogether outside its ambit or scope? What, then, was the nature, and what were the terms, of the employment?

In the judge's note of his judgment this passage occurs: "Preston was employed as a general garage hand. It was part "of his duty to assist in the movement of cars on the defendants' "premises by pushing them or by giving guidance to the driver "when reversing." The judge went on to find that Preston was forbidden to drive, and there is no question in this court that that was so. But is it true to say that the nature of his employment was of the somewhat limited and curious nature of what I will call manhandling motorcars and, if so, was that something wholly distinct from moving them by any other means? We have been supplied with notes taken of the judge's oral judgment by both counsel, who have assisted this court, and on this matter there is a close identity between them. Mr. Eveleigh's note contains this statement: "His job was to get cars out of the "way of other cars and a great deal of that had to be done "by hand." Mr. Coningsby's note is: "Part of his job being "to assist in getting cars out of the way of other cars," etc. I quite agree, as Mr. Coningsby points out, that it is not to be expected in a county court case that a full note will be found of everything which the witnesses said or, indeed, except occasionally, of everything that the judge said. But we have also the judge's note of the witnesses' evidence, and I will turn at once to what the manager, Mortimer, said of the nature of Preston's employment. He said that he did not himself engage Preston, but that his job was that of general garage hand and "assisting to shunt vehicles, that is, to assist drivers when "reversing by standing behind the vehicles. It was not his job "to drive vehicles. At first he was not employed to grease. "Then he was asked to fit in on the servicing side." Then later, but this is not stated as part of the terms of his employment, Mortimer said, "Preston was not employed to drive himself. I "once saw him in a vehicle driving. I warned him that if I "saw it again I would dismiss him."

Doing the best we can on the note of the evidence and on what Mr. Eveleigh and Mr. Coningsby recorded of the oral judgment, it appears to me tolerably clear that the terms of Preston's engagement were not very precise. He was employed in a general capacity as a garage hand, and part of the functions of a garage hand was to move or to help to move cars in the garage, so as to make way for other cars which wanted to get in or out, and so forth. I think from the evidence that the prohibition about driving was not a limitation of the scope of his employment, so much as a prohibition subsequently insisted upon (for obvious reasons) when it was discovered that he had no qualifications for driving. I think that it is impossible to say, therefore, that Preston was engaged for the defined job of pushing cars by hand or, indeed, that such a job is one which can be

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sensibly supposed in contradistinction to moving cars by other means, including that of driving them.[A] I am leaving out of account, for the moment, the circumstance which has caused me a little difficulty, that the accident occurred when Preston was driving this van not in the garage at all but when he was on the Pentonville Road. To that matter I will return. But for the moment I confine myself to the general matter of moving cars by driving them under their own motive power, as distinct from pushing them or using any other means for moving them. It seems to me that once the nature of the employment is regarded as I have stated it, then, as a matter of common sense, the result inevitably follows that the use of a motor car's own engine in order to do the shunting was not something independent of the job of shunting, but was an unauthorized or prohibited mode of doing an authorized job.

We have been referred to a number of cases, and of all of them it may be said that the facts being very different, they cannot be decisive in the present case. But I think that the case already mentioned, *Lockhart's* case[3] and one other which I will particularly mention, also a Privy Council case, *Goh Choon Seng* v. *Lee Kim Soo*,[4] tend to support the view that the court does not attempt narrowly to define the precise limit and scope of a man's employment by treating the particular prohibition, express or implied, as limiting the scope of the employment as distinct from being confined in its application to modes of performance. In *Goh Choon Seng* v. *Lee Kim Soo*[4] persons who had been employed, among other things, to collect and set fire to rubbish, had thought fit to carry the rubbish on to somebody else's land and set fire to it there. It does not appear that they were expressly prohibited in terms from going on to somebody else's land, but obviously such a prohibition would be implicit; at least it could not have been authorized. That, however, was what had been done. It was held by the Board, nevertheless, that the damage which flowed from the burning of rubbish on the land of a third party, flowed from an act done by the servants in an unauthorized manner but in pursuance of their authorized task.

I also cite a few words of Romer L.J. in *Beard* v. *London General Omnibus Co.*[5] (a case in which the decision went the other way), as indicating what I have ventured to call the common sense of the matter. He said: "If one sees in the "streets of London an omnibus admittedly belonging to the "defendant company driven in the ordinary way by a person who "appears to be a driver, the presumption is that he is "authorized by the company." So here, as it seems to me, if one sees a van on the premises of a garage company being driven by a garage hand, the presumption is that the garage hand is

[3] [1942] A.C. 591.
[4] [1925] A.C. 550.
[5] [1900] 2 Q.B. 530; 16 T.L.R. 499.

doing something which he is authorized to do. Apart, therefore, from the matter of the highway, to which I will come in a moment, it seems to me, with all respect to the judge, that the prohibition against moving cars by driving them does not amount to such a limitation of the scope of Preston's authority that it can be said that he was doing something outside the scope of his employment.

There remains this last point. As I have indicated, Preston moved this van, not within the precincts of the garage itself, but out on to the highway, on to the Pentonville Road, where incidentally, he was doing something unlawful, having no licence to drive at all. The question then arises whether the scope of the employment, defined in general terms as it was by Mortimer, did not extend to the movement of this van out into the street with a view to bringing it back behind the lorries into the yard. I think that it is clear that nothing of significance was made of that particular matter in the court below. The question was asked during the argument, supposing Preston, obeying the command or request of "Bob," had pushed this van on to the highway and then it had caused some accident, whose would the liability have been? In cross-examination, all that was said that was material was this by Mortimer: "Not on to the road; there "would be nothing wrong for him to push it on to the ramp." By the ramp I understand is meant not the inside of the garage, but that part of the defendants' premises on which the pumps were. Again, it is important to bear in mind the circumstances of the accident. Preston himself said (and there seems to be no reason to doubt it, nor was he cross-examined upon it) that originally he intended to move the van (albeit by the prohibited method of driving) out of the lorries' way by going forward and then back again into a doorway, but the possibility of so doing was prevented by the fact that the lorries were too close behind him to enable him to get back. Therefore, to get out of the way, he had to go out into the Pentonville Road. In the circumstances, it seems to me that the excursion on to the Pentonville Road is purely accidental to what Preston was doing. And that was something which he was engaged to do. In general terms, he was moving this van out of the way of two other lorries. I do not, therefore, think, that the result is altered by the circumstance that Preston took this van off the garage premises on to the Queen's highway.

I said at the beginning of my judgment that the principle is not difficult to state. The difficulty has been in its application. Giving the matter the best attention that I can, and applying (as I hope I am entitled to do) some degree of commonsense to the matter, I conclude (contrary to the view of the judge) that Preston was here doing no more than performing in an unauthorized way an act he was employed to perform. In my judgment, the plaintiffs are entitled to recover and this appeal should be allowed accordingly.

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BIRKETT L.J. I agree. My view of this case is that the act of Preston's was merely a wrongful and unauthorized mode of doing an act authorized by the employer. It is plain that the judge took the opposite view because he said that Preston was not authorized to drive: "I hold that this was not a case where the "defendants' servant was doing an authorized act in a manner "which was unauthorized, but that the act in question, viz., "the driving of a car, was outside the scope of what he was "employed to do and was wholly unauthorized." Those are the two conflicting views with which we have been concerned during the argument. With the greatest respect to the county court judge, I think that in coming to his conclusion he fell into a very pardonable error in regarding this act of driving in itself as being a conclusive thing. Lord Wright in *Century Insurance Co. Ld.* v. *Northern Ireland Road Transport Board* [6] was dealing with the act of a servant (which was, of course, a negligent act) in throwing down a lighted match or cigarette at a place and at a time where petrol fumes were to be expected. He said [7]: "The "duty of the workman to his employer is so to conduct himself "in doing his work as not negligently to cause damage either "to the employer himself or his property or to third persons or "their property, and thus to impose the same liability on the "employer as if he had been doing the work himself and com- "mitted the negligent act. This may seem too obvious as a "matter of common sense to require either argument or authority. "I think what plausibility the contrary argument might seem "to possess results from treating the act of lighting the cigarette "in abstraction from the circumstances as a separate act."

With great respect to the county court judge, I think that that is what he did here, because from the careful note which he made about the matter the clear line of demarcation that he made was: "You were not authorized to drive and therefore the thing "you did was outside the scope of your employment"; whereas I think that the view which ought to be taken on the facts and on the authorities which have dealt with similar facts is that this was a wrongful and unauthorized mode of doing the act authorized by the master. In *Canadian Pacific Railway Co.* v. *Lockhart*,[8] the judgment of the Privy Council said: "In these cases the "first consideration is the ascertainment of what the servant was "employed to do. The existence of prohibitions may, or may "not, be evidence of the limits of the employment."

In this case it is not clear exactly what Preston was employed to do. The evidence of Mr. Mortimer, which was preferred and accepted by the judge, can be summarized in this way. He said that Preston was a general garage hand and that he was to assist in shunting vehicles, that is, to assist drivers by standing behind vehicles. Later he was to fit in on the service side. What that means is not quite clear. It may mean greasing or filling up with

[6] [1942] A.C. 509; [1942] 1 All E.R. 491.
[7] [1942] A.C. 509, 519.
[8] [1942] A.C. 591, 600.

petrol, or polishing cars—I do not know. Furthermore, Mr. Mortimer said that between 8 and 9 o'clock in the morning, which was the time when this accident occurred, Preston's job was to assist the drivers when driving out. What he meant by that was, I think, to stand behind them and give them directions. Furthermore, Mr. Mortimer said that Preston could push a car, but not into the road. It was not wrong for him to push a car on to the ramp. Finally, he said that he was not authorized to drive, and there was, indeed, a prohibition against it. It is not really clear what were the precise duties of Preston.

We had the advantage of the note made by counsel from which it appears that the judge said, adopting Mr. Mortimer's evidence: "It is enough if Preston was employed to move vehicles." So the argument before the judge was that the scope of Preston's employment was to move vehicles. "Later his job was to get "cars out of the way of other cars. A great deal can be done by "hand. In no sense a driver and has never driven in his life." Then we had Mr. Coningsby's note, according to which the judge said: "I am not able to take the view that if the plaintiffs "showed no more than this, that Preston was authorized to push "vehicles about by hand, thus moving them a few feet, and "perhaps assisting movement by guiding them with one hand "on the steering wheel, they can succeed in this action against "Preston's employers. Part of his job being to assist in getting "cars out of the way of other cars, a man who is in no sense "a driver and has never perhaps driven a car in his life could "have done this job." The important words there, I think, are "Part of his job being to assist in getting cars out of the way "of other cars." Then the judge's note says: "It was part of "his duty to assist in the movement of cars on the defendants' "premises by pushing them or by giving guidance to the driver, for "example, when reversing, but he was not authorized to drive."

Having cited those passages, it seems to me, in view of what the Privy Council said, that the first consideration is to gather the scope of the employment. The conclusion to which I have come on the evidence is that the scope of the employment was as a general garage hand to get cars out of the way of other cars. I do not know whether one is justified in bringing one's own experience into a case of this kind, but everybody knows that quite frequently in a big garage, in order to get one's car out of the garage, someone has to move other cars out of the way. It seems to me clear from the evidence, even rejecting entirely that of Preston, that his employment can reasonably and properly be stated in this way: "Part of his job was to get cars out of the "way in order to let other cars move freely in the garage."

There is a passage in Salmond on Torts, 11th ed., p. 109, which says: "Even express prohibition of the wrongful act is "no defence to the master, if that act was merely a mode of "doing what the servant was employed to do." So once a conclusion is reached as to what the scope of the employment of

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Preston was, even bearing in mind what is called an express prohibition, my own view is that the driving of the car in the circumstances of this case was not something outside the scope of the employment, but was merely a wrongful, improper and unauthorized mode of doing an act which was authorized by the master, so as to make the master liable.

I confess that I was disturbed by the point that this happened upon the highway. To drive upon the highway without a licence, as Preston did, was an illegal act, and it cannot be said, so the argument runs, that that was in any sense an unauthorized way of doing an authorized thing: it was something completely and entirely outside the scope of the employment. That consideration occasioned me some perturbation of mind, but I am bound to say that upon full reflection that I agree in the view which has been expressed by the Master of the Rolls. If the facts are looked at, it seems to be quite an incidental matter. It was not a case where Preston was driving some 40 or 50 miles with a customer's car. It was part and parcel of the movement of the car, to enable the business of the garage to go on. No doubt he had been rather forcibly told by the lorry drivers what he had to do, and he was getting the car out of the way in the garage. In the circumstances of the case, it became impossible to fulfil that duty without taking the course he did, which involved him going upon the highway where the accident took place. Had he not done that, there would have been no trouble, but I cannot think that the mere fact that he did go on the highway, and the mere fact that when he was there he was without a licence and, therefore, his act was illegal, makes any difference. I think that the true view to take of the matter is that it was merely an incidental part of performing the act which he was employed to do, though it was an unauthorized way of doing it.

I agree with the judgment delivered by my Lord and that this appeal should be allowed.

ROMER L.J. I agree. I was troubled a little at one time during the discussion about the point whether the fact that the accident took place not within the curtilage of the garage premises but on the public highway outside made any difference. The judge in his short note of judgment said: "It was part of his "duties"—he was referring to Preston—"to assist in the move-"ment of cars on the defendants' premises by pushing them." Then in one of counsel's note of the judgment the judge, according to the note, said: "Preston was authorized to push vehicles "in the garage." It was not quite clear to me that a point could not be made to this effect, that a necessary inference from those statements of the judge was that anything that was done by Preston outside the defendants' premises was something done outside the scope of his employment. But the point does not appear to have been relied on a great deal in the court below. It was used for a somewhat different purpose, and certainly, I think,

formed no foundation for the judge's decision. I think myself, on reflection, that Mr. Eveleigh was well justified in submitting that that act of taking the van on to the road was not an independent act in itself, but was part of the act of getting the van out of the way. I do not think that the judge was intending to define the premises within which alone the defendants were authorized to do their work and, accordingly, it follows from Mr. Eveleigh's submission that the accident did take place within the area of Preston's authorized activities.

If that be so, I have practically nothing to add to what my lords have said, because it seems to me that the facts bring this case clearly within the third proposition which was laid down by the Privy Council in *Goh Choon Seng* v. *Lee Kim Soo*,[9] where judgment was delivered by Lord Phillimore. I need not refer to the first of the two heads which Lord Phillimore laid down. The third one is[10]: "Where the servant is doing some work which he "is appointed to do, but does it in a way which his master has "not authorized and would not have authorized, had he known of "it." That statement was afterwards elaborated and affirmed in the later decision of the Judicial Council in *Lockhart's* case,[11] and, applying it, it seems to me that when Preston was told to keep the garage clear for other cars, it involved the movement of cars and the mode in which he chose to perform that duty was a subsidiary part of the function itself, and the fact that he chose what, after all, is a usual and not an abnormal method of doing it, brings the matter within the operation of the law as stated in those cases. It was an unauthorized method of doing an authorized act, and according to the law as decided in those cases, the employer is liable for the consequences.

I accordingly agree that the appeal should be allowed.

*Appeal allowed.*

Solicitors: *J. G. Barr; Robbins, Olivey & Lake.*

B. A. B.

[9] [1925] A.C. 550.
[10] Ibid. 554.
[11] [1942] A.C. 591.

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[PRIVY COUNCIL.]

* BRIDGET ANTONY . . . . . APPELLANT;

AND

IMELDA WEERASEKERA AND ANOTHER . RESPONDENTS.

J. C.†
1953
*July* 8.

ON APPEAL FROM THE SUPREME COURT OF CEYLON.

*Ceylon—Deed of gift—Undue influence—Principles applicable.*

The English law relating to undue influence is part of the law of Ceylon.

† *Present*: LORD NORMAND, LORD COHEN, SIR LIONEL LEACH, and MR. L. M. D. DE SILVA.

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*Perera* v. *Tissera* (1933) 35 N.L.R. 257, at pp. 266 and 282 approved.

It is clear from the observations of Evershed M.R. in *Tufton* v. *Sperni* [1952] 2 T.L.R. 516, based on a review of the authorities, including *Allcard* v. *Skinner* (1887) 36 Ch.D. 145, to the effect that certain circumstances can give rise to a relationship between two parties which makes it "the duty of one party to take care "of the other," that that includes the duty of giving advice.

APPEAL (No. 13 of 1952) from a judgment and decree of the Supreme Court of Ceylon (September 11, 1950) which affirmed a judgment and decree of the District Court of Colombo (September 8, 1948) which had dismissed an action in which the appellant sought to set aside a deed of gift executed by her in favour of the first respondent.

The following introductory statement is taken from the judgment of the Judicial Committee: The plaintiff instituted this action in the District Court of Colombo on June 11, 1946, to obtain a declaration that a deed of gift executed on April 12 of that year in favour of the first defendant, her grand-daughter, was "void on the ground that it had been obtained by pressure "and surprise, without making her aware of the contents and "through the exercise of undue influence and by fraudulent "representations." The plaintiff was then a widow of the age of 70 years. Her husband had died three years previously, and she was living with her son and the first defendant, who was the plaintiff's grand-daughter through a deceased daughter. The deceased daughter had in her lifetime first married the father of the first defendant, and, after his death, a Dr. Van Dort who, at the times material to this action, was in close touch with the family. The first defendant married the son of the second defendant on June 28, 1947.

The two defendants filed separate answers in which the above-mentioned allegation of the plaintiff was denied. The second defendant pleaded further that no cause of action had arisen against him even if the fcts stated in the plaint were true. He was unrepresented at the hearing before the Board, and their Lordships did not go into the question, which was not argued before them, whether he should have been joined in this action.

The District Judge (Sinnetamby A.D.J.) dismissed the action after examining all the relevant aspects of the case, and he expressed his views upon them in detail. His judgment was affirmed by the Supreme Court (Jayetileke C.J. and Dias S.P.J.).

1953. April 22, 23, 27 and 28. *D. N. Pritt Q.C.* and *Stephen Chapman* for the appellant referred to *Tufton* v. *Sperni*[1]; *Allcard* v. *Skinner*[2]; *Baker* v. *Monk*[3]; and *Inche Noriah* v. *Shaik Allie Bin Omar*.[4]

[1] [1952] 2 T.L.R. 516.
[2] (1887) 36 Ch.D. 145.
[3] (1864) 33 Beav. 419.
[4] [1929] A.C. 127.

*Ralph Millner* and *T. O. Kellock* for the first respondent were not called upon.

July 8. The judgment of their Lordships was delivered by MR. L. M. D. DE SILVA who, after stating the facts set out above, continued:—Their Lordships take the view that the Supreme Court were clearly right in affirming the judgment of the District Judge, and their Lordships have very little doubt that the Supreme Court before whom the case was argued for four days dismissed the appeal without giving any reasons because they were in full agreement with the findings of fact of the District Judge and the views taken by him on the law. Their Lordships would, however, have derived great assistance if the reasons for the dismissal had been stated.

The plaint which has been filed set out in outline the facts upon which the plaintiff relied to sustain her case. It stated, inter alia, that: "The second defendant commenced to visit the "plaintiff in or about the year 1945 and to evince concern and "interest in the plaintiff and the first defendant and continued "such behaviour as a self-constituted friend and adviser to the "plaintiff. In or about November, 1945, the second defendant "through his brother John Zoysa suggested to the plaintiff a "marriage between the second defendant's son and the first "defendant, to which proposal the plaintiff did not agree.

"Notwithstanding the plaintiff's rejection of the said proposal "the second defendant continued his visits which became more "frequent thereafter and gained an ascendancy over the minds of "the first defendant and the plaintiff with a view to gaining his "purpose of putting through the marriage for his son with the "first defendant and securing all the properties of the plaintiff "for the benefit of his son. With the aforesaid intent, the "second defendant succeeded in making the first defendant "amenable to his wishes prior to the dates hereinafter set out."

It then proceeded to give in some detail the events of April 11, 1946, which led to the execution of the impugned deed. The plaintiff said she was "induced and prevailed upon" by "those present" to sign it in spite of a refusal by her so to do. The case was opened on the basis of the plaint but, as observed by the District Judge "In her evidence the plaintiff made it quite "clear that the second defendant did not at any stage gain "an ascendancy over her mind. . . . It is her case that at "no time did she consult the second defendant with regard to "any of her actions." She said in the course of her evidence: "I have nothing to consult him (second defendant) about. I "have nothing to do with him. . . . After my husband's death "I did not find it necessary to get his advice. He gave me no "advice and I did not consult him on anything." And as observed by the District Judge: "There is no other evidence in "the case . . . which indicates that the second defendant had

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" in the slightest degree gained an ascendancy over the mind of " the plaintiff."

The plaint averred that the first defendant was aware of the facts alleged by the plaintiff. There was nothing further averred against her except that she had agreed to execute a retransfer but had not done so. The words " those present " (referred to above) were wide enough as a matter of language to include the first defendant, but it was no part of the argument before the Board that she " induced " or " prevailed upon " the plaintiff to execute the deed, or that she did anything she should not have done. Presumably no such suggestion was made in the courts below.

The case for the plaintiff was based on the conduct of the second defendant in relation to her. It was not disputed that if undue influence was shown to have been exercised on the plaintiff by the second defendant, it would vitiate the deed in favour of the first defendant, even though the first defendant took no part in the exercise of that undue influence.

Seven issues were framed by the District Judge, of which the first six were suggested by counsel for the plaintiff. The seventh, suggested by counsel for the second defendant, raised the question whether a case against him had been made out in the plaint. It is sufficient to say of the first six issues that they put in issue the facts stated in the plaint and referred to above, and raised the question whether, on the basis of those facts, undue influence or fraud had been established. The District Judge observed: " Strictly speaking, even on the plaintiff's own " evidence, these issues will have to be answered mainly against " the plaintiff because, according to the evidence, even if there " was any pressure, surprise, or undue influence, it was not " exercised as alleged in the plaint or in the circumstances set " out in the plaint." From what has been said earlier, and from other observations correctly made by the District Judge, it is clear that there is much substance in this view. He, however, did not decide the case on that ground. He went on " to " consider whether on the evidence led there was undue influence, " pressure, surprise or fraudulent representation of any kind which " would justify the setting aside of the deed of gift." This was a more satisfactory course. Their Lordships see no ground on which they could disturb the findings of fact of the District Judge, concurred in as they must be taken to have been by the Supreme Court, and they agree with him that the facts as so found do not give rise in law to a case for setting aside the deed.

The English law relating to undue influence is part of the law of Ceylon. It was so held by the Supreme Court of Ceylon in *Perera* v. *Tissera*.[1] The view there expressed was not challenged at the hearing of the present case before the board or in the courts in Ceylon. Their Lordships are of the opinion that that view is correct.

[1] (1933) 35 N.L.R. 257, 266, 282.

The principles on which this case falls to be decided were laid down by Cotton L.J. in *Allcard* v. *Skinner*.[2] It was there stated that voluntary gifts would be set aside in two classes of cases:— "First, where the court has been satisfied that the gift was the "result of influence expressly used by the donee for the purpose; "second, where the relations between the donor and donee have "at or shortly before the execution of the gift been such as to "raise a presumption that the donee had influence over the "donor. In such a case the court sets aside the voluntary gift, "unless it is proved that in fact the gift was the spontaneous "act of the donor acting under circumstances which enabled him "to exercise an independent will and which justifies the court in "holding that the gift was the result of a free exercise of the "donor's will. The first class of cases may be considered as "depending on the principle that no one shall be allowed to "retain any benefit arising from his own fraud or wrongful "act. In the second class of cases the court interferes, not on "the ground that any wrongful act has in fact been committed "by the donee, but on the ground of public policy, and to "prevent the relations which existed between the parties and the "influence arising therefrom being abused."

That case was approved and applied by Lord Hailsham (delivering the judgment of the board) in *Inche Noriah* v. *Shaik Allie Bin Omar*.[3] It was referred to also in the recent case of *Tufton* v. *Sperni*,[4] in which the Master of the Rolls examined the case law relating to undue influence in great detail. He observed that the decided cases on the subject established the proposition that the jurisdiction exercised by courts of equity over the dealings between persons between whom there was a relationship of confidence was "not circumscribed by reference to defined "limits," and that "the existence of the jurisdiction and the "right and duty to exercise it must in every case depend on the "special facts of that case and the inferences properly to be "drawn from them." He pointed out that the cases refuted the suggestion "that to create the relationship of confidence, the "person owing the duty must be found clothed in the recognizable "garb of a guardian, trustee, solicitor, priest, doctor, manager, "or the like." Of special relevance to this case is his observation, based on previous cases, that certain circumstances can give rise to a relationship between two parties which makes it "the "duty of one party to take care of the other," and it is clear from what he says that the duty of taking care includes the duty of giving advice.

Before their Lordships it was stated by counsel for the plaintiff that he did not find it possible to press the plea of fraud. He said also that it was not possible to argue that this case came within the first category of cases referred to in *Allcard* v. *Skinner*,[5] namely, cases where "the gift was the result of

[2] (1887) 36 Ch.D. 145, 171.
[3] [1929] A.C. 127.
[4] [1952] 2 T.L.R. 516, 522.
[5] 36 Ch.D. 145, 171.

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" influence expressly used." His argument was that it came within the second category. He urged that the relationship between the plaintiff and the second defendant was in the circumstances of this case one of confidence giving rise to a duty on the part of the second defendant to surround the plaintiff with care, and to advise her. He argued that there had been a breach of that duty and that consequently a presumption of undue influence had arisen. With this contention their Lordships are unable to agree.

It is common ground that the impugned deed was signed in the house of Dr. Van Dort on April 12, 1946, and that there were present on that occasion the plaintiff, the two defendants, Mr. P. D. A. Mack, a proctor acting for the first defendant, Mr. J. A. V. Modder, a proctor who had been instructed to act for the plaintiff, and Dr. Van Dort. Mr. Modder, however, had not met the plaintiff before that day, and the plaintiff stated in evidence that she was taken to Dr. Van Dort's house in the belief that she was being taken elsewhere. It is admitted that the car in which she was taken there had been procured by the second defendant. She stated further that she was prevailed upon to execute the impugned deed although she had expressed unwillingness to do so on that day. These facts and these allegations called for careful investigation. Their Lordships see no reason to doubt that they received due consideration from the District Judge when reaching his conclusions as to the credibility of the witnesses who have been called and as to the facts which he found to be established. It is not necessary for their Lordships to refer in this judgment to more than a few of the facts so found.

It is clear from what has been stated earlier that the plaintiff in her evidence had disavowed any suggestion that she consulted the second defendant or took his advice. Consequently the case for her could be put and was pressed before their Lordships only on the basis that the duty which it was suggested the second defendant owed the plaintiff arose on April 12, 1946. It was argued that the second defendant was the prospective father-in-law of the first defendant and that he had been instrumental in securing the presence of the plaintiff at the house of Dr. Van Dort on that day. She was there asked to sign the impugned deed, to which she had given no thought till that day. It was argued that in these circumstances, taking into account that the proctor who usually attended to her affairs was not present, it was the duty of the second defendant to warn the plaintiff against signing the deed, or at least to explain to her its implications. The findings of fact destroy this argument.

The District Judge had no doubt about the credibility of Dr. Van Dort, who gave evidence. Dr. Van Dort said that he had earlier in 1946, probably in February or March, told the first defendant in the course of a conversation about her affairs, that she should have independent advice with regard to her share of her grandfather's (plaintiff's husband) intestate estate; that with

the plaintiff's approval Mr. Mack was retained by him to act for the first defendant; that in the course of investigation Mr. Mack discovered that certain valuable properties had been transferred by the plaintiff to her son; that he (Dr. Van Dort) informed the plaintiff that she had "signed away" these properties, and that she appeared to be angry when she realized what she had done; that some days before its execution the plaintiff asked him to get a lawyer to prepare the deed which is now impugned "before her "son forced her to sign other things away"; that he asked Mr. Mack to prepare the deed, but Mr. Mack was unwilling as he was acting for the first defendant, and that Mr. Modder was thereafter secured to do the work. This evidence is corroborated by Mr. Mack, whom the District Judge regarded, no doubt correctly, as a person of integrity with a high standing in his profession.

It will thus be seen that the train of events which led to the execution of the impugned deed was set on foot by Dr. Van Dort. The reason for its execution was the idea entertained by the plaintiff that she had "signed away" properties to her son and that immediate provision should be made for the first defendant. It is not necessary for their Lordships to go into the question whether this idea was correct or not. She certainly entertained it. On the findings in the court below their Lordships have formed the view that without doubt the plaintiff went to Dr. Van Dort's house on April 12, 1946, with the object of executing the impugned deed, having given instructions for its preparation earlier. It is impossible to accept the suggestion that the second defendant alone or with others lured her to Dr. Van Dort's house and asked her to sign a deed which had not been under contemplation by her prior to that day. There are no facts established in this case on which it can be suggested that a duty was cast on the second defendant to advise the plaintiff or to surround her with care. Even if there were, it is difficult to see why the second defendant, upon such knowledge of facts as could be supposed he had, should have advised the plaintiff not to execute the deed. Even if the plaintiff's knowledge of the facts was faulty, there is nothing to show that the second defendant knew better. There is nothing in this case upon which the impugned deed can be assailed on the principles discussed earlier.

Their Lordships feel that reference should be made to an application made at the trial by the counsel for the plaintiff to call evidence in rebuttal after the case for the defendant had been closed. It was urged that certain evidence led for the defendant, namely, that the plaintiff was surprised when she learnt that she had transferred certain properties to her son, had not been put to the plaintiff in cross-examination. And also that an incident spoken of by the first defendant as having taken place on April 11 was not so put. With regard to the first point, it is to be observed that in examination-in-chief one Father Bourgeois, the first witness called by the plaintiff, made reference to a statement made by the plaintiff to him that "people told her that she had

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" signed away valuable things belonging to her and she did not " know what she had signed." This evidence was, in the context in which it was given, materially the same as the evidence complained of, and consequently it was unnecessary for the defence to put the latter in cross-examination to the plaintiff. The incident of April 11 was put to one of the plaintiff's witnesses who was one of the principal participants in it. Their Lordships do not attach much importance to the failure to put it to the plaintiff. Upon the view their Lordships have formed on these two points certain submissions of law relating to the calling of evidence in rebuttal, and involving a consideration of certain sections of the Ceylon Civil Procedure Code, which were made in the courts below (but not argued before their Lordships) do not arise for comment in this judgment.

For the reasons they have stated their Lordships will humbly advise Her Majesty that the appeal be dismissed. The appellant must pay the costs of the appeal.

Solicitors: *Darley, Cumberland & Co.; T. L. Wilson & Co.*

C. C.

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[COURT OF CRIMINAL APPEAL.]

C. C. A.
1953
*July* 6.
Lord Goddard C.J., Parker and Donovan JJ.

## * REGINA *v.* SIMONS AND SIMONS.

*Criminal Law — Summary offence punishable with more than three months' imprisonment — Committal to quarter sessions — Doubt whether election by accused to go for trial—Whether power to quash committal—Summary Jurisdiction Act,* 1879 (42 & 43 *Vict. c.* 49), *s.* 17.

*Road Traffic—Driving while disqualified—Conviction for other offences —Offence under Road Traffic Act taken into consideration when passing sentence for other offences—Jurisdiction of court—Road Traffic Act,* 1930 (20 & 21 *Geo.* 5, *c.* 43), *s.* 7 (4).

The applicant was charged before justices under section 7 (4) of the Road Traffic Act, 1930, with driving a motor-vehicle while disqualified and was committed to quarter sessions for trial for that and other offences. A doubt arose as to whether he had elected to go for trial for the offence of driving while disqualified and a count charging that offence was not included in the indictment. The recorder quashed the committal for that offence and the applicant pleaded guilty to the other offences. In passing sentence for the other offences, the recorder took into consideration (on request) the offence of driving while disqualified. On an application for leave to appeal against sentence:—

On refusing leave to appeal, *per curiam.* A court has no power to quash a committal and, in the circumstances, the indictment should have contained a count charging the applicant with driving while disqualified, when evidence could have been given whether he had elected to go for trial or not, and then, if the recorder was

satisfied that he had not so elected, the count could have been quashed.

Quarter sessions ought not to have taken that offence into consideration when passing sentence for the other offences; since (1) they had no power to try it (unless the applicant had so elected), and (2) the taking into consideration of an offence does not in law amount to a conviction, and as the special provisions of the Road Traffic Act, 1930, with regard to endorsement and disqualification from holding a driving licence can only follow on a conviction, offences under that Act to which these special provisions apply ought not to be taken into account where there is a conviction for some other offence but should be the subject of a separate prosecution.

APPLICATION for leave to appeal against sentence.

The applicants, two brothers, were charged with various offences including the taking of a motor-vehicle without consent and with storebreaking. One, Kenneth, was also charged under section 7 of the Road Traffic Act, 1930,* with driving a motor-vehicle while disqualified, a summary offence punishable with six months' imprisonment. Both brothers were committed for trial to quarter sessions. There was a difference of opinion as to whether Kenneth had elected to go for trial for the offence of driving a motor-vehicle while disqualified, and both counsel agreed that, if there was a conviction, that offence should be asked to be taken into consideration. A count charging that offence was not included in the indictment and the recorder was asked to quash the committal for that offence, which he did. Kenneth pleaded guilty to taking a motor-vehicle without consent, receiving, and dangerous driving. The recorder was asked and took into consideration the offence of driving while disqualified and Kenneth received a sentence of three, and his brother four, years' corrective training. Both brothers applied for leave to appeal against sentence.

The applicants were not represented.

LORD GODDARD C.J. stated the facts as set out above and continued: It is with regard to the offence that was taken into consideration that this court desires to make a comment because we are not giving leave to appeal. Driving a motor-vehicle while disqualified is a summary offence punishable with six months' imprisonment under the Road Traffic Act, 1930, s. 7 (4), and it is one of the offences—I think the only offence—in that Act for which it is provided that the sentence shall be one of imprisonment unless special circumstances are found, but that is a matter with which we dealt in *Lines* v. *Hersom*.[1]

* Road Traffic Act, 1930, s. 7 (4): "If any person who under . . . this "Act is disqualified . . . while he "is so disqualified drives a motor-"vehicle . . . that person shall be "liable on summary conviction to "imprisonment for a term not exceed-"ing six months. . . ."

[1] [1951] 2 K.B. 682; [1951] 2 T.L.R. 481; [1951] 2 All E.R. 650.

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The magistrates committed the applicant Kenneth for trial for that offence, but it was an offence which could only be indictable if he had claimed the right to be tried by a jury under the provision in section 17 of the Summary Jurisdiction Act, 1879 —now contained in section 25 of the Magistrates' Courts Act, 1952 —which provided that if a person was liable to be sentenced to more than three months' imprisonment, he could elect to be tried by a jury. As he had been committed for trial for the offence of driving while disqualified and as there was a doubt whether he had elected to go for trial it would have been better, in the circumstances, to have included that count in the indictment. If he had been indicted, as he ought to have been, evidence could have been given, by calling the magistrates' clerk, as to whether he had elected to go for trial or not, and if the recorder came to the conclusion that he had not elected to go for trial, he could have quashed the count. As it was, the recorder was asked to quash the committal. That was the first thing about which this court thinks that a mistake was made: I do not think that a court can quash a committal. The only thing that it can do in such circumstances is to see that the indictment contains a count for the offence and then quash the count.

The recorder was asked to and said that he would take into consideration the offence of driving while disqualified. There are two objections to that. First, as this court has always said, if a court has no power to try an offence they cannot take it into consideration when passing sentence for another offence. In this case quarter sessions only had power to try the offence if the applicant had elected to go for trial. The second objection is that offences in relation to the driving of motor-cars are not offences which ought to be taken into account where there is a conviction for some other offence. That has been laid down by this court in unmistakable terms. Such offences cannot be taken into account because the special provisions of the Road Traffic Act, 1930, with regard to endorsement or disqualification from holding a licence can only follow on a conviction and, as it has been pointed out over and over again, the taking into consideration of an offence does not in law amount to a conviction.

This court, therefore, would like to repeat once more, first, that if a court has no jurisdiction to try a particular offence, it ought not to take that offence into account when passing sentence for an offence which it has power to try, and secondly, that offences against the Road Traffic Act in relation to the driving, insurance or otherwise of motor-vehicles ought not to be taken into account when passing sentence for another offence, but should be left for separate prosecution, because the steps which the law requires magistrates to take with regard to endorsement or disqualification from holding a licence cannot be taken when the offence is taken into consideration but only if there is a conviction for that offence.

In this case, however, there is no ground for interfering with the sentences, and the applications for leave to appeal are refused.

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*Applications refused.*

J. F. L.

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[QUEEN'S BENCH DIVISION.]

## * DIRECTOR OF PUBLIC PROSECUTIONS v. ROGERS.

1953
*July* 14.

Lord Goddard C.J., Parker and Donovan JJ.

*Criminal Law—Indecent assault—Girl under* 16*—Daughter requested by father to perform indecent act—No compulsion—Offences against the Person Act,* 1861 (24 *&* 25 *Vict. c.* 100), *s.* 52.

A father, being alone in the house with his daughter, aged 11, put his arm round her shoulders and led her upstairs. He then exposed his person and told the child to masturbate him, which she did. The child made no objection or resistance, and no force was used towards her:—

*Held*, that, there being no evidence that he had used compulsion or had acted in a hostile manner towards his daughter, the father was not guilty of indecent assault.

*Fairclough* v. *Whipp* [1951] 2 T.L.R. 909; [1951] 2 All E.R. 834 applied.

*Beal* v. *Kelley* [1951] 2 T.L.R. 865; [1951] 2 All E.R. 763 distinguished.

CASE STATED by Kent justices.

At a court of summary jurisdiction sitting at Hythe in the county of Kent, two informations were preferred by the appellant, the Director of Public Prosecutions, against the respondent, Sidney Frank Rogers, alleging that he between October 27 and November 7, 1952, at Hythe indecently assaulted a female under 16 years of age, contrary to section 52 of the Offences against the Person Act, 1861.

The following facts were proved or admitted: the respondent at all material times lived with his wife and 11-year-old daughter at 13 Cinque Ports Avenue, Hythe. On two days between October 27 and November 7, 1952, the respondent put his arm around the shoulders of his daughter and led her upstairs. She made no objection or resistance and no force was used. The respondent then exposed his person to the child and told her to masturbate him. On both occasions the child obeyed the respondent although she did not wish to do so. The respondent used no force or compulsion beyond a verbal request. On both occasions the respondent was alone in the house with the child. On both occasions at the time when the respondent put his arm round his daughter's shoulders he did so for the purpose of leading her upstairs intending to conduct himself indecently

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towards her. On the first occasion the child neither minded nor objected to the respondent putting his arm round her shoulders. On the second occasion, however, knowing what was the nature of the respondent's intention towards her, she did not wish to accompany him upstairs, but, nevertheless, neither objected nor resisted, but submitted to her father's request.

On behalf of the appellant it was contended that the placing of the respondent's arm round his daughter's shoulders without her consent was an assault. That as there were circumstances of indecency accompanying that act, the child could not consent to it, and that therefore the justices could hold that the respondent had assaulted his daughter; that the acts as proved disclosed more than a mere invitation by the respondent to the child to touch his penis. It was further contended that the justices could infer an assault from the fact that the child was alone in the house with the respondent; that she was ordered by him with all the weight of parental authority to masturbate him; that by reason of the exercise of that authority the touching of his penis was an involuntary act by the child; and that those facts by themselves constituted an assault having regard to the age of the child.

For the respondent it was contended that there was no case for him to answer on the grounds that the acts of masturbation were invitations by the respondent to his daughter to touch his penis which alone could not constitute an assault on the child, and that a hostile act was a necessary ingredient of an indecent assault on a child under the age of 16, and the prosecution had adduced no evidence of any such hostile act in that the placing of the respondent's arm round his daughter's shoulders was a separate transaction from the subsequent indecency, and was not an assault because it was not a hostile or unfriendly act even if (which was denied) it formed one transaction with the subsequent indecency.

The justices being of the opinion that they were unable to distinguish the case from *Fairclough* v. *Whipp* [1] dismissed both informations.

*Mervyn Griffith-Jones* for the appellant.
*Dudley Collard* for the respondent.

The following cases were cited in argument: *Fairclough* v. *Whipp* [1]; *Beal* v. *Kelley* [2]; *Reg.* v. *Burrows* [3]; *Reg.* v. *Rolfe*.[4]

LORD GODDARD C.J. stated the facts and continued: Before one can find that a man has been guilty of an indecent assault, one has to find that he was guilty of an assault, for an indecent

[1] [1951] 2 T.L.R. 909; [1951] 2 All E.R. 834.
[2] [1951] 2 T.L.R. 865; [1951] 2 All E.R. 763.
[3] [1952] 1 T.L.R. 51; [1952] 1 All E.R. 58n.
[4] (1952) 36 Cr.App.R. 4.

assault is an assault accompanied by indecency. If one could show here that the respondent had done anything towards his child which by any fair use of language could be called compulsion, or acted, as I have said in other cases, in a hostile manner towards her, that is, with a threat or a gesture which could be taken as a threat, or by pulling the child, after she had shown reluctance, towards him, that would undoubtedly be assault, and if it was accompanied by an act of indecency, it would be an indecent assault.

*Beal* v. *Kelley*,[1] to which we were referred, was quite a different case from the present, because there the defendant exposed himself to a boy and asked the boy to handle him and, when the boy refused to do so and began to go away, the defendant caught hold of him and pulled the boy towards him. As we have pointed out, one can have an assault without battery, and in that case there was undoubtedly an assault because the boy wanted to get away from this disgusting behaviour. There was an assault, it was accompanied by indecency, and, therefore there was an indecent assault. That case must be compared with *Fairclough* v. *Whipp*,[2] in which the respondent exposed himself in the presence of a girl aged nine, saying "touch it," which she did. There we had to hold that that was not an indecent assault because there was no authority which said that where one person invites another to touch him that can amount to an assault on the person who is invited.

I think that the justices were right in saying that in principle they could not distinguish the present case from *Fairclough* v. *Whipp*.[2] It is true that one might get a case in which the evidence showed that what was being done was really done against the will of the child. But in the present case, however much we may regret that we cannot punish this man for doing an act which deserves the reprobation of every decent man, I feel that the only thing we can do is to say that the justices came to a right decision, and reluctantly dismiss this appeal.

PARKER J. I feel constrained to agree, but with extreme reluctance.

DONOVAN J. I agree.

*Appeal dismissed.*

Solicitors: *Director of Public Prosecutions; G. F. Hudson, Matthews & Co. for Frederic Hall & Co., Folkestone.*

J. D. P.

[1] [1951] 2 T.L.R. 865; [1951] 2 All E.R. 763.

[2] [1951] 2 T.L.R. 909; [1951] 2 All E.R. 834.

C. A.

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*June* 26.

Evershed M.R., Birkett and Romer L.JJ.

[COURT OF APPEAL.]

# *TAYLOR *v.* WILLOUGHBY.

[Plaint No. J. 160.]

*Landlord and Tenant—Rent restriction—Death of statutory tenant—Rival claims to succession by members of tenant's family—Procedure for settling dispute—Whether mandatory—Increase of Rent and Mortgage Interest (Restrictions) Act*, 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 12 (1) (*g*)—*Increase of Rent and Mortgage Interest (Restrictions) Rules*, 1920 (*S.R. & O.* 1920, *No.* 1261/*L.*37), *rr.* 1, 19.

After the death of the statutory tenant of a dwelling-house within the Rent Acts, two members of his family, a son and a stepdaughter, continued to live in the house, and the landlord gave the stepdaughter a rent book and accepted rent from her. A dispute having arisen between two occupants, the stepdaughter served a notice on the son requiring him to leave the premises by a specified date. He refused to go and she brought proceedings against him. The county court judge held that, there being a dispute as to which member of the statutory tenant's family was entitled to succeed to the tenancy under the Increase of Rent and Mortgage Interest (Restrictions) Act, s. 12 (1) (*g*), the procedure to be followed was that laid down by the Increase of Rent and Mortgage Interest (Restrictions) Rules, 1920, and that that procedure was mandatory. He, accordingly, dismissed the action and directed that proceedings should be brought under those rules. The stepdaughter appealed.

*Held*, that the procedure was not mandatory; and that the action should not be dismissed but stood over (with liberty to apply to the judge to restore it) to give either or both of the parties an opportunity to apply under the rules.

APPEAL from Judge Emlyn-Jones sitting at Warrington County Court.

On December 12, 1950, one Willoughby, who was the statutory tenant of a dwelling-house, 62 Fox Street, Warrington, died, leaving a son, the defendant, and a stepdaughter, Mrs. Taylor, the plaintiff, living in the premises. Both of them had lived with Willoughby for a considerable period before his death. Six weeks after he died the landlord gave Mrs. Taylor a rent book and, thereafter, he accepted rent from her. The defendant paid his stepsister a weekly sum of £2 and she provided meals and various other services for him. Subsequently, a dispute arose between them and the plaintiff served a notice on the defendant requiring him to leave the premises by May 10, 1952, but he refused to go. Thereafter he paid nothing to the plaintiff and she provided no services for him, but both remained in the house. In March, 1953, the plaintiff brought proceedings against the defendant seeking to establish her right to exclusive possession of the house as tenant. The county court judge dismissed her action on the ground that, as the dispute involved a question which occupant was entitled to succeed to a statutory tenancy under section 12 (1) (*g*) of the Increase of Rent and Mortgage Interest

(Restrictions) Act, 1920,[1] the appropriate procedure was that provided by the Increase of Rent and Mortgage Interest (Restrictions) Rules, 1920, rr. 1 and 19,[2] and he held that that procedure was binding on him. He, accordingly, directed that proceedings should be brought under the rules to settle the dispute. The plaintiff appealed.

[The preceding is a statement of those facts which were not in dispute, but the county court judge stated that he had expressly refrained from making any findings of fact except as to the existence of the dispute between the parties.]

*T. H. Pigot* for the plaintiff.
*A. P. Fletcher* for the defendant.

EVERSHED M.R., having stated the facts: As both plaintiff and defendant had been living in this house up to the death of Mr. Willoughby senior, one of them, or possibly both, might be entitled to succeed to the statutory tenancy which Mr. Willoughby senior enjoyed at the time of his death by virtue of section 12 (1) (*g*) of the Act of 1920. The plaintiff and the defendant are at loggerheads as to who is so entitled, but provision is available for solving the dispute by section 12 (1) (*g*), and by the Rent and Mortgage Interest (Restrictions) Rules, 1920, rr. 1 and 19, whereby application may be made to a county court judge to determine such a point, and to decide, when such an application is made, as to the form of procedure to be followed. No such application has been made and, therefore, as I apprehend, neither the plaintiff nor the defendant, nor both of them jointly, can assert that he, or she, or they, are the statutory tenant within the meaning of the Act.

After about six weeks following the father's death, the landlord of these premises gave the plaintiff a rent book, and since that time he has continuously accepted rent from her. In those circumstances it is plainly arguable, as I think (although I express no conclusion on it), that a contractual tenancy has come

[1] Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12 (1) (*g*): "The expression 'tenant' "includes the widow of a tenant . . . "who was residing with him at the "time of his death, or, where a tenant ". . . leaves no widow or is a woman, "such member of the tenant's family "so residing as aforesaid as may be "decided in default of agreement by "the county court."

[2] Increase of Rent and Mortgage Interest (Restrictions) Rules, 1920, r. 1: "An application to the county "court under the Act . . . (*d*) by a "member of the tenant's family "under s. 12 (1) (*g*) . . . may be "made . . . to the court in the dis-"trict of which the premises are "situate."

Rule 19: "Where, on the death of "a tenant intestate, a member of his "family requires the decision of the "court under the latter part of sec-"tion 12 (1) (*g*) of the Act, the judge "shall give such directions as to the "procedure to be followed, and the "notices to be given to and the "attendance of all such persons as "may be interested as he shall think "fit, and he (or the registrar, if so "directed by him) shall consider what "may be urged (either orally or in "writing) by or on behalf of such "persons, and thereupon give his "decision: provided that the regis-"trar's decision may be varied by the "judge pursuant to rule 7."

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into being between the landlord and the plaintiff. It may also no doubt be true to say that if application is made, and the defendant is held to be entitled to the benefits of the old statutory tenancy, the new contractual tenancy may have to give way to it. I think, however, that it must be assumed that the defendant has known for some time that the plaintiff has paid rent to the landlord and that the landlord has accepted it from her.

[His Lordship referred to the statement by Judge Emlyn-Jones that he refrained from making any findings of fact except as to the existence of the dispute as to which of them had succeeded to the tenancy under section 12 (1) (*g*). He continued:] The proceedings in this action are somewhat incomplete for the particulars of claim omit to make any claim to relief, and many of the matters of fact which are in doubt and in dispute are not really raised on the pleadings. But the plaintiff's case, put briefly by Mr. Pigot, was that, as the plaintiff had obtained a contract of tenancy, or at least recognition of some kind from the landlord, she had the legal right to possession of this house, and until the defendant could establish some other right to remain there, she must be entitled to evict him. Having regard to the nature of the case as I have stated it, Judge Emlyn-Jones thought that the best course would be to dismiss the action, taking the view that the provisions of the rules of 1920 for solving this question between members of a family were mandatory in their effect.

I am not persuaded that that is right. The Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, provides at the end of section 12 (1) (*g*) that in the circumstances which have arisen in the present case the expression "tenant" shall include such member of the tenant's family as may be decided in default of agreement by the county court. Rule 1 of the Increase of Rent and Mortgage Interest (Restrictions) Rules, 1920, provides that: "An application to the county court under the Act . . . "(*d*) by a member of the tenant's family under section 12 (1) (*g*) ". . . may be made . . . to the court in the district of which the "premises are situate." The rules seem to me to be doing what rules, prima facie, are only competent to do, that is, to provide a means whereby a particular matter specified in the Act under which they are made can take effect. Rule 19 provides that where a member of the family requires the decision of the court, the judge "shall" give such directions as to the procedure to be followed, and he may do certain other things as well. Judge Emlyn-Jones, however, taking the view which I have indicated, said, "It seemed to me that I was bound by the provisions of "these rules," dismissed the action and directed that proceedings should be brought by one party or the other before him to have the question decided as to which of them was the tenant.

If that direction were certainly effective, it might well be that the form of order which Judge Emlyn-Jones made would be the best one; but I do not quite see how such a direction can be

certainly effective. If neither party in fact makes application, then nothing whatever will happen. On the whole, therefore, it seems to me that what was in the mind of Judge Emlyn-Jones can be better achieved, and should have been achieved, not by dismissing the action but by standing it over in order to give either party liberty to make application under the rules. I do not want to interfere with the judge's discretion in this case any more than I need, and I think it will suffice to set aside the order dismissing the action. I contemplate that the proceedings will then be treated as standing over, and either party will be at liberty to apply under the rules, or to apply in this action to amend the pleadings, or for any other purpose which they like. But, to make it quite clear, I think that each of the parties should be given express liberty to apply, so that if neither party makes any move under the rules of 1920, either of them may apply to restore this action. In particular, the plaintiff may wish, if after a reasonable interval nothing is done by the other side, to restore this action and then to seek to prove a contractual tenancy with such consequences as may follow.

In making that last observation, I am not to be taken as suggesting that the plaintiff ought not, herself, to make the application under the rules of 1920, and that she would be necessarily justified in waiting for the defendant to do so. I think that one or other of them plainly should apply, possibly they might apply together. The proceedings, I gather, are of an informal character. But as, in my opinion, it is or may be futile to direct one or the other to make that application, I suggest that the order be discharged and this action be treated as standing over. Then if neither party takes the necessary steps under the rules of 1920 the matter can come before the judge, and he may require, as a term of any further adjournment, that one or other should give an undertaking that he or she will proceed under the rules. These are matters, however, which I think should be left to the judge.

I think we are really doing no more than giving effect to the sense of the judgment of Judge Emlyn-Jones, with which I agree, though I think the form which I have proposed is better adapted to achieve the end in view.

BIRKETT L.J. I agree.

ROMER L.J. I also agree.

*Appeal allowed.*
*Order discharged, liberty to either party to apply to the judge. No order as to costs.*

Solicitors: *Bentleys, Stokes & Lowless for Steels, Warrington; Forshaw, Richmond & Co., Warrington.*

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*July* 6.

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[COURT OF APPEAL.]

## * HOWELL *v.* HOWELL.

*Legal Aid—Costs—Divorce—Petition and cross-petition dismissed—Successful co-respondent ordered to pay towards costs—Relief to taxpayer—Jurisdiction—Legal Aid and Advice Act*, 1949 (12 & 13 *Geo.* 6, *c.* 51), *s.* 1 (7) (*b*).

In divorce proceedings in which the wife asked for a decree on the ground of cruelty and the respondent husband alleged adultery by the wife with a person cited, the commissioner dismissed both petitions, but having deprecated the conduct of the person cited he, in the exercise of his discretion, ordered the person cited, though successful, to pay £75 towards the respondent husband's costs and thus reduce the burden on the legal aid fund. All three parties were State aided. On appeal by the person cited—

*Held*, first, that only in most exceptional circumstances should a successful co-respondent be ordered to pay costs, and the criticisms made by the commissioner did not approach the circumstances which would justify the making of such an order.

Secondly, that having regard to the provisions of section 1 (7) (*b*) of the Legal Aid and Advice Act, 1949, it was not right to exercise the discretion of the court, if it existed, in a particular way because its effect would be to relieve the taxpayer quoad the person in whose favour the order for costs was made.

APPEAL from Commissioner Bush James Q.C.

A wife petitioned for divorce on the ground of cruelty. The husband respondent denied cruelty and cross-petitioned, alleging adultery by the wife with a man cited as co-respondent. The co-respondent was a lodger in the matrimonial home. He became friendly with the wife and they admittedly went about together, but misconduct was denied by both the wife and the co-respondent. The commissioner dismissed both the petition and the cross-petition. He said, however, that in his view the conduct of the party cited was to be much deprecated. He added: "I think it is entirely through him that the wife left her "husband in August, 1951. I think he comes out of this case "very badly; but that is very different from making a finding "of adultery against him."

The commissioner then proceeded to make an order against the successful co-respondent, who was legally aided, for £75 costs. He said he had an absolute discretion in regard to costs, and added: "Why should the taxpayer subsidize this man?"

The co-respondent appealed.

*R. T. Barnard*, for the co-respondent, cited *Gray* v. *Lord Ashburton* [1] and *Foster* v. *Great Western Railway Co.* [2]

The other parties did not appear and were not represented.

SOMERVELL L.J., having stated the facts and the conclusion arrived at by the commissioner, continued:—When costs came

[1] [1917] A.C. 26, 33.

[2] (1882) 8 Q.B.D. 515.

to be discussed Mr. Barnard stated that he did not propose to ask for any order as to costs in favour of the party cited, against the husband respondent, but he asked, being legally aided, for the usual order in respect of that status. The commissioner then asked to see the figures and, when he found that the party cited had to make a substantial contribution towards his own costs, he proceeded to make an order against the party cited, although successful, for £75. In the course of the discussion he said, "I have an absolute discretion?"

Mr. Barnard: "I think so. One cannot say he brought this "action about."

The commissioner: "Why should the taxpayer subsidize this "man? That is what you are asking me to do."

Then he made the order for £75.

Mr. Barnard submitted in the first place, citing what was said in *Gray* v. *Lord Ashburton*,[1] that in the case of a successful defendant—and a party cited is in the same position as a defendant—there was no jurisdiction to make an order ordering him to pay costs. The same matter was considered, so far as the courts of Chancery and common law were concerned, under Ord. 55 under the Judicature Act, 1875, in *Foster* v. *Great Western Railway Co.*[2]

It is unnecessary to consider whether in the circumstances of this case the court would have no jurisdiction to make an order that the successful co-respondent should contribute towards the costs, because Mr. Barnard is content to base his submission for the purpose of this appeal on the proposition that it would be only in the most exceptional circumstances that such an order could judicially be made, and that the criticisms made by the commissioner of the co-respondent do not approach the circumstances which would justify the making of such an order. I agree with that. I do not think that they would justify the making of such an order, assuming that there was jurisdiction to make it. I think that the explanation of the order made by the commissioner in this case is to be found in the observation which he made in the course of the discussion: "Why should "the taxpayer subsidize this man?"

The effect of what the commissioner was seeking to do would have been to relieve the taxpayer to some extent in respect of the respondent's costs, because the respondent was himself state-aided. So far as that is concerned, I think that section 1 (7) (*b*) of the Legal Aid and Advice Act, 1949, is relevant. That provides: "Save as expressly provided by this Part of this Act or by "regulations made thereunder.— . . . (*b*) the rights conferred "by this Part of this Act on a person receiving legal aid shall "not affect the rights or liabilities of other parties to the "proceedings or the principles on which the discretion of any "court or tribunal is normally exercised." Therefore, I do not think that it would be right to exercise this discretion, assuming

[1] [1917] A.C. 26, 33. [2] 8 Q.B.D. 515.

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it exists, in a particular way because its effect would be to relieve the taxpayer quoad the person in whose favour the order for costs was made. I think that it is probably because the commissioner had in mind that he was proceeding on novel grounds, and not merely exercising an ordinary discretion, that he gave leave to appeal in this case. For these reasons I think that the order against the successful co-respondent here cannot stand and it should be set aside.

Jenkins L.J. I agree. On the assumption that the court has jurisdiction in a proper case to order payment of costs by a wholly successful defendant, in my view that can only be the right order to make in most exceptional circumstances. It is clear that the observations made by the commissioner in regard to the injudicious conduct of the co-respondent in this case fall far short of providing ground on which such an exceptional step could properly be taken. I agree with my Lord that it appears from the discussion at the end of the judgment that the commissioner was led, in part at all events, to take the course he took by the circumstance that the parties were state-aided litigants. That, as my Lord has pointed out, was a circumstance that he should not have taken into account. Accordingly, I agree that the commissioner erred in making this order for costs and that the appeal should be allowed.

Hodson L.J. I agree and have nothing to add.

*Appeal allowed: no order as to costs. Appellant's costs to be taxed as between solicitor and client under the Legal Aid Act.*

Solicitors: *Blundell, Baker & Co.*

A. W. G.

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[COURT OF APPEAL.]

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*June* 4, 5, 8; *July* 2.
Somervell, Hodson and Jenkins L.JJ.

* SWAN HUNTER AND WIGHAM RICHARDSON LD. *v.* FRANCE FENWICK TYNE & WEAR CO. LD. THE ALBION.

*Shipping — Towage — Contract — Breach — Whether fundamental — Construction — Towage contractors to be indemnified for all "damage whatsoever"—Tow in collision with another vessel—Tug owners and tow owners liable in disproportionate degrees—Indemnity.*

By a contract in writing dated August 3, 1949, the plaintiffs (towage contractors) agreed with the defendants (shipbuilders)

to tow the uncompleted aircraft carrier *Albion* from the Tyne to Rosyth, using three tugs for the purpose. The *Albion* was a mere hulk without steering apparatus, motive power or equipment of any sort, and the plaintiffs agreed to provide her (inter alia) with side lights and other navigational lights. It was a term of the agreement that the printed towage conditions of the plaintiffs were to be incorporated in the contract. Those conditions contained the following indemnity clause:—"That to all intents "and purposes whatsoever the master and crew of the tug or tugs "employed shall be deemed and considered to be the servants of "the owners, master and crews of the vessels or crafts towed, the "tug owners being in no way liable for any of their acts or for "any of the consequences thereof. That the owners of the tugs "are not held liable for any loss or damage whatsoever which may "happen to or be occasioned by any vessel . . . during any towage "contract whether arising from or occasioned by any accident or "by any omission, breach of duty, mismanagement, negligence or "default of them or their servants . . . or from any perils of "the seas, rivers or navigation . . . nor for any of the consequences "of the causes above excepted. The owners or persons interested "in the vessel or craft being so towed . . . shall and do undertake "to bear, satisfy and indemnify the tug owners against all "liability for the aforegoing matters."

During the towage the *Albion* collided with and sank the steamship *Maystone*, and in the action which arose from the collision the *Albion* was held alone to blame, the liability being apportioned as to two-thirds against the shipbuilders and one-third against the towage contractors; *Thomas Stone Shipping Ltd.* v. *Admiralty; The Albion* [1953] P. 117. Both were to blame for a fault in planning—in risking the expedition on the known barometric readings. The contractors were also negligent in providing a defective port side light and for towing the *Albion* to sea equipped with that light. In third party proceedings by the contractors claiming against the builders an indemnity under the towage conditions:—

*Held*, (1) that the plaintiffs were not, because they were in breach of their contract, precluded from relying on the indemnity clause, since there was no breach of a fundamental condition in the nature of a deviation; and (2) that the clause, in the circumstances, entitled the plaintiffs to an indemnity; the final words, "all "liability for the aforegoing matters," were sufficient to include liability to a third party arising out of or occasioned by negligence or default which also constituted a breach of contract as between the plaintiffs and the defendants.

Order of Willmer J. [1952] W.N. 292; [1952] 1 Ll.L.Rep. 104 reversed.

APPEAL from decision of Willmer J. on April 25, 1952.

The plaintiffs, France Fenwick Tyne & Wear Co. Ltd., towage contractors, claimed to be indemnified by the defendants, Swan Hunter & Wigham Richardson Ltd., shipbuilders (hereinafter called respectively France Fenwick and Swan Hunter), under the terms of an indemnity clause contained in a contract of August 3, 1949, to tow the hull of the aircraft carrier *Albion* from the Tyne to Rosyth.

During the towage the *Albion* came into collision with and sank the steamship *Maystone*. In an action brought by the owners of the *Maystone* against, amongst others, France Fenwick

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and Swan Hunter, they were held to be to blame for the collision in unequal degrees. In third party proceedings brought by France Fenwick against Swan Hunter claiming to be indemnified in respect of their liability to the owners of the *Maystone*, Willmer J. gave judgment in favour of Swan Hunter.

The plaintiffs appealed.

The terms of the indemnity clause are set out in the judgment of the court.

*K. S. Carpmael Q.C.* and *G. N. W. Boyes* for the plaintiffs.
*H. I. Nelson Q.C.* and *Derek H. Hene* for the defendants.

The following cases were cited in argument: *The West Cock* [1]; *The Cap Palos* [2]; *The Forfarshire* [3]; *The Refrigerant* [4]; *The Uranienborg* [5]; *Glen Line Ld.* v. *W. J. Guy & Sons*, *The Glenaffric* [6]; *The Baltyk* [7]; *The Clan Colquhoun* [8]; *Cory & Son Ld.* v. *France, Fenwick & Co. Ld.* [9]; *Lilley* v. *Doubleday* [10]; *Gibaud* v. *Great Eastern Railway Co.* [11] *London & North Western Railway Co.* v. *Neilson* [12]; *Alexander* v. *Railway Executive* [13]; *Buerger* v. *Cunard Steamship Co.* [14]; *Pyman Steamship Co.* v. *Hull & Barnsley Railway Co.* [15]; *Herschtal* v. *Stewart & Ardern Ld.* [16]; *Bontex Knitting Works Ld.* v. *St. John's Garage.* [17]

*Cur. adv. vult.*

July 4. SOMERVELL L.J. The judgment which I am about to read is the judgment of the court.

In our previous judgment we decided that the second and third defendants, Swan Hunter and France Fenwick, were liable to the plaintiffs for damages arising out of the collision. The Admiralty claimed against France Fenwick for damage to the *Albion*, and on our judgment France Fenwick were liable on that claim. In these proceedings France Fenwick claim an indemnity against Swan Hunter in respect of their liability under a clause in their towage conditions. Swan Hunter resist this claim on various grounds and claim by cross-action to recover, by way of damages, for breach of contract, any amount they may be called upon to pay by reason of the collision. We were

[1] [1911] P. 208; 27 T.L.R. 301.
[2] [1921] P. 458; 37 T.L.R. 921.
[3] [1908] P. 339.
[4] [1925] P. 130.
[5] [1936] P. 21; 52 T.L.R. 114.
[6] [1948] P. 159; [1948] 1 All E.R. 245.
[7] [1948] P. 1; [1947] 2 All E.R. 560.
[8] [1936] P. 153; 52 T.L.R. 349; [1936] 1 All E.R. 429.
[9] [1911] 1 K.B. 114; 27 T.L.R. 18.
[10] (1881) 7 Q.B.D. 510.
[11] [1921] 2 K.B. 426; 37 T.L.R. 422.
[12] [1922] 2 A.C. 263; 38 T.L.R. 653.
[13] [1951] 2 K.B. 882; [1951] 2 T.L.R. 69; [1951] 2 All E.R. 442.
[14] [1925] 2 K.B. 646.
[15] [1915] 2 K.B. 729; 31 T.L.R. 243.
[16] [1940] 1 K.B. 155; 56 T.L.R. 48; [1939] 4 All E.R. 123.
[17] (1943) 60 T.L.R. 44; [1943] 2 All E.R. 690; (1944) 60 T.L.R. 253; [1944] 1 All E.R. 381n. (C.A.).

asked, as was the judge, to apportion blame provisionally between the two parties subject to the rights which are relied on in these proceedings. With respect, we think that this was waste of time. If the case goes to the House of Lords we would most respectfully suggest that the issues raised in the present proceedings should not be, as they have been before us, postponed for argument at a second hearing.

The towage conditions relied on were not expressly referred to in the contractual document of August 3, 1949. On the question whether they were part of the contract, the judge said: "I have "already decided that the order of August 3, 1949, constituted "the contract under which the towage was performed, and that "there was no subsequent variation by agreement. But it is "not now in dispute that the terms of the order must be "interpreted in the light of the correspondence which passed "between the parties. This correspondence made it clear that "France Fenwicks were only prepared to quote on the basis that "Swan Hunters accepted their towage conditions, and that those "towage conditions were to be incorporated as terms of any "contract that was made."

We agree with what the judge there said, and the position was the same before us. We will deal first with the claim of France Fenwick for indemnity. The clause on which they rely is set out in their statement of claim and is as follows:—"That to all "intents and purposes whatsoever the master and crew of the "tug or tugs employed shall be deemed and considered to be "the servants of the owners master and crews of the vessels or "crafts towed the tug owners being in no way liable for any of "their acts or for any of the consequences thereof. That the "owners of the tugs are not held liable for any loss or damage "whatsoever which may happen to or be occasioned by any "vessel or craft or any of the cargoes on board of the same "during any towage contract whether arising from or occasioned "by any accident or by any omission breach of duty mis-"management negligence or default of them or their servants "or any defect or imperfection in the tugs or any of them or the "machinery or ropes of any part of them or shortage of bunker "coal owing to bad weather or other unforeseen circumstances or "any delay stoppage or slackness of speed however occasioned "or from any perils of the seas rivers or navigation or from "strikes lockouts disturbances disputes or anything done in "contemplation or furtherance thereof whether the tug owners "be parties thereto or not nor for any of the consequences of the "causes above excepted. The owners or persons interested in "the vessel or craft being so towed and the cargo on board of "same shall and do undertake to bear satisfy and indemnify the "tug owners against all liability for the aforegoing matters."

In our previous judgment our findings against the *Albion* were summarized in these words: (1) defective port light; (2) failure to exhibit "not under command" lights or other

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illuminations to warn oncoming shipping; (3) defective planning in sailing in the conditions shown by the falling barometer, and, having sailed, in not broadcasting warnings to other shipping. With regard to (1), France Fenwick had under their contract undertaken to provide navigation lights. The sentence in which we dealt with their liability to the plaintiffs in respect of this matter is in the following words: "France Fenwick cannot, "however, escape from blame themselves, since, having provided "the defective light, they towed the *Albion* to sea equipped "with that light, which as the judge found, brings them into a "relationship of proximity with other vessels which might be "encountered at sea." France Fenwick were not concerned with (2). With regard to (3), there was some discussion as to the expression "defective planning." The relevant negligence was, however, in sailing in the conditions which prevailed at the time. The loss of or damage to the *Maystone* and the *Albion* was, as it seems to us, plainly loss or damage "which may "happen to or be occasioned by any vessel" within the meaning of the clause. Further, France Fenwick's liability to the plaintiffs arises on our findings from their, France Fenwick's, negligence or default and not from any wilful or malicious act. It is submitted, in the first place, that France Fenwick are precluded from relying on the exceptions in this clause and the idemnity by reason of their own breaches of contract. In the second place, it is submitted that the relevant negligence was, or ought to be regarded as having occurred at a time, anterior to that covered by the exceptions or the indemnity.

In considering the first of these submissions, the judge, in the first instance, accepted and applied a principle as submitted by Mr. Nelson for Swan Hunter that general words in exception clauses could not be relied on if the loss or damage flowed from a fundamental breach which went to the root of the contract. A familiar example of a breach which prevents general words in an exception clause being relied on is "deviation" in a contract of carriage. On the other hand, general words of exception for negligence have been held to relieve against mis-delivery by negligence (*Smackman* v. *General Steam Navigation Co.*[1]) In *Cunard Steamship Co. Ld.* v. *Buerger*[2] goods were to be carried to Odessa. There was a clause in the contract making liability conditional on a declaration of value by the shipper which had not been made. The goods had been lost, and in a claim for damages the defendants sought to rely on that clause. The history of the goods was complicated and need not be set out. It was argued in the House of Lords that the Court of Appeal, which had decided against the defendants, had treated mis-delivery as if it was equivalent to a deviation in its effect on the clause and that that was wrong. Lord Sumner, in his opinion, did not proceed on the basis that any fundamental

[1] (1908) 13 Com.Cas. 196. [2] [1927] A.C. 1; 42 T.L.R. 653.

breach ousted the exception and misdelivery was, as one would have thought, such a breach. He analysed the judgments in the Court of Appeal and held that they had not proceeded on the basis of mis-delivery but had found an abandonment of the voyage or such unreasonable delay as amounted to a deviation. In a later part of his speech he spoke of [3]: "a fundamental "departure from the course of the agreed transit, after which "such a clause of exception would cease to apply."

The same criterion was adopted in *London & North Western Railway Co.* v. *Neilson.*[4] In that case the goods were, under the contract, to be carried to "B." Owing to negligence, they were unloaded at an intermediate station and dispersed with consequent delay. Under the contract the goods were to be delivered at "B" on a stated day and, the goods being theatrical properties, this term might well have been regarded as fundamental and going to the root of the contract. The House of Lords did not proceed on those lines. It was held that the protection afforded by the general words in the clause could not be relied on because the agreed transit had been departed from.

In *The Cap Palos* [5] the claim arose under a contract of towage. The defendants sought to rely on an exception clause exempting them from liability from damage occasioned by their neglect or default. The tow, owing to negligent navigation by the defendants' servants, had got into a position of danger in Robin Hoods Bay and the tugs had left her there. The next and essential stage in the carrying out of the contract was to get her from there to a place of safety. The tug owner, believing erroneously that a salvage association were going to do this, cancelled an order which he had previously given to one of his tugs to go to the tow's assistance. The headnote, we think, accurately summarizes the decision: "Held, that as the defendant had at "any rate temporarily given up any attempt to continue the "towage and had left the performance of his duty to others, "he could not avail himself of the words 'default of the steam "'tug owner,' which only extended to cover defaults during the "actual performance of the duties of the contract." The court would, we think, have held, if damage had been caused by negligence or default up to the time when the defendants gave up the attempt to tow her to a place of safety, that the clause would have applied.

We have referred to these cases because we think that the words "fundamental breach" might be read in this context in a wider sense than the decisions justify. Having applied the test in the wide form to which we have referred, the judge said: "I cannot find any such fundamental breach of contract or "any such radical departure from the work contracted for on "the part of France Fenwick as would disentitle them from

[3] [1927] A.C. 1, 8.
[4] [1922] 2 A.C. 263.
[5] [1921] P. 458.

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"relying on their towage conditions to the extent that these "protect them." We agree, so far as the navigation light is concerned, that there was no abandonment even of that subsidiary term. A navigation light was delivered, thought by both parties to be a proper light. The judge found, and we have upheld his finding, that it fell short of the proper degree of luminosity. The judge had found that four tugs should have been provided. This was, to use a non-technical term, a more serious breach than those which we have found against France Fenwick.

The judge then proceeded to hold that the clause could not be relied on for different reasons, and he summarized his conclusion in this way: "I do not think that the general words of "the towage conditions are sufficiently clear to cover the matters "in respect of which France Fenwicks have been found at fault, "matters which as between themselves and Swan Hunters 'constituted plain breaches of specific terms of their contract." We feel a difficulty about this. If the test is whether or not there is a breach of a specific term, it seems difficult to reconcile this test with the test based on breach of a fundamental term which is in the nature of a deviation. It was at one time suggested in the course of the argument that a breach of an express term might differ in its effect on the clause from a breach of an implied term. We cannot follow this suggestion. We agree that if there is a direct conflict, a written term in a contract will override or prevent the application of general words in a printed condition, or at any rate will normally do so. If, for example there, was an express undertaking to take all reasonable care with regard to "X," that would prevent a general exception of liability for negligence applying to "X." As the cases which we have stated show, there is no inconsistency between an express undertaking, for example, to deliver to "X," and an exception against liability if this undertaking is broken through negligence.

Mr. Nelson sought to argue that in no case could an indemnity be claimed by a party in breach. It seems to us impossible to suggest that parties are precluded from coming to such an arrangement. We think that it is precisely what the present clause provides for. The earlier words plainly apply, inter alia, to damage done by the tug to the tow, occasioned by the negligence or default of the tug owner or his servants. This negligence or default would, except in possibly very exceptional circumstances, be a breach of contract, but the indemnity clause refers to all liability for "the aforegoing matters." It seems to us impossible to take out of "the aforegoing matters" cases in which the liability to a third party has arisen out of or been occasioned by negligence or default which also constituted a breach of contract as between France Fenwick and Swan Hunter. The second submission was that the acts should be regarded as

having occurred at a time anterior to that covered by the exception clause. We were referred to *The West Cock*,[6] where on quite different words this point arose. Mr. Carpmael, for France Fenwick, relied on the words "during any towage contract" and submitted that that period plainly covered all the happenings which led to the liability of the plaintiffs. We agree.

Mr. Nelson, for Swan Hunter, invited us to cut down these words by reason of the words in the last sentence "being so "towed," and to hold that this created an ambiguity which would, on familiar principles, lead to the construction less favourable to the defendants. These words relate back, we think, to the first paragraph in the clause, and in our opinion are plainly words identifying the parties liable to indemnify, and cannot be read as cutting down the words in the earlier part of the clause which have clearly been inserted in order to define the period which the exceptions are to cover. In any case, we doubt if the defendants could succeed on this ground, even if one regarded the exceptions as limited to the towage. The negligence with regard to the light, which led to France Fenwick's liability, was the setting out to sea after having supplied it. Again, the setting out to sea, having regard to the falling barometer, would seem to be in the course of the towage. For this reason we think that France Fenwick's claim succeeds and that they are entitled to be indemnified.

We have not thought it necessary to refer to or rely on Swan Hunter's responsibility as found, both by the judge and this court, in respect of the lamp, or to their responsibility, with France Fenwick, for setting out in the weather conditions which prevailed. Their knowledge may well be regarded as supporting the view that there was no abandonment of the contract or an essential part of it. We do not, however, find it necessary to base our decision on these facts as amounting to waiver, and express no opinion whether that principle would or would not be applicable, assuming we are wrong in the reasons which have led us to our conclusion. It was not suggested that if France Fenwick succeeded, as we hold they do, on their claim for an indemnity, Swan Hunter could succeed on the cross-claim for damages. That is plainly inconsistent with the terms of the towage clause, if applicable.

There is only one other matter to which we need refer. Mr. Carpmael, on behalf of France Fenwick, made an application to the judge to amend his statement of claim. His statement of claim was clearly drafted on the basis that the towage clauses were part of the contract. It did, however, also refer to certain clauses in Swan Hunter's form as being part of the contract in so far as they did not override the towage conditions. In the amendment, as submitted to the judge, France Fenwick were seeking to incorporate in the contract not only previous

[6] [1911] P. 208.

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correspondence between the parties but also certain oral terms alleged to have been arrived at in the course of discussions. The judge refused to allow the amendment and an appeal from that decision was properly before us. Mr. Carpmael did not seek before us to bring in the oral terms. He did, however, wish to contend that the clauses in Swan Hunter's form to which he had referred in his original pleading should not be regarded as part of the contract in any circumstances.

Having regard to the fact that neither side has objected to the whole of the correspondence being read as relevant to the question whether the towage clauses were incorporated and also as to other implications, we decided not to allow the amendment. On the view which we have formed, the question as to the Swan Hunter clauses does not arise. If it should arise hereafter we do not regard our refusal as precluding Mr. Carpmael from submitting, as he did, that those clauses should be regarded as excluded for all purposes and in all circumstances. The appeal will be allowed.

*Appeal allowed; cross-appeal dismissed.*

Solicitors: *Middleton, Lewis & Co., for Middleton & Co., Sunderland; Bentleys, Stokes & Lowless for William Mark Pybus & Sons, Newcastle-upon-Tyne.*

H. G.

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[COURT OF APPEAL.]

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*July* 1.
Evershed M.R., Birkett and Romer L.JJ.

* *In re* HOWELL. HOWELL *v.* LLOYDS BANK LD.

[*x* 1951 No. H. 1017.]

*Family Provision—Whole of small estate bequeathed to second wife—No provision for infant children of first marriage—Date at which reasonableness of provision for dependants to be determined—Inheritance (Family Provision) Act*, 1938 (1 & 2 *Geo.* 6, *c.* 45), *s.* 1.

A testator divorced his first wife in 1947, the custody of the two young children of the marriage being given to him. He remarried, and the children of his first marriage lived with him, together with his second wife. By his will the testator appointed his second wife to be guardian of his children and left all his property to her. He died in 1950, leaving an estate of approximately £2,500, which included the house where he had lived with his family. After the testator's death his widow became seriously ill and incapable of earning her living. The children of the testator's first marriage then went to live with their mother and on an application made to Danckwerts J. to make them wards of court, he allowed them to remain with their mother. By this application the children applied by their next friend under the Inheritance (Family Provision) Act, 1938, that

reasonable provision might be made for them out of the testator's estate. At the time when the application came before Roxburgh J. both the children's mother and the testator's widow were in receipt of national assistance. Roxburgh J. dismissed the application. On appeal:—

*Held*, that prima facie in determining whether a testator had made reasonable provision for a dependant the matter should be judged in the light of the circumstances which did present, or should have presented, themselves to the testator up to the moment of his death; that the circumstances to be considered must include eventualities reasonably to be foreseen, but the provisions which the testator made should not be judged exclusively in the light of circumstances happening after his death; that it was not possible to say that the direction of the testator that, if his widow survived, she should have his whole estate, was unreasonable or unwarranted; and that the application should accordingly be dismissed.

The principle laid down by Morton J. in *In re Styler* [1942] Ch. 387, 388; [1942] 2 All E.R. 201 applied.

*Per curiam*: Applications under the Inheritance (Family Provision) Act, 1938, are very much matters for the exercise of the judge's discretion, and the Court of Appeal should not readily interfere with orders made under the Act.

Decision of Roxburgh J. affirmed.

APPEAL from Roxburgh J.

The testator, who died in 1950, made a will leaving all his estate, valued at approximately £2,500, to his second wife, Mrs. Marjorie Howell, and he appointed her to be guardian of the two children of his first marriage, aged eight and ten years respectively. The children, having gone to live with their mother, Mrs. Gladys Howell, the testator's first wife, applied by their next friend that reasonable provision might be made for their maintenance out of the testator's estate. Roxburgh J. dismissed the application.

The children appealed.

The facts are more fully stated in the judgment of Evershed M.R.

*J. W. Mills* for the applicants.

*A. C. Munro Kerr* for the testator's widow, Mrs. Marjorie Howell, the respondent.

The cases cited in argument are referred to in the judgment.

EVERSHED M.R. I do not think that we should interfere with the order which Roxburgh J. made, though the case has, to my mind, that difficulty which is characteristic of all cases which relate to the fortunes and affairs of young children. The application is one made under the Inheritance (Family Provision) Act, 1938, on the footing that here the testator was unreasonable in having made no direct provision whatever for his two small children.

The applicants, the children in question, aged eight and ten

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respectively, are the children of the marriage of the testator and his first wife, Mrs. Gladys Howell. That marriage was dissolved on the petition of the testator in April, 1947, on the ground of the wife's cruelty to the testator. In 1949 Barnard J. made an order which withdrew from Mrs. Gladys Howell all right of access to the children, who were then living with the testator and his second wife, Mrs. Marjorie Howell, whom he had married in March of that year. Those conditions remained until the testator's death in August, 1950.

The testator, by his will made in 1950, left the whole of his property to his second wife, and he also appointed her to be guardian of the infant children, the effect of that appointment being, by virtue of the Guardianship of Infants Act, 1925, that the widow was joint guardian with the mother, Mrs. Gladys Howell, subject to any directions which the court might give on an application by either the natural or the testamentary guardian.

It is not insignificant to point out that the testator had his children in mind, for his will contained the further provision that in the event of his wife, Mrs. Marjorie Howell, predeceasing him, all his property should go to his children.

The testator was not a man of property. He carried on business as an optician, and substantially his estate consisted of that business and the assets connected with it, including the premises, No. 43 Milton Road, Portsmouth, where it was carried on. The total value of the estate is £2,500, and, broadly speaking, stands in this way: that part of No. 43 Milton Road on which the business was carried on has been let to the man who bought the goodwill of the business for £1,000, payable in ten yearly instalments of £100 each. He also pays a rent of £104 per annum for the use of that part of the premises. Mrs. Marjorie Howell lives in the residential part of the same premises, and it seems tolerably clear that that is the best arrangement for her, because she has thereby a home, and, through the arrangement made about the business, some means of support. There is nothing else available.

Mrs. Marjorie Howell, the widow, has been seriously ill since the testator's death, and the evidence shows that her state of health is such as to make her now, in the technical sense, unemployable. But the financial hardships are equally shared at the moment by the first wife, Mrs. Gladys Howell, who, again, is without property, though she appears to be in not so poor a condition of health. She is slightly the older of the two women, and is said to be a woman of some education, who normally would be able to earn an income. But the effect, or an effect, as I gather, of Mrs. Marjorie Howell's illness immediately following the testator's death was that the two children of the first marriage returned to their mother, Mrs. Gladys Howell, who now has them with her; and Danckwerts J., on an application to make the children wards of court, took the view that

there was no good ground for disturbing that state of affairs and so they remain with their mother.

The facts as to the estate show plainly the unhappy limitation on anything which the court could in any circumstances achieve. The statutory limit imposed of two-thirds of the income, even if the power were exercised to its maximum extent, would provide a very small weekly sum for each child. There is, in addition, the difficulty to which Roxburgh J. alluded, and about which I do not feel competent to express any very decided opinion, namely, that if something is provided for the children, it may well be that the effect of that provision will, on the one hand, be to reduce what the children's mother is getting under the National Assistance Act, 1948, and, on the other, to impose upon the State an increased liability, or a liability, to make similar provision for the widow. It was expressed picturesquely—and though I think that it was clear what the judge had in mind, it was, perhaps, not entirely accurately expressed—when the judge referred to the matter as being out of which pocket the State was to pay. But I do not myself think that it is right or necessary to deal with this case on the footing that, assuming the jurisdiction is exercisable, there is nothing very much that the court can do. If, on that ground, I were disposed to follow the judge in saying what he did, I am aware of the argument that I should be in one and the same breath saying that I thought that the testator had acted unreasonably in making no provision for the children, and thereupon acting unreasonably myself by doing exactly the same thing.

I therefore go back to the first point, namely, the premise upon which any exercise of jurisdiction must depend; whether the court can rightly say that the testator, in the circumstances as they were when he died as well as when he made his will, acted unreasonably in giving the whole of his property to his wife, if she survived him. The judge took the view that the testator had not acted unreasonably, and, as I have earlier indicated, on the whole I have come to the same conclusion.

The words of the Act, so far as relevant, are: "Where, after "the commencement of this Act, a person dies domiciled in "England leaving" a wife and infant children "and leaving "a will, then, if the court on application" on behalf of the dependants (as has happened here) "is of opinion that "the will does not make reasonable provision for the mainten- "ance of" the dependant, then the court may make orders under the Act. At first sight that subsection might appear to indicate that the function of the court went so far as this, that if a judge sitting (as has been said) in the armchair of the testator would have thought it better to make some provision different from that which the testator made, then the court might say that the testator in making his dispositions acted unreasonably; but it is, I think, clear that the function of the court is of a more limited character.

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In *In re Styler, Styler* v. *Griffith* [1] Morton J. said [2]: "There "are one or two observations in the cases decided on this Act "to which I desire to refer, although I fully appreciate that "every case must rest on its own facts. In *In re Brownbridge*,[3] "Bennett J. said that the Act did not throw on a testator a "duty to make provision for his dependants. It only gave the "court the right to interfere if it came to the conclusion that "the dispositions which were made were unwarranted. In that "case Bennett J. did not think it right to interfere with the "testator's disposition. I respectfully agree with the observa-"tions which he made. I do not think that a judge should "interfere with a testator's dispositions merely because he thinks "that he would have been inclined, if he had been in the position "of the testator, to make provision for some particular person. "I think that the court has to find that it was unreasonable on "the part of the testator to make no provision for the person in "question or that it was unreasonable not to make a larger "provision."

That view of the intention of the Act has, so far as I know, been consistently acted upon since and should, in my judgment, be followed now. The question then is: in making this will did the testator make unreasonable provision for these children? The matter could equally well be put: was the series of dispositions unwarranted in the circumstances as they presented, or should have presented, themselves to the testator at the moment of his death? For I think, prima facie, at any rate, that it must be right to judge this matter, whether the testator was unreasonable, in the light of the circumstances which did present, or should have presented themselves, to him up to the moment of his death. No doubt the circumstances must include eventualities reasonably to be foreseen, but the testator ought not to be judged exclusively in the light of circumstances happening after his death, which might very much have altered the situation.

I have referred to the state of affairs at his death; and I think, within the very limited range in which the testator could make dispositions, that it is not possible to say that his direction that, if his widow survived him, she should have everything, was unreasonable or unwarranted. I was attracted by the way Mr. Munro Kerr put it when he said that, on the facts as they were, the only adequate provision which the testator could make was by securing that there was a home available where his widow would live, it being the fact, and known to him to be the fact, that she would make provision for the children and would look after them as she had been doing for some little time before he made his will and before he died.

One does not improve upon a case of this kind by attempting elaboration. I have indicated the considerations that have influenced my mind, and, for these reasons, I would dismiss

[1] [1942] Ch. 387; [1942] 2 All E.R. 201.

[2] [1942] Ch. 387, 388.

[3] (1942) 193 L.T.J. 185.

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the appeal. I confess that I do so, perhaps, with a greater readiness (if I may use that phrase) because I think, generally speaking, that applications under this Act are of such a kind that this court should not readily interfere with decisions of judges below—though that is not to say that if this court was convinced that the judge had erred, it would not interfere with the order made below. But I have come to the conclusion which I have stated, and I would therefore dismiss the appeal.

BIRKETT L.J. I am of the same opinion. In many respects this is, I think, quite a sad and pitiful case, and one cannot help feeling a certain amount of compassion for all the parties concerned; but, of course, the appeal must be decided according to law, and applying the principles of law which have been laid down with regard to the interpretation of the Act of 1938, and considering the whole of the facts in this case, I think that there is no other conclusion to which this court could come, and that this appeal ought to be dismissed.

ROMER L.J. I also agree, and I would only add, as, indeed, my Lord has already indicated, that questions under the Act of 1938 are very much matters for the exercise of the judge's discretion, and appeals to this court, at all events in the case of small estates, should not be encouraged.

*Appeal dismissed.*

Solicitors: *Pengelly & Co.; Joynson-Hicks & Co. for Lyndhurst G. Groves, Portsmouth.*

B. A. B.

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[HOUSE OF LORDS.]

* FENWICK . . . . . APPELLANT;

AND

INLAND REVENUE COMMISSIONERS . RESPONDENTS.

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*June* 8, 9, 10; *July* 20.

*Revenue—Special contribution—Relief—Income attributable to a period of years—More than one year's income in year of charge—"Full year's income"—Finance Act*, 1948 (11 & 12 *Geo.* 6, *c.* 49), *s.* 61.

In the fiscal year 1947–48 (being the period in respect of which the special contribution was imposed under Part V of the Finance Act, 1948) two dividends were paid to the appellant on his shareholding in a certain company: (a) a final dividend of £1,554 in respect of the company's year ending December 31, 1946, and

† *Present*: LORD NORMAND, LORD OAKSEY, LORD MORTON OF HENRYTON, LORD REID and LORD COHEN.

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(b) £388 10s. 0d., being an interim dividend in respect of the year ending December 31, 1947. Both were included in his total income and aggregate investment income for the purpose of his assessment to special contribution. He claimed relief under section 61 of the Act on the ground that the income represented "more than the "income which would be attributable to a period of one full year "if the income were deemed to have accrued from day to day" within section 61 (1) (*b*) of the Act, and that in the direction in section 61 (1) that "the Special Commissioners shall in ascertaining "total income and aggregate investment income for the purposes of "this Part of this Act make such reduction, if any, as may be "appropriate to secure that there shall be taken as representing "the income from the assets an amount equivalent to a full year's "income therefrom" the words "a full year's income" meant "the income . . . attributable to a period of one full year if the "income were deemed to have accrued from day to day."

The Special Commissioners treating "a full year's income" as meaning one of the company's successive financial years, selected the year 1946 and rejected the claim for relief. The income received in respect of that year was precisely equal to that received in the fiscal year 1947–48, whereas the income received in respect of the company's financial year 1947 was less. If the income received in respect of the company's financial years 1947 and 1948 "were "deemed to have accrued from day to day," the income "attribu-"table to a period of one full year" would have been less than the taxpayer's aggregate investment income for the purposes of assessment:—

*Held*, (1) that the words "a full year's income" did not bear the meaning submitted by the appellant; (2) that by section 61 (1) of the Act the Special Commissioners were given a discretion in calculating "an amount equivalent to a full year's income"; (3) that they might properly exercise their discretion as they did; and (4) that the claim for relief failed.

APPEAL from the Court of Appeal (Somervell, Denning and Romer L.JJ.).

This was an appeal from an order of the Court of Appeal dated July 25, 1952, allowing an appeal by the respondents, the Commissioners of Inland Revenue, from an order of the High Court of Justice (Donovan J.), dated March 7, 1952, whereby an appeal by the appellant, E. A. F. Fenwick, on a case stated by the Commissioners for the Special Purposes of the Income Tax Acts was allowed and the decision of those Commissioners was reversed. The matter arose out of an assessment made on the appellant under Part V of the Finance Act, 1948, to special contribution in respect of his aggregate investment income for the year 1947–48.

The facts are fully stated in the opinion of Lord Normand.

*Cyril King Q. C.* and *H. H. Monroe* for the appellant.

*Sir Reginald Manningham-Buller S.-G., L. C. Graham-Dixon Q.C., J. H. Stamp* and *Sir Reginald Hills* for the Crown.

Their Lordships took time for consideration.

July 20. LORD NORMAND. My Lords, this appeal arises out of an assessment made upon the appellant, under Part V of the Finance Act, 1948, to special contribution in respect of his aggregate investment income for the year 1947–48. The matter in dispute is the construction and application of the provisions for relief in section 61 of the Act.

The special contribution was imposed by the Finance Act, 1948, as a tax for one year only, payable by individual taxpayers whose total income for 1947–48 exceeded £2,000 and whose aggregate investment income for that year exceeded £250. The contribution was payable on or before January 1, 1949. Total income was to be ascertained in the same manner as for the purposes of surtax. Investment income was defined as meaning income from any source other than a source of earned income. The contribution was assessable by the Special Commissioners to whom also an appeal lay. For the purposes of this case section 61 is the important section and I therefore cite it in full:

"(1) Where—

"(*a*) either before or after an assessment to contribution is "made, but in any case before such an assessment has become "final, application is made to the Special Commissioners for "relief under this section, and

"(*b*) the Special Commissioners are satisfied as respects any "assets that, by reason of the provisions of the Income Tax Acts "which require that income which is chargeable with income tax "by way of deduction shall be deemed to be income of the year "in which it is receivable, the income from the assets represents "more than the income which would be attributable to a period "of one full year if the income were deemed to have accrued from "day to day,

"the Special Commissioners shall in ascertaining total income "and aggregate investment income for the purposes of this Part "of this Act make such reduction, if any, as may be appropriate "to secure that there shall be taken as representing the income "from the assets an amount equivalent to a full year's income "therefrom.

"(2) Subsection (1) of section 36 of the Finance Act, 1927 "(which specifies the period over which income is deemed to "have accrued from day to day) shall apply for the purposes of "paragraph (*b*) of the last foregoing subsection as it applies for "the purposes of section 34 of the said Act of 1927 (which makes "in relation to surtax the like provision as subsection (1) of this "section)."

The appellant at all relevant times before December 11, 1947, held £12,950 ordinary stock in a colliery company. His holding was reduced in December, 1947, in consequence of a reduction of the company's capital, but no evidence was laid before the commissioners to connect this reduction in any relevant way with the problem which arises in this appeal and I shall therefore make no further reference to it. The company's accounts

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were made up to December 31 in each year, and the appellant received dividends on the stock held by him, as shown conveniently in the following table:—

| | Date declared | Date received (and date on which payable) | Description | Period in respect of which paid | Gross amount before deduction of Income Tax |
|---|---|---|---|---|---|
| | | | | | £ s. d. |
| A | 4.7.1946 | 1.8.1946 | 3% Interim | Calendar Year 1946 | 388 10 0 |
| B | 15.5.1947 | 31.5.1947 | 12% Final | Calendar Year 1946 | 1,554 0 0 |
| C | 24.7.1947 | 1.9.1947 | 3% Interim | Calendar Year 1947 | 388 10 0 |
| D | 18.3.1948 | 23.4.1948 | 7% Second Interim | Calendar Year 1947 | 543 18 0 |
| E | 21.7.1948 | 1.9.1948 | 3% Interim | Calendar Year 1948 | 233 2 0 |
| F | 7.4.1949 | 13.4.1949 | 7% Final | Calendar Year 1948 | 543 18 0 |

In consequence of the provisions of section 39 of the Finance Act, 1927, and of the provisions of section 48 of the Finance Act, 1948, that total income shall be ascertained as it is ascertained for the purposes of surtax, the two dividends marked B and C, which were those paid in the fiscal year ending April 5, 1948, fell to be included in the appellant's total income for the fiscal year 1947–48, and accordingly the gross amount of these dividends was included in his aggregate investment income for the purposes of the assessment to the special contribution.

The appellant applied to the Special Commissioners for relief under section 61 on the ground that the income from his stock in the company included in his aggregate investment income represented more than the income which would be attributable to a period of one full year if the income were to be deemed to have accrued from day to day.

Section 61 makes reference to sections 34 and 36 of the Finance Act, 1927, which deal with surtax. Section 34 of the Finance Act, 1927, made provision for relieving the taxpayer of the hardship of paying surtax on the fortuitously swollen income of any assets in a particular year, a hardship which might involve payment of tax both on a larger sum than is equitable and at a higher rate. It was foreseen that the same hardship might arise also in the reckoning and payment of the special contribution. Paragraph (*b*) of section 61 (1) prescribes the antecedent condition for the grant of relief and it employs substantially the same terms as paragraph (*a*) of section 34 of the Finance Act, 1927. Under both Acts the Special Commissioners have to be satisfied that "as respects any assets that, by reason of the provisions of the "Income Tax Acts which require that income which is charge-"able with income tax by way of deduction shall be deemed to be "income of the year in which it is receivable, the income from "the assets represents more than the income which would be "attributable to a period of one full year if the income were "deemed to have accrued from day to day." For surtax purposes there is another condition prescribed by section 34 (*b*) of the Finance Act, 1927. It is that the Special Commissioners

must also be satisfied that as respects any assets the amount of surtax payable by the applicant for the year "exceeds by more "than five per cent. the amount . . . which would have been "payable by him for that year if the amount of his income from "those assets had not exceeded the amount which would be "attributable to a period of one full year if the income from "those assets were deemed to have accrued from day to day." Section 36 (1) of the Finance Act, 1927 (which is applied by subsection (2) of section 61 of the Finance Act, 1948, for the purposes of paragraph (*b*) of section 61 (1) (*b*)), provides that income which "is deemed to have accrued from day to day . . . "shall—(*a*) if payable in respect of any stated period, be deemed "to have accrued from day to day during that period." Paragraph (*b*) of section 36 (1) of the Finance Act, 1927, provides for the case where the income is not payable in respect of any stated period. In the present case, however, the dividends on the appellant's holding in the company receivable in the fiscal year 1947–48 were paid in respect of stated periods, dividend B being stated to be the final dividend in respect of the calendar year 1946 and dividend C being an interim dividend in respect of the calendar year 1947, and all other dividends are similarly assigned to a stated period.

When the application for relief first came before the Special Commissioners they held that the condition for the grant of relief as prescribed by section 61 (1) (*b*) had not been fulfilled, but this decision was reversed by Danckwerts J., who remitted to the Special Commissioners to consider what relief if any should be granted. The decision of Danckwerts J. has been accepted by the parties in the proceedings which have followed upon it. It would nevertheless be necessary to consider what was the exact ratio of his decision, and what was the precise construction which he put upon the words in section 61 (1) (*b*) which define the preliminary condition, if the construction of that part of the subsection which deals with the amount of the relief to be granted depended upon them. But that is itself the main issue in the appeal, and if, as I think, there is no such dependence, it is unnecessary to consider further the judgment of Danckwerts J. or the construction of the words defining the preliminary condition. Nor would it be desirable to prejudge unnecessarily a question which may yet come to this House for decision.

In the debate the appellant's counsel submitted for consideration several alternative constructions of the final part of section 61 (1). All of them had one common feature; in all of them the Special Commissioners were required in arriving at the relief to be granted, to make a calculation attributing to a period of twelve months the income received from the appellant's holding in the company on the footing that the income was deemed to have accrued from day to day. Two examples may be given. The income thus to be attributed was, in one of the alternative submissions, the dividends C, D, E and F in the table, that is,

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the whole dividends which were in fact paid (at whatever date) in respect of the calendar years 1947 and 1948, and the Special Commissioners were then to take the portion attributable to the twelve months of the fiscal year 1947–48 as the equivalent of a full year's income. According to another of the alternative submissions it was the income receivable in the fiscal year 1947–48, viz., dividends B and C, which was to be apportioned and the portion attributable to any consecutive period of twelve months out of the twenty-four months of the calendar years 1946 and 1947 was to be taken. The basis of all these submissions is that the words "a full year's income" at the end of the subsection "echo" the words "the income which would be attribu- "table to a period of one full year if the income were deemed "to have accrued from day to day" and therefore by virtue of section 61 (2) and of subsection (1) of section 36 of the Finance Act, 1927, entitle the appellant to have the dividends treated as accruing during the period in respect of which they were payable.

The Special Commissioners rejected the basis of the appellant's contention that a process of day to day apportionment was contemplated as the means for arriving at the relief to be granted. They said that the natural meaning of "a full year's income" in the context was a full year's income in reality and that, having regard to all the circumstances, the most real and natural test was to take the dividends in respect of the company's successive financial years, each of which coincides with a full calendar year. The two years to which they thought it was most natural to turn were 1946 and 1947, and they selected the year 1946 since the dividends received in it were equivalent to the statutory income for the fiscal year 1947–48. They therefore made no reduction.

Donovan J. reversed the decision of the Special Commissioners. He held that they were not entitled to select some representative year for the purpose of section 61, and that they ought to have apportioned dividends B and C or B, C, D and E in the manner described above.

The Court of Appeal unanimously reversed the judgment of Donovan J. and restored the decision of the Special Commissioners. Judgments were delivered by Somervell L.J. and Romer L.J. Denning L.J. concurred with Somervell L.J. The court rejected the basic contention of the appellant that the words "a full year's income" in their natural sense required any method of apportionment, or that they were capable of bearing the meaning "the income attributable to the financial year "1947–48 on the basis that dividends referable to these years "were apportioned as accruing from day to day."

My Lords, I agree with the Court of Appeal on this point, for reasons which I will presently state. Both Somervell L.J. and Romer L.J. gave additional reasons for rejecting the appellant's contention. I do not propose to deal with them because the rejection of the day to day attribution of income goes to the root

of the appellant's case and whatever other reasons there may be for dismissing the appeal are superfluous.

There are two points to be considered in their bearing on the main issue. First, do the words "a full year's income" "echo" the words "the income which would be attributable to "a period of one full year if the income were deemed to have "accrued from day to day"? In my opinion the "echo" is a false echo and does not justify the reading into the final part of section 61 (1) of any part of the wording from the paragraph relating to what I have called the antecedent condition. I cannot think that the legislature would have left the crucial words by which the income is deemed to have accrued from day to day to be implied from the mere fact that the words "a full year's "income" recall the words "a period of one full year." There is no reason why the words "a full year's income" should bear any artificial meaning or be stretched by implication into a meaning which they seem to be incapable of supporting. If the words "deemed to have accrued from day to day" are not to be read in, then section 36 of the Finance Act, 1927, cannot help the appellant. It may be noted that these crucial words are repeated in each of the two paragraphs of section 34 of the Finance Act, 1927, and that they are not left to implication in the second of the two paragraphs.

This brings me to the second point for consideration. If attribution by accrual from day to day is excluded, the consequence must be that, unless the Special Commissioners have some degree of discretion, there is no means of arriving at the relief to be granted. The appellant contended that the Special Commissioners had no discretion to select a year the income in respect of which was to be regarded as equivalent to a full year's income. If that contention is well founded, and if the appellant's method of arriving at the relief is to be rejected, the result might be that section 61 is abortive. The questions whether the Special Commissioners have a discretion and how far it extends depend on the words of the section itself. We were invited to contrast them with other words in other sections or statutes in which a discretion was given to the Special Commissioners. Such comparisons have little or no value and I have not been helped by them. The Special Commissioners are, by the concluding words of section 61 (1), directed, and to that extent the subsection is directory, to "make such reduction, *if any*, as may be *appropriate* "to secure that there *shall be taken as representing* the income "from the assets *an amount equivalent to* a full year's income "therefrom." The whole wording seems designed, not to define what the relief must be, but to allow some latitude of judgment in deciding what it may fairly be. The words which I have italicized are specially apt if the Special Commissioners' duty is to exercise a discretionary judgment. How far it may extend it is not necessary to decide here. The year they have chosen is one of the years in respect of which the dividends received in

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FENWICK v. INLAND REVENUE COMMISSIONERS.

Lord Normand.

1947–48 were paid. They might have taken the year 1947, but it cannot be said that they either ignored relevant matters or took into account irrelevant matters or acted capriciously in choosing 1946. Whether they might have gone further back than 1946, in certain circumstances, and have taken a year the income in respect of which had no connexion with the dividends received in 1947–48 is a question which does not arise and I express no opinion upon it.

My conclusion is that the appeal should be dismissed with costs.

My Lords, I am asked to say that my noble and learned friends, LORD OAKSEY and LORD MORTON OF HENRYTON, concur in this opinion.

LORD REID. My Lords, I concur.

LORD COHEN. My Lords, I also agree.

*Appeal dismissed.*

Solicitors: *Peacock & Goddard; Solicitor of Inland Revenue.*

F. C.

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[QUEEN'S BENCH DIVISION.]

1953 *July* 15.

Lord Goddard C.J., Parker and Donovan JJ.

## * REGINA *v.* NAILSWORTH LICENSING JUSTICES. *Ex parte* BIRD.

*Justices — Bias — Licensing — Application for off-licence — Petition in favour of licence previously signed by one justice.*

After members of a licensing committee had retired to consider an application for the grant of a beer off-licence, it was discovered by a party opposing the grant of a licence that one member of the committee had previously signed a petition in favour of the licence. No objection was taken by the party until after the committee had announced its decision granting the licence, when, on being informed of the position, the committee refused to change its decision. On a motion for an order of certiorari to quash the decision:—

*Held*, that an order should be refused since objection had not been taken before the committee announced its decision; and further that, although it was undesirable for a justice who had signed a petition in favour of a matter to sit as a member of a committee adjudicating thereon, it had not been established that there was any such bias on the part of the justice concerned as would make her unfit to sit.

*Per* Lord Goddard C.J.: It is not anything that raises doubt in somebody's mind that is enough to set aside an order or a judgment of justices. There must be something in the nature of real bias.

*Reg.* v. *Taylor, etc., Justices; ex parte Vogwill* (1898) 14 T.L.R. 185 referred to.

*Rex* v. *Caernarvon Licensing Justices* [1948] W.N. 505 distinguished.

[Reported by Mrs. E. M. WELLWOOD, Barrister-at-Law.]

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REG. v. NAILSWORTH LICENSING JUSTICES. *Ex parte* BIRD.

MOTION for an order of certiorari.

On February 5, 1953, Joseph Burton & Sons Ld. applied to the Divisional Licensing Committee at Nailsworth, Gloucestershire, for a beer off-licence to be granted to one of their directors, Francis Adlington Stokes, in respect of a grocer's shop, Prices Stores, Nailsworth. The applicant for the order, Harold Bird, licensee of the Foresters Arms Inn, Stroud, and secretary of the Stroud and District Licensed Victuallers' Protection Society, opposed the grant of the licence and instructed a solicitor to appear on his behalf. The committee consisted of three justices, one of whom was Mrs. Alice Waine. At the hearing, a petition in favour of the licence was produced, but it was not examined by the committee. When the justices retired, the solicitor for the applicant was informed by his client that Mrs. Alice Waine had signed the petition in favour of the licence. The justices returned and announced their decision to grant the licence and thereupon the solicitor for the applicant informed the chairman that Mrs. Waine's name appeared among the signatures on the petition. The two other members of the committee retired again but on their return announced that they did not intend to change their decision.

The applicant moved for an order of certiorari to quash the decision on the grounds that the member of the committee who had signed the petition was biassed so that justice did not seem to be done; alternatively that only two members of the committee adjudicated and were not a quorum.

By an affidavit Mrs. Alice Waine admitted signing the petition some weeks before the hearing, but stated that when she signed it she did not expect to sit on the bench to hear the application; that she was asked to sit at short notice and was not told that licensing matters were to be considered; and that she did not remember having signed the petition until objection was taken after the decision had been announced.

*W. A. Fearnley-Whittingstall Q.C.* and *E. B. Conway Clifford* for the applicant.

*Conolly Gage* for the justices.

Cases cited in argument: *Reg.* v. *Taylor, etc., Justices*; *Ex parte Vogwill*[1]; *Rex* v. *Caernarvon Licensing JJ.*[2]; *Reg.* v. *Sussex JJ.*; *Ex parte McCarthy.*[3]

LORD GODDARD C.J. having stated the facts continued: It is undesirable that a justice of the peace should sign a petition in favour of something which may come before the court, and then sit and adjudicate on that matter. No one suggests here that Mrs. Waine knew about this matter when she came to the court,

[1] (1898) 14 T.L.R. 185.
[2] [1948] W.N. 505.
[3] [1924] 1 K.B. 256; 40 T.L.R. 80.

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REG. v. NAILSWORTH LICENSING JUSTICES. *Ex parte* BIRD.

Lord Goddard C.J.

and I do not attach any blame to her. She was brought in in an emergency to sit as a justice. But it is said that justice was not seen to be done because the parties discovered while the justices were out of court that Mrs. Waine had signed the petition. It is obvious from the affidavit of the clerk to the justices that while the justices had retired, one of the licensed victuallers who was instructing the solicitor to oppose the application for the licence called the solicitor's attention to the fact that the name of Mrs. Waine appeared on the petition. The solicitor did not take his objection then and it seems clear that he decided to let the matter go on, taking the view that this was a heaven-sent opportunity of getting the order quashed if the committee found in favour of the application. That would be sufficient ground for refusing this application because certiorari is a discretionary remedy even where there is jurisdiction.

The more important point is whether or not the court is bound to quash this order on the ground of bias simply because one of the justices had signed the petition. I do not in the least wish to depart from what my predecessors have said about the necessity of justice being seen to be done because it is most important that it should be seen to be done, but it is not everything which may raise suspicion in somebody's mind that is enough to set aside a decision of justices. I need not put it as it was put by Day J. in *Reg.* v. *Taylor; Ex parte Vogwill*, where he said[1]: "Anything at any time which could make fools "suspect." It is not anything that raises doubt in somebody's mind that is enough to set aside an order or a judgment of justices; there must be something in the nature of real bias. If a person has a proprietary or a pecuniary interest in the subject-matter that is before the court and that person does not disclose it, that has always been held to be enough to upset the decision; but the mere fact that a justice may be thought to have formed some opinion beforehand is not, in my opinion, enough to upset the decision. As I pointed out in the course of the argument, licensing matters are left by Parliament to local justices for the very best of reasons, that is to say, because justices have local knowledge, and it is impossible to suppose that any justice coming on to the bench at a licensing meeting when he knows that there is an application for a licence or that there is opposition to the renewal of a licence, has not formed his own private views as to whether the licence ought to be granted or refused as the case may be. The anomaly has often been pointed out that whereas no person interested in a brewery may sit as a licensing justice, a person who is a very active teetotaller may sit as a justice; but it cannot be said that because an application is refused the justice necessarily acted improperly because he happens to be a total abstainer. In all these cases it must be a question of degree.

[1] 14 T.L.R. 185.

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The attention of the court has been drawn to *Rex* v. *Caernarvon Licensing Justices*,[2] in which the court, consisting of myself, Hilbery and Birkett JJ., granted an order of certiorari to set aside a decision of justices refusing a licence. In that case, one of the justices was a deacon of a chapel, which had called a meeting for the express purpose of considering whether the grant of the licence should be opposed, and although the justice did not actually vote at the meeting, he took part in it. The court took the view that in those circumstances, where a man was practically making himself a party to the body which intended to oppose the licence, it was not right that he should sit on the bench. In the present case, all that happened was that Mrs. Waine at some time—it is not clear when—went into a grocer's shop and signed a petition which indicated that she thought that an off-licence would be justified. We do not think, in those circumstances, that we ought to say that she was so biassed that she was unfit to sit on the bench. The application is refused, therefore, on two grounds, first, because it was not established that there was any real bias on the part of Mrs. Waine, or that anything was done which would make it appear improper for her to sit, although it was undesirable that she should do so—there is no reason to suppose that she would have signed this petition had she known that she was going to sit; secondly, because there was ample opportunity for objection to have been taken before the decision was given, and no objection was taken.

PARKER J. I agree.

DONOVAN J. I also agree.

*Application refused.*

Solicitors: *Speechly, Mumford & Craig, agents for Little & Bloxam, Stroud; Gustavus Thompson & Sons, agents for Scott & Fowler, Gloucester.*

[2] [1948] W.N. 505.

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[QUEEN'S BENCH DIVISION.]

* KRUGER TOWNWEAR LD. *v.* NORTHERN ASSURANCE CO. LD.

1953
*July* 21

Lord Goddard C.J., Parker and Donovan JJ.

[PRACTICE NOTE.]

*Practice—Arbitration—Issue of fraud—Application for an order that arbitration agreement and a condition precedent clause should cease to have effect—Jurisdiction of Divisional Court—Arbitration Act,* 1950 (14 *Geo.* 6, *c.* 27), *ss.* 24 (2), 25 (4).

The claimants brought an action against insurers for indemnity under an insurance policy. The insurance policy contained an

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Kruger Townwear Ld. v. Northern Assurance Co. Ld. [Practice Note.]

arbitration agreement and a *Scott* v. *Avery* clause that the obtaining of an award should be a condition precedent to the bringing of any action against the assurors. On the application of the insurers the master made an order for a stay of all further proceedings under section 4 of the Arbitration Act, 1950. The claimants appealed and Barry J. dismissed the appeal without prejudice to their right to apply for a revocation of the arbitration agreement and the condition precedent clause. The claimants applied by motion under section 24 (2) and 25 (4) of the Arbitration Act, 1950, for an order that the stay of all further proceedings be removed, and that the arbitration agreement and the condition precedent clause in the policy should cease to have effect on the ground that an issue of fraud had been raised in the dispute. The motion was set down for hearing in the Divisional Court List.

The court held that the Divisional Court was the appropriate court to which to apply for an order under section 24 of the Arbitration Act, 1950, and made the order sought. If it is desired to make such an application when the Divisional Court list is not being taken it can be made on any day on which ex parte motions are heard.

J. F. L.

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[CHANCERY DIVISION.]

[DIVISIONAL COURT IN BANKRUPTCY.]

1953
*June* 15, 29.

Harman and Upjohn JJ.

## * *In re* A DEBTOR, No. 10 of 1953. *Ex parte* THE DEBTOR *v.* AMPTHILL RURAL DISTRICT COUNCIL.

*Bankruptcy — Rating — Sum due for unpaid water rate — Bankruptcy notice — Extension of time for complying with notice — Duty of registrar—Validity of notice—Bankruptcy Act*, 1914 (4 & 5 *Geo.* 5, *c.* 59), *s.* 4 (1) (*c*)—*Bankruptcy Rules*, 1915 (*S.R. & O.* 1914, *No.* 1824/*L.*47), *r.* 141.

On September 10, 1952, the registrar dismissed an application by a debtor to set aside a bankruptcy notice which began to run from that date. On appeal to the Divisional Court the registrar's order was discharged, but on February 10, 1953, the Court of Appeal reversed the decision of the Divisional Court and directed that the registrar's order of September 10, 1952, be restored.

On March 10, 1953, a petition was presented, founded on the act of bankruptcy which was complete on September 10, 1952:—

*Held* that, as the time for the validity of the bankruptcy notice (namely, three months), began to run at the latest on September 11, 1952, and the Court of Appeal had reversed the decision of the Divisional Court and restored the registrar's judgment, that judgment accordingly remained standing as from the date when it was given, namely, September 10, 1952, and the petition was out of time and must be dismissed.

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A Debtor, *In re*, No. 10 of 1953. *Ex parte* The Debtor *v.* Ampthill Rural District Council.

Appeal from the Brentford County Court.

The Ampthill Rural District Council obtained on April 26, 1951, an order against a debtor in a court of summary jurisdiction for the payment of £2 12s. 6d., being a water rate which the council claimed in respect of premises owned by the debtor. On August 22, 1952, a bankruptcy notice was served on the debtor in respect of £2 15s. 6d., being the total sum owing under the judgment. The registrar, having fixed September 10, 1952, for the hearing of an application by the debtor to set the notice aside, extended to the date of the hearing what he described as "the "completion of the act of bankruptcy." On September 10, 1952, the registrar dismissed the application.

On November 10, 1952, an appeal from the registrar's decision to the Divisional Court was allowed by that court, which directed that the order of September 10, 1952, be discharged and the bankruptcy notice be set aside.

On appeal by the council, the Court of Appeal by an order dated February 10, 1953, directed that the order of the Divisional Court dated November 10, 1952, be set aside and the registrar's order of September 10, 1952, be restored: *In re A Debtor, No.* 48 *of* 1952, *ex parte Ampthill Rural District Council* v. *The Debtor.*[1]

On March 10, 1953, the council presented a petition stating that the debtor was indebted to them for £76 8s. 2d. (which sum included the amount due in respect of the water rate).

The registrar having, on May 1, 1953, made a receiving order against the debtor, the debtor applied by motion in the Divisional Court that the receiving order of May 1, 1953, be discharged and the bankruptcy petition be dismissed, one of the grounds of appeal being that the act of bankruptcy was complete on September 10, 1952, when the registrar made his order and therefore was not available as a foundation for a petition filed more than three months after that date.

*Muir Hunter* for the appellant.

*P. B. Showan* for the respondent council.

Cases referred to in argument: *Nitrate Producers Steamship Co. Ld.* v. *Short Bros. Ld.*[2]; *In re Teale.*[3]

*Cur. adv. vult.*

June 29. Harman J. The judgment which I am about to read is the judgment of the court.

This is an appeal against a receiving order made by the registrar of the Brentford County Court on May 1, 1953, on the petition of the respondents. The act of bankruptcy relied on was the appellant's failure to comply before February 10, 1953, with

[1] [1953] 1 Ch. 335; [1953] 2 W.L.R. 444; [1953] 1 All E.R. 545.

[2] (1922) 38 T.L.R. 747; 127 L.T. 726.

[3] [1912] 2 K.B. 367; 28 T.L.R. 415.

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A DEBTOR, *In re*, No. 10 OF 1953. *Ex parte* THE DEBTOR *v.* AMPTHILL RURAL DISTRICT COUNCIL.

a notice served on him on August 22, 1952, in respect of a judgment debt of rather over £2 under an order of the petty sessional court at Ampthill dated April 26, 1951. The dates of the judgment and the bankruptcy notice and the amount concerned are sufficiently remarkable: more remarkable still is the fact that this bankruptcy notice has already received the attention of this court and of the Court of Appeal, the former having set it aside, and the latter having restored it by a considered judgment delivered on February 10, 1953, in *In re A Debtor, No. 48 of* 1952.[1] The facts are stated in the Court of Appeal's judgment. It appears that the £2 15s. 6d. represents water rates for two half-yearly periods in the year 1950 or thereabouts, aggregating £2 12s. 6d., which have admittedly remained unpaid, and 3s. costs. There has been in fact a long and protracted dispute between the respondents and the appellant about rates. The importance of the judgment for water rates was, as the Court of Appeal has held, that it was a good basis for a bankruptcy notice (because, unlike other rates, it is recoverable as a civil debt), thus enabling the council, having regard to the decision in *In re McGreavey*,[2] to present a petition supported by its judgment for general rates, although the latter could not have been the subject of a bankruptcy notice.

As before stated, the bankruptcy notice was served on August 22, 1952. In due course, the appellant filed an affidavit in opposition, pursuant to Bankruptcy Rule 140 of 1915. This operated as an application to set aside the notice (see Rule 141). Accordingly, on September 1, 1952, the registrar, as the last rule required, fixed Wednesday, September 10, 1952, for the hearing of the application. This date was later than the date of expiration of the bankruptcy notice and therefore the registrar, as he was obliged to do by the same rule, extended to the date of the hearing what he called "the completion of the act of "bankruptcy."

On September 10, 1952, the registrar dismissed the appellant's application on the ground that there was no good counterclaim or set off under section 1 (*g*) of the Bankruptcy Act, and he at the same time (but, as it was conceded, without jurisdiction) added a sum of £7 18s., consisting of costs and expenses, to the bankruptcy notice.

On October 18, 1952, the appellant in person appealed by leave to this court, which heard his appeal on November 10, and allowed it, not on the ground taken before the registrar, but on a different ground later disapproved of and explained by the Court of Appeal in the report of the case.

It appears that directly the Court of Appeal gave its decision the appellant sent by registered post to the respondents a cheque for the sum in question. There is no reason to suppose that the

[1] [1953] 1 Ch. 335.

[2] [1950] Ch. 269; 66 T.L.R. (Pt. 1) 389; [1950] 1 All E.R. 442.

cheque would not have been met. It appears, however, though the evidence on this point is most unsatisfactory, that the cheque was not received by the respondents till the next day, when they refused to accept it. They maintain in this court that they were justified in so doing.

The grounds of the appeal as argued before us are first that the receiving order and the petition are bad on their face in stating as the act of bankruptcy a failure to comply with the bankruptcy notice "before" February 10, 1953. This point is admittedly good as matters stand and we were asked to give leave to amend the petition by adding the words "on or" immediately before the word "before."

The second ground taken was that the act of bankruptcy was complete on September 10, 1952, when the registrar made his order and therefore was not available as a foundation for a petition filed more than three months thereafter, namely, on March 10, 1953; (Bankruptcy Act, s. 4 (1) (*c*)).

The third ground was that the Bankruptcy Court ought to have looked behind the judgment for £2 12s. 6d. and costs and, if it did so, the judgment would be found to be unsatisfactory for the following reasons: First, it was a judgment by default, the defendant not being present, as he was ill and sent a doctor's certificate to the bench, but they refused to adjourn the matter. Secondly, there was no effective appeal from that judgment. The debtor appealed to quarter sessions against two judgments, one involving the water rate already mentioned and the other certain general rates. The appeals committee at quarter sessions dismissed both appeals as premature. So far as the appeal against general rates was concerned, that was correct, as there had been no distraint for the rates in question (see *Reg.* v. *London Justices* [3]). It also by inadvertence dismissed at the same time and apparently on the same ground the part of the judgment relating to water rate, although *Reg.* v. *London Justices* [3] had no application to that part, as that rate was recoverable as a civil debt. In the result, the truth of the matter seems to be that the debtor's defence against the claim for water rates has never been heard.

Fourthly, it is said that the registrar misdirected himself, in that he took the view that, having regard to the finding of the Court of Appeal, it was no longer open to the debtor to take the point that he had a counterclaim or set off, whereas the fact that there is no cross-claim to satisfy section 1 (*g*) of the Bankruptcy Act does not decide the question whether the debtor may not be able, on the hearing of the petition, to set up a cross-claim. These last two grounds are not covered by the notice of appeal and we have been asked to give leave to amend in that respect. There are other grounds of appeal stated in the notice which were not proceeded with before us.

[3] [1899] 1 Q.B. 532; 15 T.L.R. 196.

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A DEBTOR, *In re*, No. 10 OF 1953. *Ex parte* THE DEBTOR *v.* AMPTHILL RURAL DISTRICT COUNCIL.

As to the first point, we were asked to refuse leave to amend the petition, it being argued with force that this was not a technical matter, because the appellant was in a position to pay and did in fact send a cheque which reached the respondents on the morning of the day following the Court of Appeal's decision. It was said that, as the respondents were relying on two technical points, first that the cheque was sent a few hours too late, and secondly that a tender by cheque is not a tender in law, they ought not to be allowed to amend. In many cases we should agree with that argument, but this case is only one step in a long and highly technical piece of litigation between the appellant and the respondents in respect generally to rates said to be due from him, and we think that in the circumstances the respondents may properly rely on any technical matters and at the same time should be allowed to amend what is plainly a verbal slip; though the ultimate outcome of the litigation may depend on highly technical matters, it would be wrong to let it be decided on a mere slip.

As to the second point, it is enough to remember the two dates appearing on the face of the receiving order, namely, August 22, 1952 (the date of service of the notice) and February 10, 1953 (the date of failure to comply), to suggest at once the conclusion that the interval is too great. The notice in the ordinary course expired on August 29, and it was admittedly extended by the registrar, under Rule 141 of 1915, to September 10. On that date prima facie the act of bankruptcy was complete and the three months then began to run. It was, however, argued for the respondents that either the notice of appeal filed by the appellant on October 18 or the order of this court on November 10, discharging the order of September 10, and setting aside the bankruptcy notice, in some way suspended the running of time, and that time remained so suspended until the final determination of the matter by the Court of Appeal on February 10, 1953. That order allowed the appeal, rescinded the order of this court of November 10, and restored the registrar's order, and it is said that the respondents had three months from that date to enter their petition, and complied by filing it on March 10. We are unable to accede to this argument. In our judgment, it follows from the terms of Rule 141 of 1915 (replaced now without material alteration in this respect by Rule 139 of 1952) that the only person who can extend the time for complying with the bankruptcy notice is the registrar, or, having regard to the definition in Rule 3, his deputy. The rule is directory and compels the registrar to extend it "until "the application has been heard and determined." These words can only apply, in our judgment, to the determination before the registrar of the application to set aside the bankruptcy notice made by filing the affidavit mentioned in the rule, and cannot apply to its determination either by this court or by the Court

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of Appeal. It seems to us, therefore, that the time began to run at the latest on September 11, 1952. There were in fact, on any view, two months during which the registrar's order stood and in which a petition could have been presented. Of course, when this court set aside the bankruptcy notice it would also have set aside the petition, but the order of the Court of Appeal would have restored both.

It was pointed out to us on behalf of the appellant that under Ord. 58, r. 16, of the Rules of the Supreme Court, which applies to a Divisional Court in Bankruptcy under Bankruptcy Rule 134 of 1915 (No. 132 of 1952), an appeal does not operate as a stay of execution or of proceedings under the decision appealed from unless the court so orders. The only case touching on this matter to which we were referred was *Nitrate Producers Steamship Co. Ld.* v. *Short Brothers Ld.*[4] The immediate point is not relevant, but Lord Buckmaster in the course of his speech, in which the other Lords concurred, said this: "It is, of course, a "totally different proposition where the effect of an order in this "House is to restore a judgment of the court of first instance "which has been reversed by an order of the Court of Appeal. "In that case the judgment of the court of first instance is "expressly restored and remains standing as from the date "when it was given." So here the Court of Appeal reversed the Divisional Court and restored the registrar's judgment, which accordingly remains standing as from the date when it was given, namely, September 10, 1952. In our judgment, therefore, the appeal succeeds on this ground.

This makes it unnecessary to consider the third and fourth grounds argued before us. Formally, in case this matter should go further, we grant leave to amend the notice of appeal to raise these points. We think, however, that there is no substance in either of them. As to the third point, the Court of Bankruptcy can, of course, look behind a judgment, but, so far as we are aware, the only defence to the summons before the justices would have been that the appellant had some counterclaim. This, however, was never put forward by him until after the bankruptcy proceedings had been started. We do not see, therefore, that any injustice can have been done to him by the original decision of the petty sessional court or upon the appeal.

With regard to the fourth point, evidence as to what took place before the registrar was most unsatisfactory, but we are not satisfied that he misdirected himself on this matter. The information given to us leads us to suppose that the general rates paid by the appellant to the respondents were voluntarily paid by him in order to obtain some advantage for himself, namely, to clear the title of some property which he had sold, and therefore were not paid in circumstances in which he could

[4] (1922) 127 L.T. 726, 727; 38 T.L.R. 747, 748.

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succeed in an action for money paid under a mistake of fact or under some undue pressure. We think that this is not a case for the exercise of the powers given by section 5 (5) of the Bankruptcy Act: it is a matter which could be determined in the bankruptcy itself.

However, as, in our view, the bankruptcy notice is no longer available as an act of bankruptcy, this appeal must be allowed and the petition dismissed. The respondents must pay the appellant's costs of the petition and of this appeal; and the £20 in court must be paid out to the appellant. Of course, as the appellant was in person below, there will only be such costs, if any, as an appellant in person is entitled to.

*Appeal allowed.*
*Petition dismissed.*

Solicitors: *Shelton, Cobb & Co.; Crossman, Block & Co. for Sharman & Trethewy, Bedford.*

J. L. D.

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[QUEEN'S BENCH DIVISION.]

1953
*July* 16.

Lord Goddard C.J., Parker and Donovan JJ.

## *EVANS *v.* JONES.

*Food and Drugs—Milk—Adulteration—"Trifling offence"—Duty of justices to convict—Food and Drugs Act,* 1938 (1 & 2 *Geo.* 6, *c.* 56), *s.* 3.

The defendant was charged under section 3 of the Food and Drugs Act, 1938, with selling on two occasions to the prejudice of the purchaser milk which was not of the quality demanded. The milk in question contained added water, in one case to the extent of 9 per cent. of the bulk, and in the other case to the extent of 4 per cent. Although containing less than the prescribed percentages of solids not fat the milk was in each case good quality milk with more than the prescribed percentages of fat solids. The defendant failed to prove that the milk was in the same state as it came from the cow but the justices considered that, as the milk was still of very good quality, the presence of water in the quantities proved did not prejudice the purchaser, and, following *Banks* v. *Wooler* (1900) 81 L.T. 785, they held that the offence was trifling and dismissed the informations. On appeal by the prosecutor:—

*Held* that, the purchaser not having received what he demanded, namely genuine milk, the sale was to his prejudice and it was the duty of the justices to convict, although, if they considered the offence trifling, they could, under section 7 of the Criminal Justice Act, 1948, give a conditional or an absolute, discharge.

Dictum of Channell J. in *Banks* v. *Wooler* (1900) 81 L.T. 785, no longer good law.

*Per curiam*: Whatever may have been the view of the court in 1900, the adulteration of milk today is not to be regarded as a trivial offence merely because the milk contains sufficient butter-fat.

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EVANS v. JONES.

CASE STATED by Montgomery justices.

Informations were preferred under section 3 of the Food and Drugs Act, 1938,[1] by an Inspector of Food and Drugs against the defendant, a dairy farmer, alleging that he, on two occasions, unlawfully sold to the prejudice of the purchaser, the Milk Marketing Board, a food which was not of the quality of the food, namely, milk, demanded by the purchaser.

The following facts were proved or admitted before the justices: On December 10, 1952, the prosecutor purchased from a retailer a pint of milk supplied by the defendant, which, on analysis calculated on the standard of 8·5 per cent. for solids not fat was found to contain added water to the extent of 9 per cent. of the bulk, 7·7 per cent. solids not fat and 4·6 per cent. fat solids. On December 12, 1952, the prosecutor visited the defendant's farm and took a sample of milk from each of two churns which were waiting collection by the retailer. The milk from one of the churns containing the morning's milking was found to be pure and unadulterated containing the prescribed quantities of non-fat and fat solids, but the milk from the other churn, which contained the milking from the previous evening, was found on analysis calculated on the standard of 8·5 per cent. for solids not fat, contained added water to the extent of 4 per cent. of the bulk, 4·4 per cent. fat and 8·2 per cent. solids not fat. Apart from the fact that water was present in both samples, the milk was in each case good milk notwithstanding that the percentage of milk solids other than milk fat was below the standard prescribed in the Sale of Milk Regulations, 1939.[2] The defendant lived at his farm with his sister-in-law and a man servant who both handled the milk which was left at the farm overnight, but neither was called to give evidence, and there was no evidence to indicate who had added the water to the milk. The prosecutor had known the defendant since 1937 and had carried out tests of his milk from time to time and had found no previous cause of complaint.

On behalf of the prosecutor it was contended that the milk in both cases, notwithstanding its good quality, in that the percentages of solids exceeded the prescribed percentages, was sold to the prejudice of the purchaser within the meaning of section 3 of the Food and Drugs Act, 1938, as it was not of the quality of the food demanded by virtue of the addition of

[1] Food and Drugs Act, 1938, s. 3: "If a person sells to the prejudice of "the purchaser any food . . . which "is not of the nature, or not of the "substance, or not of the quality, of "the food . . . demanded by the purchaser, he shall . . . be guilty of an "offence."

[2] Sale of Milk Regulations, 1939, reg. 1: "Where a sample of milk ". . . contains less than 3 per cent. "of milk-fat, it shall be presumed "for the purposes of the Food and "Drugs Act, 1938, until the contrary "is proved, that the milk is not "genuine. . . . 2. Where a sample "of milk . . . contains less than 8.5 "per cent. of milk-solids other than "milk-fat, it shall be presumed for "the purposes of the Food and Drugs "Act, 1938, until the contrary is "proved, that the milk is not "genuine."

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water to it, and that the defendant had failed to rebut the presumption laid down in regulation 2 of the Sale of Milk Regulations, 1939, as to milk containing less than 8·5 per cent. of milk solids other than milk fat.

On behalf of the defendant it was contended that both samples of milk were of very good quality and that the purchaser was not prejudiced notwithstanding the unexplained presence of water in it.

The justices were of the opinion that the defendant by his failure to call his sister-in-law and the man servant had failed to prove that the milk in question was in the same state as it came from the cow, but were also of the opinion that both charges should be dismissed, in that it had been proved to their satisfaction that the milk sold was of very good quality, and in that the presence of water in the quantities proved did not make it prejudicial to the purchaser. Further, after considering the judgment in *Banks* v. *Wooler*,[3] they were of the opinion that as, in the cases before them the percentages of water were less and the percentages of fat more, than in that case, they should follow that decision and, therefore, they dismissed the information.

The prosecutor appealed.

*Maurice Ahern* for the prosecutor.

The defendant did not appear and was not represented.

The following case was referred to in argument: *Banks* v. *Wooler*.[3]

PARKER J. stated the facts and continued: The magistrates held that although no attempt had been made by calling the sister-in-law or the man servant to prove that the milk was in the same state as when it came from the cow, nevertheless it was, by reason presumably of the content of fat solids, very good quality milk, and that the presence of water in the quantities proved did not make it prejudicial to the purchaser. Pausing there, there is ample authority for holding that where the purchaser does not get what he demands—in this case genuine milk—the sale is to his prejudice. The magistrates apparently held that, because the milk was good, the offence was trivial, and because it was trivial they were entitled to dismiss the informations. They took that course because of the decision in *Banks* v. *Wooler*,[1] to which they were referred. In that case, which was decided under the Food and Drugs Act, 1875, Channell J. said[1]: "If the milk had been exceptionally good after adul- "teration, the justices might have considered the offence too "trifling to convict. If the milk had only been exceptionally "good before adulteration, the offence was not trifling, and they "should have convicted."

[3] (1900) 81 L.T. 785; 64 J.P. 245. [1] (1900) 81 L.T. 785.

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Parker J.

That case was decided long before the Milk Regulations, 1939, and long before the Criminal Justice Act, 1948. It was a case which was dismissed under section 16 [2] of the Summary Jurisdiction Act, 1879, which empowered justices to dismiss a summons in the case of a trifling offence. Speaking for myself, whatever was thought in 1900 as to the seriousness or triviality of selling milk with an adulteration of 10 per cent., it seems to me that today any adulteration of milk is far from being a purely trivial offence. Indeed, if one takes the words of Channell J. literally, they really mean that the richer the milk the more one is entitled to adulterate it and to treat the matter as a triviality. In my opinion, an offence was clearly proved here. Of course, if the magistrates considered the offence trivial they could, after finding the offence proved, have granted either a conditional or an absolute discharge under section 7 of the Criminal Justice Act, 1948, but it seems to me that in the present case they have confused matters of defence with matters of mitigation, and have failed to convict when an offence was clearly proved.

I would only add, that whether the matter is considered trivial or not is really a matter for the magistrates to decide, but because in 1900 an adulteration of 10 per cent. of water was treated as trivial, it does not follow that that is the same today. In my opinion this case should go back to the magistrates with a direction to convict.

DONOVAN J. I agree, and I think it should be remembered that today a great deal of public money is spent on milk under the provisions of the various welfare schemes, and that would appear to me to underline the importance of not regarding adulteration by water as trivial.

LORD GODDARD C.J. I agree. I only want once more to emphasize how careful magistrates should be not to confuse matters of defence with matters of mitigation. In *Banks* v. *Wooler*,[3] the passage on which the magistrates relied only showed that in those days, when section 16 of the Summary Jurisdiction Act, 1879, was in force, magistrates were required to dismiss a case if they thought it trivial. Today, under the Criminal Justice Act, 1948, they are no longer required to dismiss a case if they think it trivial; they must convict, but under section 7 they can grant an absolute discharge or a conditional discharge.

In spite of the fact that one of the judges who decided *Banks* v. *Wooler* [3] was Channell J., for whose judgments I always have the highest respect, I cannot agree that if I buy milk and am served with milk and water, that that is a trivial offence. Parker J. has pointed out that it would mean that the better the milk the greater adulteration permitted.

[2] (Repealed: Probation of Offenders Act, 1907, s. 10 (2), Sch.)

[3] 81 L.T. 785.

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Lord Goddard C.J.

There is no adulteration permitted, and in the present case there is clear evidence that there was adulteration. In my opinion, the magistrates cannot treat this case as trivial. I am not attaching any blame to the magistrates, because *Banks* v. *Wooler*[3] was quoted to them, and they thought they ought to follow it, but section 16 of the Summary Jurisdiction Act, 1879, is no longer in force, and they ought to have convicted and not dismissed the case.

On the question of penalty, I think the magistrates must pay attention to what this court has said in giving judgment today, that these offences of watering milk are not to be regarded as trivial merely because even when adulterated milk will give the purchaser the butter fat he is entitled to get, otherwise anybody buying a pint of Jersey milk would have to be satisfied if they have a pint of Jersey milk plus water.

*Appeal allowed.*

Solicitors: *Sharpe, Pritchard & Co. for P. E. White, Welshpool.*

J. F. L.

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[QUEEN'S BENCH DIVISION.]

1953
*July* 16.

* POPE *v.* CLARKE.

Lord Goddard C.J., Parker and Donovan JJ.

*Road Traffic—Prosecution for dangerous driving—Notice of intended prosecution—Erroneous statement of time of offence—Validity of notice—Road Traffic Act,* 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *s.* 21.

A notice of intended prosecution was sent to the defendant under section 21 of the Road Traffic Act, 1930, in which the particulars of the alleged offence stated that "at or about 1.15 p.m. "on . . . you did drive . . . in a manner which was dangerous to "the public . . . ." In fact, the defendant was the driver of a motor-car which had been involved in an accident at 11.15 a.m. on the day and at the place stated in the notice and the charge against him related to that accident. The justices considered that the erroneous statement of the time invalidated the notice and dismissed the charge. On appeal by the prosecutor:—

*Held* that, the object of section 21 was to bring to a proposed defendant's mind, while the facts were still fresh in his memory, the fact that he was going to be prosecuted; the mandatory provisions of the section were that a notice must be served on a defendant stating that he was going to be prosecuted and the offence for which he was going to be prosecuted, and therefore, as those mandatory provisions had been complied with and the defendant had not been misled, the mere fact that the time was incorrectly stated in the notice in the circumstances made no difference, and accordingly the notice was valid.

*Venn* v. *Morgan*, 65 T.L.R. 571; [1949] 2 All E.R. 562; [1949] W.N. 353, and observation of Lord Coleridge C.J. in *Woodward* v. *Sarsons* (1875) L.R. 10 C.P. 733, 746 applied.

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POPE v. CLARKE.

CASE STATED by Essex justices sitting at Brentwood.

An information was preferred by a superintendent of police against the defendant charging him "that he on the 4th day of "December, 1952, at Great Warley . . . did unlawfully drive a "certain motor vehicle in a manner dangerous to the public . . . "contrary to section 11 of the Road Traffic Act, 1930."

The following facts were proved or admitted before the justices. At or about 11.15 a.m. on December 4, 1952, a collision occurred between a motor-car driven by the respondent and a lorry on the road leading from Brook Street, Brentwood, to Ingrave at Mascalls Lane, Great Warley, at the junction with Warley Hill. The circumstances of the defendant's driving immediately before the collision were alleged by the prosecutor to constitute the offence to which the information related. The defendant was not warned at the time of the alleged offence that the question of prosecuting him for an offence of reckless or dangerous or careless driving would be taken into consideration, and the summons for the alleged offence was not served upon him within fourteen days. Within the fourteen days a notice of intended prosecution was sent to him by registered post in accordance with the provisions of section 21 of the Road Traffic Act, 1930.* The notice, which related to the same circumstance as the information, was as follows: ". . . in accordance with "the provisions of section 21 of the Road Traffic Act, 1930, I "hereby give you notice that it is intended to institute proceed-"ings against you in respect of an offence under section 11 of the "Road Traffic Act, 1930, the particulars being that, at or about "1.15 p.m. on the 4th day of December, 1952, whilst driving ". . . on the road leading from Brook Street, Brentwood, to "Ingrave at Mascalls Lane, Great Warley, at the junction with "Warley Hill you did drive . . . in a manner which was "dangerous. . . ."

On behalf of the defendant it was contended that the provisions of section 21 of the Road Traffic Act, 1930, which stipulated that the notice must specify, inter alia, the time at which the offence was alleged to have been committed, must be strictly complied with, that as the time of the alleged offence was proved to have been at or about 11.15 a.m. on December 4, 1952, whereas the notice stated the time as 1.15 p.m. on that day, the provisions had not been strictly complied with and that, therefore, the notice was invalid and the information bad.

On behalf of the prosecutor it was contended that the time

* Road Traffic Act, 1930, s. 21: "Where a person is prosecuted for an "offence . . . relating . . . to . . . dangerous driving . . . he shall not be "convicted unless either—(*a*) he was "warned at the time the offence was "committed that the question of prosecuting him . . . would be taken "into consideration; or (*b*) within "fourteen days . . . a summons . . . "was served on him; or (*c*) within ". . . fourteen days a notice of the "intended prosecution specifying the "nature of the alleged offence and "the time and place where it is "alleged to have been committed was "served on or sent by registered post "to him. . . ."

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was sufficiently specified in the notice by the statement of the date, the statement of the hour of the day being unnecessary and superfluous; that the purpose of the notice, namely, to call the attention of the defendant to the time and circumstance in respect of which he might be charged, had been fulfilled; that the requirements of section 21 had been substantially and sufficiently complied with, and that the notice was adequate and valid.

The justices were of the opinion that the defendant's contentions were correct and that the erroneous statement of the time invalidated the notice, and they dismissed the information without hearing any evidence on behalf of the defendant.

The prosecutor appealed.

*Leonard Moules* for the prosecutor.
*Lionel Jellinek* for the defendant.

The following cases were referred to in argument: *Attorney-General* v. *Thomas Keegan* † and *Venn* v. *Morgan*.‡

LORD GODDARD C.J. stated the facts and continued: In this case, by some mistake the police put in the notice of intended prosecution under section 21 of the Road Traffic Act, 1930, the time 1.15 p.m. instead of 11.15 a.m. As I said in *Venn* v. *Morgan* [1] " In considering whether a notice purported to be given " under section 21 is sufficient we ought to use a modicum of " commonsense." Oliver J. in that case pointed out that these notices are not formal documents like informations or indictments, but that what we have to consider is the object of the legislature. That object is to call the proposed defendant's attention to the fact that he is going to be prosecuted while the facts are still in his mind. Oliver J. said [2]: " The object of the notice is to call " the attention of the driver of the motor-car to the time and " circumstances in respect of which he may be charged so as to " give him, as my Lord has said, an opportunity, in good time " while memories are still fresh, to prepare his defence."

The defendant did not give evidence in the present case, but if it were a case such as Mr. Jellinek has suggested, where a defendant went into the witness box and said: " I was in that " particular road twice that day, once at about 11.15 a.m., and " again at about 1.15 p.m.," it is possible that different considerations might apply—if he had had two accidents on that day the position would, of course, be different. In my opinion, the principle which we have to bear in mind here is that there is a distinction between the construction to be placed on a statute where the provisions are mandatory and where they are merely directory. In

† (1940) 74 Ir.L.T. 129.
‡ (1949) 65 T.L.R. 571; [1949] 2 All E.R. 562; [1949] W.N. 353.
[1] [1949] 2 All E.R. 562, 563.
[2] [1949] 2 All E.R. 562, 564.

that connexion I may quote a passage from Maxwell on the Interpretation of Statutes, 10th ed., p. 376: "It has been said that no "rule can be laid down for determining whether the command" —that is the command of the statute—"is to be considered as a "mere direction or instruction involving no invalidating con- "sequence in its disregard, or as imperative, with an implied "nullification for disobedience, beyond the fundamental one that "it depends on the scope and object of the enactment. It may, "perhaps, be found generally correct to say that nullification is "the natural and usual consequence of disobedience, but the "question is in the main governed by considerations of con- "venience and justice"—for which there is cited Lush J. in *Reg.* v. *Ingall*,[3]—"and, when that result would involve general "inconvenience or injustice to innocent persons, or advantage "to those guilty of the neglect, without promoting the real aim "and object of the enactment, such an intention is not to be "attributed to the legislature. The whole scope and purpose "of the statute under consideration must be regarded. The "general rule is, that an absolute enactment must be obeyed or "fulfilled exactly, but it is sufficient if a directory enactment be "obeyed or fulfilled substantially."

In *Woodward* v. *Sarsons*[4] Lord Coleridge C.J., giving the judgment of the court, said[5]; "The general rule is, that an abso- "lute enactment must be obeyed or fulfilled exactly, but it is "sufficient if a directory enactment be obeyed or fulfilled "substantially." That was a question with regard to the marking of ballot papers by a presiding officer for an illiterate defendant. A provision that the papers should be marked secretly, it was said, was absolute, but the following out of the rules which were given in the Ballot Act, 1872, as to the way in which it was to be done were directory. The object of the Act was secrecy, and disregard of the rules as to the way in which it was done would not invalidate the vote provided that the object of the Act was obtained.

In the present case the object of the provision in section 21 of the Road Traffic Act, 1930, as Oliver J. said in the passage I have read from *Venn* v. *Morgan*,[6] is to bring to the defendant's mind while the events are still fresh in his memory the fact that he is going to be prosecuted. The defendant could have been under no conceivable doubt as to what he was to be prosecuted for; he was told the exact place where he was alleged to have committed the offence, and that is the place where the accident happened. Therefore, it is idle to say that his mind was not at once directed to the actual occurrence in respect of which he was going to be prosecuted. Had the notice said 11 a.m. instead of 11.15 a.m., could it be suggested that the notice would be bad?

[3] (1877) 2 Q.B.D. 199, 208.
[4] (1875) L.R. 10 C.P. 733.
[5] Ibid. 746.
[6] [1949] 2 All E.R. 562, 564.

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POPE v. CLARKE.

Lord Goddard C.J.

In my opinion, applying the passage which I have quoted from *Woodward* v. *Sarsons*,[7] the mandatory part of the provision in section 21 is that a notice must be served on the defendant stating that he is going to be prosecuted, and in respect of what he is going to be prosecuted—in the present case dangerous driving at this particular place. The mere fact that the actual hour is incorrectly stated makes no difference, unless the circumstances are such that the defendant was misled. In this case, the defendant, on whom is the onus of showing that he was misled, gave no evidence. In my opinion, this was a point on which the justices came to a wrong decision, though one which I can well understand, and the case must go back to them with an expression of opinion from this court that the notice was good and that they must proceed to hear the case.

PARKER J. I agree.

DONOVAN J. I agree.

*Appeal allowed*

Solicitors: *Sharpe, Pritchard & Co. for Arthur Morgan, Chelmsford; Patersons, Snow & Co. for Gepp & Sons, Chelmsford.*

J. F. L.

[7] L.R. 10 C.P. 733, 746.

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[CHANCERY DIVISION.]

1953
*July* 14, 15.

Upjohn J.

## *BULSTRODE *v.* LAMBERT.

[1952 B. 5660.]

*Easement—Right of way—Reservation to vendor in grant—Right to "pass and repass with or without vehicles . . . for the purpose of "obtaining access to . . . the auction mart"—Right to halt for loading and unloading goods for auction.*

By a conveyance made in 1944, the plaintiff's father and predecessor in title conveyed to the defendant's predecessor in title a house "reserving unto the vendor his tenants and workmen and "others authorized by him the right to pass and repass with or "without vehicles over and along the land coloured brown on the "plan for the purpose of obtaining access to the building at "the rear of the said premises and known as the auction mart."

This auction mart, at which the plaintiff and his father before him had for a long time held periodical sales of furniture and chattels, lay behind the defendant's house and the plaintiff's house, which was next door. Access to it was had by a wide drive at the side of the plaintiff's house, leading to wide sliding doors in the mart building, and also by a narrower passageway ("coloured brown on the plan") at the side of the defendant's house, leading to a door 3 feet 6 inches wide. At the date of the conveyance the

defendant's entrance was obstructed by wooden gates and other erections which prevented the entry of large vans, but these became dilapidated, and were removed by the defendant in about 1951. Thereafter the plaintiff, when pressure of traffic to or from the mart caused congestion at the main entrance, made use of the defendant's entrance for the entry of vehicles, including pantechnicons, bringing articles to and from sales, and such vehicles halted for appreciable periods on the right of way to load and unload.

The defendant, who carried on business as a café, guest house and car hire proprietor, objected to this use of his side entrance, as it was an obstruction to his guests and servants and prevented him from taking out his car when required. In an action brought to determine the extent of the plaintiff's rights under the reservation in the conveyance:—

*Held*, that, on its true construction, in the light of the surrounding circumstances (1) the plaintiff was entitled to bring goods vehicles and pantechnicons on to the right of way reserved; observations of Jessel M.R. in *Cannon* v. *Villars* (1878) 8 Ch.D. 415, at p. 421 applied; (2) such vehicles were entitled to remain on the right of way for such time as was necessary for loading and unloading, that being an ancillary right necessary for the substantial enjoyment of the right of way; observations of Lord Parker of Waddington in *Pwllbach Colliery Co. Ltd.* v. *Woodman* [1915] A.C. 634, at p. 646, applied.

ACTION.

The premises involved in the action were two semi-detached houses, Nos. 11 and 13 Stour Road, Christchurch, Hampshire, of which No. 13 was occupied by the plaintiff and No. 11 by the defendant. On the west of No. 13 there was an entrance some 16 ft. wide leading to premises belonging to the plaintiff which lay behind both houses and were used as an auction mart. The entrance through No. 13 led to large sliding doors in the auction mart building.

To the east of No. 11 was a much smaller passageway also leading to the auction mart. It was some 11 ft. wide at the entrance and it then became wider, and gave access to the auction mart through a door some 3 ft. 6 ins. wide. There was a garage which restricted the entrance to the auction mart through the narrow doorway to a width of some 6 ft. 8 ins. to 8 ft.

The plaintiff, and his father before him, had carried on the business of estate agents and auctioneers in the auction mart since about 1919. In 1921 the plaintiff's father acquired the freehold reversion of the two houses and the auction mart, and ever since 1919 the plaintiff and his father before him had held bi-weekly auctions in the auction mart of freehold properties and furniture and chattels. On the death of his father in 1950 the plaintiff became the owner of the auction mart and of No. 13.

In 1944 the plaintiff's father had sold No. 11, together with the passageway and garage to the east and the passageway immediately behind leading to the auction mart to the defendant's predecessors in title. The conveyance was dated October 10, 1944; in it the plaintiff's father was described as an estate agent "and hereinafter called the vendor." After

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reciting the seisin of the vendor the deed witnessed that in consideration of the sum of £1,500 paid by the purchasers to the vendor the vendor, as beneficial owner, conveyed No. 11 Stour Road to the purchasers, "excepting and reserving unto "the vendor his tenants and workmen and others authorized by "him the right to pass and repass with or without vehicles over "and along the land coloured brown on the said plan for the "purpose of obtaining access to the building at the rear of the "said premises and known as the auction mart." The plan attached to the conveyance showed the premises of No. 11 in pink, together with a garage, except for the yard, which was coloured brown, over which was the reservation of the right of way.

No. 11 was purchased by the defendant in January, 1951. He carried on on the premises the business of a guesthouse and café or restaurant proprietor and car-hire proprietor. He kept the car used for hire in the garage on the pink part of the plan behind the house. His café was in the front of the house; behind was a kitchen, from which the ordinary exit was through a door into the yard, and its window looked out into the yard; guests occupying the guesthouse normally used this door.

The plaintiff claimed that in order to bring furniture to and from the auction mart he was entitled to bring large vans into the defendant's yard and to load and unload them, and to let his men carry the furniture through the narrow part of the yard by the door into the auction mart. That was a source of great inconvenience to the defendant. When large vans were standing in the yard loading or unloading furniture they obstructed the light into the kitchen and made it difficult to use the door giving access from the guests' rooms on to the yard, which was the normal method of ingress and egress, and made it difficult to get to the coalshed, boilerhouse, the outside w.c., a store room, and certain bins which were placed there for café refuse. They also seriously obstructed the defendant when he wished to drive his hire car in or out of the garage.

The plaintiff only used, or wished to use, the defendant's yard when there was a heavy pressure of business at the auction mart, so that the normal means of ingress and egress through the wider entrance to the west of No. 13 was not available, by reason of it being blocked by vans already there, and the user of the yard of No. 11 was not frequent.

At the date of the conveyance in 1944 the entrance through the defendant's premises was obstructed in such a way that large vehicles could not pass through to the mart entrance. The details of these obstructions and the circumstances of their later removal are set out more particularly in the judgment.

The defendant having raised strong objections to the use of his side entrance by vans and pantechnicons, and in particular to their halting there for loading and unloading for long periods, the plaintiff brought an action claiming that he had the right to use

the reserved right of way, and to halt vehicles in it outside the entrance of the mart so often and so long as might be necessary for loading or unloading goods or persons proceeding to or from the mart, and further claiming an injunction to restrain the defendant from interfering with his rights. The defendant counterclaimed for a declaration that the plaintiff's rights did not include the right to halt vehicles on the right of way; and, alternatively, for a declaration that, if the plaintiff was so entitled, he was only entitled to halt vehicles immediately opposite the entrance to the mart during the actual operation of loading or unloading, such operation to be carried out with reasonable speed; he counterclaimed also for an injunction in terms of the second declaration.

*H. E. Francis* for the plaintiff.
*Ian Campbell* for the defendant.

The following case, not referred to in the judgment, was cited in argument: *Savill Bros. Ld.* v. *Bethell.**

UPJOHN J. after stating the facts: In order to construe the conveyance in suit I must know the facts at the time of the grant. As is stated in the 12th Edition of Gale upon Easements (p. 315): "In the case of a grant the language of the instrument "can be referred to. It is for the court to construe that "language, and, in the absence of any clear indication of the "intention of the parties, the maxim that a grant must be "construed most strongly against a grantor must be applied. "In particular, in construing a grant the court will consider "(1) the locus in quo over which the way is granted; (2) the "nature of the terminus ad quem; and (3) the purpose for which "the way is to be used"; or, as it was put very briefly by Wright J. in *Callard* v. *Beeney*,[1] quoting what was said by Lord Wensleydale in *Lord Waterpark* v. *Fennell*[2]: "The con-"struction of a deed is always for the court; but, in order to "apply its provisions, evidence is in every case admissible of all "material facts existing at the time of the execution of the "deed, so as to place the court in the situation of the grantor."

The physical situation at the time of the grant in 1944 was very different from that which obtains today. In 1944, some 6 ft. within the entrance of the yard there was a double gate, each part of which was some 3 ft. wide, and they were hinged on substantial posts fixed into the ground. To the left of that double gate, looking inwards from the road, there was a smaller gate, and to the right of it a fence which was covered with thick ivy. On top of that there was a permanently fixed beam some 6 to 8 ft. high above the gate which extended right across the

* [1902] 2 Ch. 523.
[1] [1930] 1 K.B. 353, 360.
[2] (1859) 7 H.L.C. 650, 684.

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Upjohn J.

yard. Beyond that the surface was gravel and was paved with crazy paving.

The yard was greatly improved by the defendant in 1951 and 1952. By the time he purchased the property these gates had become dilapidated so he removed them. Until the defendant effected these improvements the plaintiff never used this yard for carrying furniture, at all events through the yard, into the auction mart; it may have been used occasionally by pedestrians who came away by that route from the auction mart, but I am satisfied that no furniture or anything of that sort was ever carried in. That fact, of course, cannot affect the rights of the parties where their rights depend not upon user but, as in this case, upon an express grant.

As was said in *Keewatin Power Co. Ld.* v. *Lake of the Woods Milling Co. Ld.*[3]: "When you are dealing with grant, the "grantee may always, if he chooses, not exercise his right under "the grant to the full without in any way prejudicing his full "right if he finds it convenient to use it." That is all that has happened here. Therefore the failure to use this grant for 10 years, in the absence of any claim of abandonment, which would obviously be impossible to suggest in this case, is irrelevant.

I turn to the construction of this deed in the light of those facts. It is submitted by the defendant that the deed must be construed against the grantor, the plaintiff. I am not satisfied that that is correct. That rule, which applies to an exception from a conveyance, does not, I think, apply to a reservation which operates by way of regrant by the purchaser. The doctrine may well operate against the purchaser, but I need not say anything more about that. As a matter of construction it is submitted that when one looks at all the circumstances, the nature of the locus in quo, the nature of the terminus ad quem, and the purpose for which the yard is used, one finds that there is an easement for the passage of persons only and not for the passage of goods. It is pointed out that the main means of access to the auction mart is through the other yard and not through this yard; the door into the mart is a door only some 3 ft. 6 ins. wide; and, finally, there is not a reservation for the purpose of obtaining access to business premises but merely to the premises described as an auction mart. Therefore taking all those circumstances including, of course, the condition in 1944, into account one finds that it was limited to a user for persons but not for goods. It was further submitted that one also finds that it must be confined either to hand vehicles or, alternatively, personnel-carrying vehicles; because only such vehicles could have passed within the gates, which were only some 6 ft. wide in 1944. Lorries, and especially large pantechnicons used in the furnishing trade vary in width up to 7 ft. 6 ins. and might be too high to go under the bar; and therefore, taking those circumstances into

[3] [1930] A.C. 640, 657.

consideration, the true view, it is submitted, of the construction of this reservation is that it should only be used to convey persons in ordinary private cars to the back door of the auction mart, and not for the carriage of goods.

I am unable to accept that submission. Here is a perfectly plain, unambiguous reservation for "the vendor, his tenants and "workmen"—I think that is important—"to pass and repass "with or without vehicles"—there is no limitation whatever upon the vehicles—"over and along the land coloured brown" on the plan. Pausing there, in my judgment the true effect of those words, that there is a right of way over and along the land coloured brown, cannot be affected by the circumstance that at the date of the grant there was this gate and bar across. The words of the grant are plain and unambiguous, and in my judgment the plaintiff plainly has a right over the whole of the yard coloured brown, and not merely a right to enter through the gates some 6 ft. in width. Not only that: he has a right to enter it with vehicles. That must mean vehicles of any size appropriate to go down the yard, and as the yard is at no stage, until the garage is reached, less than 11 ft. wide, there seems to be no reason why a pantechnicon should not use that yard. Further, the object of the reservation is made perfectly plain: it is "for the purpose "of obtaining access to the building at the rear of the said premises and known as the auction mart." The vendor and his workmen and others authorized by him are entitled to use that way for that purpose, and it seems to me quite clear that the whole object and purpose of this reservation was to give the plaintiff an alternative means of getting to his business premises; and that means, in the particular case of an auction mart, bringing goods to those premises; furniture and the like for sale on those premises.

A passage which I think is helpful on that point was quoted from the well-known judgment of Sir George Jessel M.R. in *Cannon* v. *Villars*,[4] It is clear, as was forcibly pointed out by Mr. Campbell, that the Master of the Rolls was dealing only with a grant of a right of way per se. Nevertheless I think that the passage is helpful. It is this[5]: "Again, if the road is not to a "dwelling-house but to a factory, or a place used for business "purposes which would require heavy weights to be brought to "it, or to a wool warehouse which would require bags or packages "of wool to be brought to it, then a grant of right of way would "include a right to use it for reasonable purposes, sufficient for "the purposes of the business, which would include the right of "bringing up carts and waggons at reasonable times for the "purpose of the business."

[4] (1878) 8 Ch.D. 415. [5] Ibid. 421.

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Upjohn J.

It seems to me that that is exactly what the parties had in mind here when this reservation was made, and I am satisfied that on its true construction the plaintiff is entitled to bring upon this yard pantechnicons and other heavy vehicles and to transport from those vehicles the furniture and other chattels, by the door at the end of the yard, into the auction mart.

It was said, however, that as it was impossible for a large van to get to the door into the mart, there was no right in the plaintiff to stop his vans short of the garage and to carry furniture and chattels from that point to the door by hand. I am unable to accept that submission. The way may be used partly with a vehicle and partly on foot. If, owing to the existence of the garage, it is impossible to get a van right up to the door, I see nothing to prevent the plaintiff using that part of the yard on which the van can be brought, and then transporting the furniture by hand, past the garage, into the mart.

There is, however, this to be said. Bringing in vans no doubt causes great inconvenience to the defendant, and the plaintiff is under a duty to minimize that. It is his duty, for instance, so to back in his vehicles, or to see that customers bringing the furniture so back in their vehicles, as to leave ample space for the defendant and his licensees to use the means of egress from the defendant's door into the side of the yard, either for the purpose of going out on to the road or for the purpose of going to the boilerhouse, the coal cellar, the water closet, or the store house. There is ample room for them to do that, and if the plaintiff's customers' vehicles do not give that amount of room, then in my judgment the defendant will have a just cause of complaint. It is also, of course, the plaintiff's duty to move any vehicles out if at any time the defendant desires to get his car out from the garage.

So far, therefore, I have no doubt that the plaintiff is entitled to succeed, but there is a much more difficult point. Is he entitled to halt in the yard while these vans, his own or his customers', are unloading, that operation taking half an hour to an hour or more?

The whole question is: What is the true construction of the reservation in the conveyance? Mr. Campbell says, and with much force, that it is a right "to pass and repass . . . over and "along" the right of way. That is something which connotes motion: a right to pass and repass. "To pass" is defined in the Oxford Dictionary as "to go, proceed or move onwards." Therefore, says Mr. Campbell, you may pass and repass; you may not halt. He concedes that of course in the case of the ordinary putting down of a passenger there must be a halt for a brief moment, but that is a matter de minimis; when it comes to halting in the yard in question, however, he submits that there is no such right, and that it was for the vendor to insert appropriate words to enable him to exercise his rights to halt for an hour or more while unloading.

Curiously enough the point seems to be without authority; counsel on neither side have been able to find any which really assists me. I again have to look at this reservation and see what it means. I have this in mind: the yard is a cul-de-sac and therefore every car that goes in must at some time come out, and it must halt in that process; further, the plaintiff concedes that the limit of his right must be this, that the car or vehicle or pantechnicon may only halt for so long as required either to remove or stow the furniture, and that there is no other right whatever to halt in the yard.

When I look at this reservation I see that the whole object of it is for the purpose of the vendor, his workmen, and others obtaining access to the auction mart. What is the object of that? It is to get access to business premises, and in particular to a place where goods are going to be auctioned and sold. The plaintiff can do it with or without vehicles. Therefore, as I have already held, he can, in my judgment, bring goods in the vehicles to his auction mart. If he is entitled to do that, then he must, of necessity in my judgment, be entitled to unload them. And if he is entitled to unload them he must, per contra, be entitled to load them.

In my judgment, therefore, the vehicles must be entitled to remain in the yard for such time as is necessary to enable the plaintiff to enjoy his easement of bringing vehicles into the yard; that is, for such time as it takes to load or unload the vehicles. It is only an incident of the right of way expressly granted and may be described as ancillary to that easement, because without that right he cannot substantially enjoy that which has been reserved to him.

The principle was put by Lord Parker of Waddington in *Pwllbach Colliery Co. Ld.* v. *Woodman*[6]: "My Lords, the right "claimed is in the nature of an easement, and apart from implied "grants of ways of necessity, or of what are called continuous "and apparent easements, the cases in which an easement can "be granted by implication may be classified under two heads. "The first is where the implication arises because the right in "question is necessary for the enjoyment of some other right "expressly granted."

It seems to me that the right of coming upon this land in order to get to the auction mart is virtually useless to the plaintiff, unless he can unload his vehicles there, and therefore he must have the right to keep his vehicles there while he unloads and loads them, and I think that the principle which I have just read is applicable here.

Accordingly the plaintiff succeeds in this action, and there will be declarations that the plaintiff has a right of way at all times for the purpose of obtaining access to the auction mart,

[6] [1915] A.C. 634, 646.

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and that he is entitled in the proper exercise of the said right of way to halt vehicles in the yard as often as and so long as may be necessary for the purpose of loading or unloading; and there will be an injunction accordingly.

*Judgment for the plaintiff.*

Solicitors: *Gillhams, for G. T. Richards & Morgan, Bournemouth; Lovell, Son & Pitfield, for R. E. Druitt & Allfree, Christchurch.*

F. R. D.

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[COURT OF APPEAL.]

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*May* 12, 13;
*July* 3, 10.

Lord Goddard C.J., Birkett and Hodson L.JJ.

* WOODS *v.* W. H. RHODES & SON LD., AND MERSEY DOCKS AND HARBOUR BOARD.

[1949 W. No. 1517.]

*Docks—Statutory liability for "general management and control"—Wooden platform propped up against door of shed — Workman injured by fall of platform—Whether place "maintained with due "regard to safety of persons employed"—"Maintained"—Docks Regulations (S.R. & O. 1934, No. 279) (a), Pt. I, reg. 1.*

A dock labourer, employed by the first defendants, while moving goods from a shed on a wharf to the quayside sustained injuries, from which he subsequently died, when a "save-all"—a large wooden platform—belonging to a firm of stevedores and placed against a wall of the shed, fell on him when the door was opened. The harbour board were found liable by the judge as persons having "the general management and control of the docks" under the Docks Regulations, 1934,[1] on the ground that they had failed to maintain the working place with due regard to the safety of the persons employed. On appeal:—

*Held*, that the use of the word "maintained" in the regulation was confined to the actual working place itself, and did not extend to any article that might be brought temporarily upon the floor of the working place; and that the harbour board were accordingly not liable under the regulations.

[Reported by Miss P. STANLEY, Barrister-at-Law.]

[1] Docks Regulations, 1934: "(*a*) "It shall be the duty of the person "having the general management and "control of a dock, wharf, or quay, "to comply with Part I of these "regulations; provided that if any "other person has the exclusive right "to occupation of any part of the "dock, wharf, or quay, and has the "general management and control of "such part, the duty in respect of "that part shall devolve upon that "other person. . . . (*d*) It shall be "the duty of every person who by "himself, his agents, or workmen "carries on the processes, and of all "agents, workmen, and persons em-"ployed by him in the processes, to "comply with Part IV of these "Regulations."

Part I, reg. 1: "Every regular "approach over a dock, wharf, or quay "which persons employed have to use "for going to or from a working "place at which the processes are "carried on and every such working "place on shore shall be maintained "with due regard to the safety of the "persons employed."

*Latimer* v. *A.E.C. Ld.* [1953] 3 W.L.R. 259; [1953] 2 All E.R. 449 discussed.

*Held*, also, that, although the appellants' notice of appeal did not ask for the reversal of the judge's order as to indemnity by them to the other defendants (the plaintiff's employers) of 50 per cent. of the liability, the notice of appeal was sufficient, and once the appellants had been found to be free from all liability, it followed that the order as to indemnity was a nullity.

Decision of Pearson J. reversed.

Appeal from a decision of Pearson J. given at Liverpool Assizes.

The following statement of facts is taken from the judgment of Birkett L.J. The deceased man, Thomas Woods, on December 29, 1948, was employed by the first defendants, W. H. Rhodes and Son Ld., at No. 3 berth, Vittoria Wharf, Birkenhead, as a dock labourer, and his job was to handle and move goods from the shed to the quayside for them to be loaded on to ships. The plans showed that there was a door between the shed and the quayside; and the evidence was that when the day shift had ended the door was closed. The men on the night shift had therefore to open this door in order to begin their work. The door was a sliding door and was opened by being pushed along the outward wall of the shed.

On December 18, a firm of stevedores, Thomas Swift & Co. Ld., brought their gear into No. 3 berth for stowage. That gear included a large wooden platform called a "save-all," which was 18 ft. 6 ins. long, and 9 ft. 10 ins. wide. The Swift Company reared that "save-all" against the dividing wall at the top of the left-hand corner of No. 3 section of the shed.

On December 29 the deceased man came on duty on the night shift and with two other men attempted to open the sliding door and, as they did so, the "save-all" fell on the deceased, and he sustained the injuries from which he died.

On a claim by the widow of the deceased man against several defendants, of whom the Mersey Docks and Harbour Board were one, for damages under the Fatal Accidents Act and the Law Reform (Miscellaneous Provisions) Act, 1934, Pearson J. on June 12, 1952, gave judgment for the plaintiff against W. H. Rhodes & Son Ld., the employers of the deceased man, and against the Mersey Docks and Harbour Board for breach of duty as "the persons having the general management and "control of the dock" within the meaning of the Dock Regulations, in that they had failed to maintain the working place with due regard to the safety of the persons employed. The judge assessed the damages against both defendants at £2,808.

The appeal of W. H. Rhodes & Son Ld. was heard on May 13, and was dismissed. The present appeal by the Mersey Docks and Harbour Board was allowed to stand over until the

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decision of the House of Lords in *Latimer* v. *A. E. C. Ld.*[2] was known.

*Sir Frank Soskice Q.C.* and *R. S. Trotter* for W. H. Rhodes & Son Ld.

*Sir Noel Goldie Q.C.* and *J. Glyn Burrell* for Mrs. Woods.

*H. I. Nelson Q.C.* and *Robertson Crichton Q.C.* for the Mersey Docks and Harbour Board.

*Latimer* v. *A.E.C. Ld.*[2] only was referred to in argument.

*Cur. adv. vult.*

LORD GODDARD C.J. I will ask Birkett L.J. to read the first judgment.

BIRKETT L.J., after stating the facts: The judge found that the present appellants were in breach of their statutory duty as the persons having the general management and control of the dock, wharf or quay, and it is against that finding that the present appeal is brought.

Paragraphs 10 and 11 of the statement of claim were as follows: "At all material times the defendants Mersey Docks "and Harbour Board were the persons having the general "management and control of the said dock, wharf or quay "(including the said dock shed erected thereon) for the purposes "of Part I of the Docks Regulations, 1934. The vicinity of "the said door was a working place on shore where the process "referred to in paragraph 2 was carried on and/or the said door "was a regular approach over the said quay which persons em- "ployed (including the deceased) in the said processes had to use "for going to or from a working place and the defendants Mersey "Docks and Harbour Board were in breach of their statutory "duty under regulation 1 of the said regulations. Particulars. "The said working place or approach was not maintained with "due or any regard to the safety of the deceased in that the "said saveall was too close to the said door and/or was unlashed "and/or was leaning insecurely and/or too close against the said "wall and/or was liable to fall upon him."

Paragraph 6 of the Board's defence was: "These defendants "admit paragraph 10 of the statement of claim but deny that "they were in breach of statutory duty as alleged or at all. . . ."

The Docks Regulations of 1934 apply to this case. [His Lordship read regulations (*a*) and (*d*) and regulation 1 of Part I and continued:] The all-important words, so far as this appeal is concerned, are: "every such working place on shore shall be "maintained with due regard to the safety of the persons "employed." It was conceded that the Board had the general

[2] [1953] 3 W.L.R. 259; [1953] 2 All E.R. 449.

management and control of the dock, and that the place where the fatal accident took place was a "working place on shore"; but the Board submitted that they had maintained the working place with due regard to the safety of the persons employed.

In *Latimer* v. *A. E. C. Ld.*[1] recently the House of Lords discussed the meaning to be attached to the word "maintained" in the circumstances of that case. A film of oil had been deposited by flood water on the floor of the respondent's factory. At a place where sawdust had not yet been applied to it the appellant, without realizing the danger, tried to get a heavy barrel on to a trolley; he was standing on one foot and using considerable force with the other when he slipped and received severe injuries. He alleged that the respondents were guilty of a breach of section 25 (1) of the Factories Act, 1937. The subsection provides: "All floors . . . shall be of sound construction and properly maintained." The word "maintained" is defined in section 152 of the Factories Act in these words: "'Maintained' means maintained in an efficient state, in efficient working order, and in good repair."

Lord Reid said[2]: "The appellant argues that a floor cannot be in an efficient state if people are liable to slip on it, but again I think one must ask whether the danger comes from the floor or from something which happens to be on it. It would be going a long way to say that a floor, perfectly good in itself, ceases to be in an efficient state whenever there is something on it which gives rise to danger. If there is any ambiguity one is entitled to look at the consequences of adopting each of the possible interpretations. It is one thing to say that an employer is absolutely responsible for the condition of his floors even if the unsafe condition has come about through no fault of his or his servants and could not have been remedied before the accident. But I would expect clearer words if it were intended that he should also be held responsible if something dangerous got onto his floor and made it for the time being 'inefficient' through some inevitable accident or the fault of some other person not his servant. But I do not think that there is really any ambiguity here. The requirement of the definition is not that the floor shall be in an efficient state; it is that the floor shall be maintained in an efficient state. 'Maintained' is the dominant word throughout and that throws one back to what is meant by maintaining a floor. I see little difference between maintaining a floor 'properly' as required by section 25 and maintaining it 'in an efficient state' as required by the definition. I have already said that I do not think that maintaining a floor includes keeping dangerous things away from it."

In the present case Pearson J. held that the Board were liable because they failed to maintain the working place with

[1] [1953] 3 W.L.R. 259; [1953] 2 All E.R. 449.

[2] [1953] 3 W.L.R. 259, 266.

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due regard to the safety of the persons employed; and their default lay in not removing the "save-all" from the place where it was standing, the "save-all" being a source of potential danger to persons employed. I cannot think that the Board's duty was so extensive. Their duty was to maintain the working place with due regard to the safety of the persons employed. For example, the Board must see, if the working place is within a building, that the floor is not liable to collapse, or that the roof is not a source of danger; and the whole structure of the working place must be sound, and due regard must be had for the safety of persons employed. If the working place was not in a building, then that working place must be maintained with due regard for the safety of persons employed; and this would depend on many factors affecting the particular place. But, in my opinion, the use of the word "maintained" in the regulation does not extend to articles on the floor of the working place which may be there for a few moments or for a longer space of time. This view is confirmed to some extent and supported by the speeches in *Latimer* v. *A. E. C. Ld.*[1]

I will quote one passage only from the speech of Lord Porter. He said[3]: "It has still, however, to be determined what it is "which has to be in an efficient state. Does it include the "elimination of some matter which is temporarily superimposed "upon the floor, or is the requirement confined to the floor itself? "To be efficient, the appellant contended, the floor must be "fit for any of the purposes for which it is intended, for example, "for support and for passing over in safety. The difficulty of "such a view is that it puts an excessive obligation upon the "employer. Indeed, it was conceded that it could not be carried "to the length of saying that a temporary obstruction, such as a "piece of orange peel or the like, would make it inefficient. "Once this concession is made it becomes a question of the "degree of temporary inefficiency which constitutes a breach of "the employer's obligation. Primarily, in my opinion, the sec-"tion is aimed at some general condition of the gangway, for "example, a dangerously polished surface or the like or possibly "some permanent fitment which makes it unsafe. But I cannot "think the provision was meant to or does apply to a "transient and exceptional condition. If it had been directed "to such a state of affairs it would have been easy to say so. "Indeed, in section 34 (2) the kind of language appropriate to "such an object is to be found where there is provision that 'all "'means of escape . . . shall be properly maintained and kept "'free from obstruction'."

It is true that the judge placed a limited duty on the Board when he said: "The obligation is far from being absolute. It "is not an obligation to keep the working places safe, it is

[1] [1953] 3 W.L.R. 259; [1953] 2 All E.R. 449.

[3] Ibid. 263.

"an obligation to maintain them 'with due regard to the "'safety of the persons employed.' The obligation has to be "performed in respect of often busy and sometimes congested "docks, covering in this case a very large area, where numerous "people are carrying on their own business for their own pur-"poses. The Board, having the general management and "control of the docks, cannot be held responsible for the details "of other persons' operations, or for the temporary unsafe "condition of premises when such unsafe condition is created "without the knowledge of the Board by casual acts of negli-"gence by other persons. In my opinion, the Board have under "this regulation an obligation to keep the approaches and "working places free from dangerous chattels, but only to such "extent as can reasonably be expected of persons having only "the general management and control of the docks." But, in my opinion, the construction of the word "maintained" in the regulation is confined to the actual working place itself, and does not extend to any article that may be brought upon the floor of the working place. I think, therefore, that the appeal should be allowed.

The other point raised by Sir Frank Soskice was that the judge had ordered that the defendants, Mersey Docks and Harbour Board, do indemnify the defendants, W. H. Rhodes & Son Ld., against 50 per cent. of the liability of £2,808 of the said W. H. Rhodes & Son Ld. under the plaintiff's judgment herein. The appellants' notice of appeal made no reference to that order, and merely asked that the judgment against them should be set aside, and that judgment should be entered for them with the costs of the action. Sir Frank Soskice argued that even if the appeal of the Board succeeded against the plaintiff and judgment was entered for them, nevertheless, because the notice of appeal had not asked for the order above recited to be quashed, he was entitled to hold to the indemnity.

I am of opinion that this point fails. The order of the judge was based on his decision that the plaintiff was entitled to succeed against W. H. Rhodes & Son Ld. and the Mersey Docks and Harbour Board. If he had found the Board free from blame no such order could possibly have been made. When this court finds the Board free from liability to the plaintiff and reverses the judge's finding against them, it seems to me to follow that the order as to indemnity is no longer in force. The indemnity arose out of third party proceedings brought by the Mersey Docks and Harbour Board against W. H. Rhodes & Son Ld., to which Rhodes & Son Ld. were not required to plead; and in the order of June 12, 1952, Rhodes & Son Ld. were ordered to indemnify the Mersey Docks and Harbour Board against 50 per cent. of the liability of £2,808, and the Mersey Docks and Harbour Board were ordered to indemnify Rhodes & Son Ld. in the like manner. In my opinion, the notice of appeal by the Board was sufficient. It asked that the judgment for the plaintiff

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against them should be set aside and judgment entered for them. In this the Board has been successful, and they are under no liability to the plaintiff whatsoever; and, in my opinion, this is enough to make the order in question a nullity. If it is necessary formally to discharge that part of the order I should do so, but, in my opinion, once the Board is made free from all liability to the plaintiff that part of the order ceases to have any effect.

HODSON L.J., having stated the facts and reviewed the pleadings, continued: Sir Frank Soskice's first contention was that, in view of the limited extent of the notice of appeal, that part of the judge's order which directed the Board to indemnify his clients against 50 per cent. of the liability of £2,808 of his clients under the plaintiff's judgment and gave liberty to his clients to sign judgment against the Board for 50 per cent. of the amount of the judgment debt and costs in the event of their paying the amount of the judgment debt and costs to the plaintiff, must stand. He contended that, no application for leave to amend the notice of appeal having been made at any time, the Board could not, as the record stood, resist this contention. I think that this contention fails since, if the judgment against the Board in favour of the plaintiff is reversed, the whole foundation for the indemnity goes with it, notwithstanding that no separate notice of appeal has been given against the part of the order which gives liberty to defendants, W. H. Rhodes & Son Ld., to sign judgment against the Board in the event stated.

Sir Frank Soskice's second contention was directed to the liability of the Board: (a) at common law; (b) under the regulation. He pointed out that his clients had made no allegation against the Board in their pleadings, but was invited to address the court on the basis of the plaintiff's allegations against the Board as contained in the statement of claim. The statement of claim contains no allegation against the Board of negligence at common law. The negligence "hereinafter appearing" alleged in paragraph 6, is found in paragraphs 8, 9 and 10, each of which contains express averments of negligence against defendants other than the Board. Paragraphs 10 and 11, in which allegations are made against the Board, contain averments of breach of the Docks Regulations only.

Further, no allegation was made by the plaintiff at the trial to make a case of negligence at common law against the Board. I think it is now too late to do so. Accordingly, I express no opinion whether or not, if such a case had been made on the pleadings and pursued at the trial, a judgment in favour of the plaintiff against the Board on the ground of negligence at common law could have been sustained.

This leaves only the question of breach of regulations on which both Sir Noel Goldie and Sir Frank Soskice supported the

judge's judgment, which was attacked by Mr. Nelson on behalf of the Board. Regulation 1 of Part I provides (inter alia): "Every regular approach over a dock, wharf, or quay, which "persons employed have to use for going to or from a working "place at which the processes are carried on and every such "working place on shore shall be maintained with due regard "to the safety of the persons employed." The controversy has centred around the meaning of the word "maintained." No definition of "maintained" is contained in the regulations (unlike the Factories Act, 1937), and the word "maintained" has to be construed according to its context and the subject-matter of the regulations.

The judge summarizes his conclusion as follows: "In my "opinion the Board have under this regulation an obligation to "keep the approaches and working places free from dangerous "chattels, but only to such an extent as can reasonably be "expected of persons having only the general management and "control of the docks." This is, I think, an interpretation which the language of the regulation in its setting will not bear. That which is in the contemplation of the regulation appears to me to be the structure of the regular approaches and working places in docks, or, if there is no structure, their surface and condition apart from chattels which may be placed on or in them from time to time. I find a difficulty in construing the words "with "due regard to the safety of the persons employed" as limiting the duty to an obligation to keep the regular approaches and working places free from dangerous chattels, but only to such an extent as can reasonably be expected of persons having only the general management and control of the docks.

The judge was, I think, saying in effect that the question is one of degree, and that, while he would not regard a piece of orange peel or a banana skin dropped upon the dock as likely to give rise to a breach of the regulation, yet this "save-all" standing, as it did, for some days in a dangerous position, was in a different category. It seems to me that the provision is not directed at all to transient and exceptional matters like the deposit of chattels on the floor of a shed, nor does its language import the concept of degree. The working place is not to be looked at in an abstract sense, as Sir Frank Soskice submitted, but rather in a concrete sense, which does not include the contents of that place.

I think that assistance is to be gained from *Latimer* v. *A. E. C. Ld.*,[1] a recent decision of the House of Lords on a kindred topic, namely, section 25 of the Factories Act, 1937, and the definition of "maintained" in section 152 of that Act. Lord Reid said in that case[2]: "I do not think that maintaining a floor "includes keeping dangerous things away from it." These observations seem to me to apply directly to the regulation now

[1] [1953] 3 W.L.R. 259; [1953] 2 All E.R. 449.

[2] [1953] 3 W.L.R. 259, 266.

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under consideration. As Lord Reid pointed out, different considerations apply when the maintenance of a machine in efficient working order is in question, as in *Galashiels Gas Co.* v. *O'Donnell or Millar.*[4]

Similarly, other considerations have been applied in construing the provisions of section 26 of the Factories Act, 1937, under which an occupier of a factory is required to maintain safe means of access to every place at which any person has at any time to work; for example, *Callaghan* v. *Fred Kidd & Son (Engineers) Ld.*[5]

I would accordingly allow the appeal of the Board against the finding of the judge that they are in breach of regulation 1 of Part I of the Docks Regulations.

LORD GODDARD C.J. I agree with both judgments which have been delivered, and I do not think that I can usefully add anything.

*Appeal allowed.*

Solicitors: *Herbert J. Davis, Berthen & Munro, Liverpool; John A. Behn, Twyford & Reece, Liverpool; R. H. Bransbury, Liverpool.*

[4] [1949] A.C. 275; 65 T.L.R. 76; [1949] 1 All E.R. 319.
[5] [1944] K.B. 560; 60 T.L.R. 409; [1944] 1 All E.R. 525.

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[CHANCERY DIVISION.]

1953
*June* 11.
Danckwerts J.

* *In re* HOLBERTON'S SETTLEMENT TRUSTS. THORBURN *v.* HART AND OTHERS.

*Costs—Taxation—Counsel's fees—Compromise—Delivery of briefs.*

A trustee of a settlement, on returning from service in the forces, learned that his co-trustee H., a solicitor, had committed technical breaches of trust. The trust funds were of considerable value, and, accordingly, on January 22, 1948, the plaintiff took out an originating summons which asked (a) for the execution of the trusts of the settlement by the court; (b) for directions. On December 24, 1949, H. died, and on March 1, 1950, an order was made to proceed. On July 4, 1950, the plaintiff took out a summons for the determination of certain questions in regard to the accounts, and which asked, inter alia, whether to institute proceedings against the settlor. On November 15, 1950, an order was made adding the personal representatives of H. as defendants and the summons was adjourned into court.

In the meantime negotiations were on foot for a settlement by way of compromise between the parties. By December 4, 1950, its main terms had been settled. The plaintiff, however, was advised

[Reported by J. A. GRIFFITHS, ESQ., Barrister-at-Law.]

that it was necessary to obtain the approval of the court, and that a scheme could not be formulated until the court had ascertained the extent to which, if any, the trust fund was deficient. On December 5, 1950, an attempt was made to set down the summons of July 4, 1950, but this was abortive as H.'s personal representatives had not entered an appearance. On December 6, 1950, the plaintiff's solicitors delivered briefs to leading and junior counsel. H.'s personal representatives having entered an appearance, the summons was set down on January 24, 1951.

On February 5, 1952, the settlor took out a summons for an order disposing of the proceedings on agreed terms, and on April 28, 1952, the judge in chambers made an order by consent on both summonses, the matter being finally disposed of. By the order the costs of all parties were directed to be taxed as between solicitor and client and paid out of the capital of the trust fund.

On taxation the taxing master disallowed briefs and brief fees to leading and junior counsel on the grounds, inter alia, (i) that the briefs were prematurely delivered, and (ii) that negotiations for a compromise were in progress before they were delivered, and that terms of settlement were agreed shortly afterwards. On objections being lodged, he allowed a small fee to junior counsel, but dismissed the objections in regard to leading counsel's fees and the greater part of junior counsel's fees.

On a summons by the plaintiff to review the order of the taxing master:—

*Held*, that, as (1) the provisional terms of compromise could not be adopted by the parties until they had been approved by the court, and as it was by no means certain that the compromise would have been approved, accordingly, it was not unreasonable to have delivered briefs shortly after agreement of terms; and as (2) the taxing master had taken no account of the circumstance that the negotiations after December, 1950, and the final settlement were conducted on behalf of the plaintiff by leading counsel without other remuneration than that on the brief originally delivered, it was a proper exercise of discretion to allow the fees in question.

SUMMONS TO REVIEW TAXATION.

By the trusts of a post-nuptial settlement dated May 26, 1930, the income of the trust fund was to be held during the life of the settlor on trust for the benefit of the settlor and his wife and the children of the marriage, with remainders under which, on the facts subsisting at the material time, only the settlor's sister could take an interest, as the settlor had no issue, and the ultimate remainderman was his next-of-kin on his mother's side.

The plaintiff was a trustee of the settlement. While he was away on service in His Majesty's Forces, his co-trustee, one Hart, a solicitor, carried out various transactions which amounted to breaches of trust in that they were not performed strictly in accordance with the terms of the settlement. This was a serious matter for the plaintiff as the trust funds were of considerable value and on January 22, 1948, he took out an originating summons asking for the execution of the trusts of the settlement by the court and, alternatively, for directions. The defendants were Hart, the settlor and his wife. On March 19, 1948, on a motion by the plaintiff, a receiver of the property subject to the trusts was appointed, and on October 20, 1948, an order was made on

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the summons for the execution of the trusts, for an account to be taken and for certain inquiries to be made. On December 24, 1949, the defendant, Hart, died and on March 1, 1950, an order was made to proceed. On May 23, 1950, the master's certificate was issued in respect of the accounts and inquiries and it disclosed possible breaches of trust involving between £6,000 and £7,000, a large part of which had been paid to or on behalf of the settlor. On July 4, 1950, the plaintiff issued a summons for the determination of certain questions in regard to the accounts and asking, inter alia, whether to institute proceedings against the settlor. On November 15, 1950, an order was made adding the personal representatives of Hart as defendants and the summons was adjourned into court.

In the meantime negotiations were proceeding for a settlement by way of a compromise between the parties. By December 4, 1950, the main terms had been settled, viz., that the settlor's sister would waive any claim in respect of breaches of trust and that an insurance policy should be effected to safeguard the rights of the remaindermen in the event of the sister predeceasing the settlor, as the settlor was unable to state who would be the next-of-kin entitled to the trust fund in such an event. The plaintiff was advised that he could not agree to such a compromise without the approval of the court, and that a scheme could not be formulated until the court had ascertained to what extent the trust fund was deficient. On December 5, 1950, an attempt was made to set down the summons of July 4, but this could not be done as Hart's personal representatives had not entered an appearance. On December 6 the plaintiff's solicitors delivered briefs to leading and junior counsel. Hart's personal representatives having entered an appearance, the summons was set down on January 24, 1951. By an order, dated February 6, 1951, the settlor's sister was added as a defendant.

On February 26, 1951, the plaintiff learnt from the settlor's solicitors that the settlor had no next-of-kin on his mother's side other than his sister, so that in the event of her predeceasing the settlor the property would devolve on the Crown. It was, therefore, possible for all parties to be brought before the court, thus avoiding the necessity for any insurance policy and making a simplified form of settlement possible. On February 5, 1942, the settlor took out a summons for an order disposing of the proceedings on agreed terms, and on April 28, 1952, the judge in chambers made an order by consent on both summonses, the matter being finally disposed of. By the order the costs of all parties were to be taxed as between solicitor and client and paid out of the capital of the trust fund.

On taxation the taxing master allowed £1,500 costs but disallowed briefs and brief fees to leading and junior counsel on the grounds, inter alia, (i) that the briefs were prematurely delivered, and (ii) that negotiations for a compromise were in progress before they were delivered and terms of settlement were agreed shortly

afterwards. On objections being lodged, he allowed a small fee to junior counsel, but dismissed the objections in regard to leading counsel's fees and the greater part of junior counsel's fees. In his answers to objections he referred to the terms of compromise as having been approved by the court on "April 28, 1951," while they were, in fact, approved on April 28, 1952.

*Harold Christie Q.C.* and *J. A. Brightman* for the plaintiff.
*W. S. Wigglesworth* for the defendants.

DANCKWERTS J. [having stated the facts]: The summons in this matter was a serious matter for the plaintiff as he might have become liable for a very considerable sum of money. It was contended on behalf of the plaintiff that the taxing master had made a number of errors of fact and had misdirected himself as to the facts. I think that this contention is well founded and that there are a number of mistakes of fact in his answers. He was in error where he said that the summons for approval of the compromise was heard on April 28, 1951. He made a slip of a year, as it should have been 1952, and the several references which he made to April 28, 1951, should be to April 28, 1952. There are also other matters. The terms of compromise which were provisionally agreed in the first place could not be adopted by the parties until they had been approved by the court. It is by no means certain that the compromise would have been approved, and therefore it was not unreasonable to have delivered briefs shortly after agreement of terms. The taxing master, moreover, took no account of the fact that the terms ultimately agreed on were wholly different from the first terms. The negotiations between December, 1950, and April, 1952, were conducted by leading counsel. In the early stages, when it was not ascertainable who were the remaindermen under the settlement, a scheme had to be prepared to safeguard, by a policy of insurance, the interests of all who might be entitled. The cost of this policy proved to be extremely high, about 33⅓ per cent., which rendered the old terms impracticable. Even if the cost had not been so high, it was not clear that the terms would be approved, and the assistance of leading counsel might well have been necessary. Later, when information was received from the settlor's solicitors that the settlor had no next-of-kin other than his sister, it became plain that the remainderman under the settlement was the Crown. Then, on the Attorney-General being joined, all the parties could be brought before the court, thus avoiding the necessity for any insurance, a simplified form of settlement could be put forward, and, all parties being fully agreed, it was possible to obtain an order by consent. No account was taken of the fact that the negotiations after December, 1950, and the final settlement were conducted on behalf of the plaintiff by leading counsel without other remuneration than that on the brief originally delivered. The matter is one for the exercise of my discretion and I allow

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the fees of leading counsel and junior counsel. Accordingly, I allow the objections to the taxing master's certificate and it will be referred back with a direction to allow. Costs of this application as between solicitor and client are to come out of the trust fund.

*Order accordingly.*

Solicitors: *Barnett, Tuson & Co.; Gamlen, Bowerman & Forward.*

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[CHANCERY DIVISION.]

1953
*July* 9, 23.

Danckwerts J.

* *In re* PILKINGTON BROTHERS LD. WORKMEN'S PENSION FUND.

[LIVERPOOL DISTRICT REGISTRY.]

[1953. P. 1623.]

*Friendly Society—Trustee—Power to appoint corporate body as sole trustee—Friendly Societies Act,* 1896 (59 & 60 *Vict. c.* 25).

There is nothing in the provisions of the Friendly Societies Act, 1896, to prevent the appointment by a friendly society of a corporate body as its sole trustee.

*In re West of England and South Wales District Bank, ex parte Swansea Friendly Society* (1879) 11 Ch.D. 768 not followed.

ORIGINATING MOTION.

The applicant fund was registered in 1925 as a society under the Friendly Societies Act, 1896, and operated the pension fund of Pilkington Brothers Ld., well-known glass manufacturers, of St. Helens, in the County of Lancaster. On May 1, 1952, a new trust deed and rules were adopted by the society (the trust deed being expressed to be supplemental to the original trust deed of April 28, 1925) and these rules were duly registered by the registrar under the Friendly Societies Act, 1896. Later a "partial amendment" of rule 53 was duly adopted by the society, but the registrar refused to register this amendment on the ground that it was contrary to the provisions of the Act of 1896. The proposed amendment sought to add at the end of rule 53, which provided that "there shall be four trustees of the "Fund of whom two shall be nominated by the representatives "of the firm on the committee and two shall be nominated by "the representatives of the members on the committee" a proviso in the following terms: "Provided always that a company "incorporated under the provisions of the Companies Act, 1948, "or any former enactment relating to companies (as in such Act "defined) may be appointed to be sole trustee of the Fund in

"the place of all existing trustees; such appointment shall be "made at a general meeting by a resolution of a majority of the "members present and entitled to vote thereat; and a copy of "such resolution signed on behalf of such company by some "person acting under its authority and by the secretary shall be "sent within fourteen days by the secretary to the registrar."

It was considered by the committee of management of the society that the appointment of a company to be the sole trustee would avoid trouble and expense in executing transfers of investments, and by enabling the committee of management to control the company as the directors thereof would vest the administration of the society in one body of persons instead of two. On the other hand, it was not contemplated that the trustee company would provide the security of a "trust corporation" as defined for the purposes of the Trustee Act, 1925. On the refusal of the Registrar of Friendly Societies to register the amendment to the rules the society appealed.

*J. Pennycuick Q.C.* and *Eric Griffith* for the society.
*N. S. Warren* (*Denys Buckley* with him) for the registrar.

The following case, not referred to in the judgment, was cited in argument: *Dartford Union Guardians* v. *Trickett & Sons.*[1]

*Cur. adv. vult.*

DANCKWERTS J., reading his judgment. This is an appeal from a decision of the Registrar of Friendly Societies, refusing to register an amendment of the rules of the Pilkington Brothers Ld. Workmen's Pension Fund. As I understand the position, the registrar's functions in regard to the registration of rules or of amendments of rules do not extend to a consideration of the prudence of a proposed rule or amendment; and the ground of the registrar's decision is simply that the proposed amendment is not authorized by the terms of the Friendly Societies Act, 1896.

[His Lordship stated the facts and continued:] At the date when the Friendly Societies Act, 1896, was passed corporate trustees were not in common use, and difficulties in regard to corporate bodies with reference to joint tenancies existed then and until the passing of the Bodies Corporate (Joint Tenancy) Act, 1899, which enabled a body corporate to be a joint tenant with another individual or corporation.

Section 25 (1) of the Friendly Societies Act, 1896, requires every registered society to have "one or more trustees"; and subsection (4) provides that "the same person shall not be "secretary or treasurer of a registered society or branch and a "trustee of that society or branch." There is no express prohibition in the Act of the appointment of a corporation to be a

[1] (1888) 59 L.T. 754; (1889) 5 T.L.R. 619 (C.A.).

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trustee or a sole trustee. By section 19 of the Interpretation Act, 1889, in every Act passed after the commencement of that Act (that is, January 1, 1890) the expression "person" shall, unless the contrary intention appears, include any body of persons corporate or incorporate. Accordingly, the burden is on those who contend that a body corporate cannot be appointed a trustee of a society registered under the Friendly Societies Act, 1896. It is contended that a contrary intention appears in that Act, and that the provisions of that Act are inconsistent with the appointment of a corporate body to be such a trustee. It is necessary, therefore, to examine the provisions of the Act to see what are the difficulties or indications in regard to this point.

Section 25 (3) requires the society or branch to send to the registrar a copy of every resolution appointing a trustee, signed by the trustee so appointed and the secretary of the society or branch. Section 34 provides for transfers of stock where a trustee becomes bankrupt, lunatic or dead, but does not provide for the case of liquidation or dissolution of a corporation. Section 35 provides for priority of claims of a society in the case of death or bankruptcy of an officer of a registered society, and does not refer to liquidation or winding up. By section 106 (unless a contrary intention appears) the expression "officer" includes any trustee, treasurer, secretary, or member of the committee of management of a society or branch, or person appointed by the society or branch to sue and be sued on its behalf. Section 50 deals with the vesting of property in "the succeeding trustees" upon the death, resignation or removal of a trustee. Section 58, which deals with the estate of a member dying intestate, empowers distribution according to the decision of a majority of the trustees. Section 76 (5) provides for the examination of officers on oath. Section 90 provides for imprisonment of an officer for certain offences. Section 94, dealing with legal proceedings against officers and other persons, does not provide for service in the case of a corporation.

It is also to be observed that section 8 of the War Loan (Supplemental Provisions) Act, 1915, contains provisions allowing the transfer of any part of the funds of a registered friendly society to the Public Trustee, which, it is argued, would be unnecessary if a corporation could under the Friendly Societies Act, 1896, be a trustee.

It is contended that all these provisions are inconsistent with a company or other corporation being a trustee under the Act. There is very little in the way of authority to assist a conclusion on these matters. In *In re Thompson's Settlement Trusts* [1] it was held that, under the common form power of appointing new trustees contained in a marriage settlement of 1866, a corporation could be appointed to be a new trustee jointly with a surviving individual trustee since the Bodies Corporate (Joint Tenancy)

[1] [1905] 1 Ch. 229; 21 T.L.R. 86.

Act, 1899, had enabled corporate bodies to hold property in joint tenancy with individuals. In *In re West of England and South Wales District Bank, ex parte Swansea Friendly Society*,[2] it was held by Fry J. that an incorporated banking company could not be the treasurer of a friendly society within the meaning of the Friendly Societies Act, 1875. The Act of 1875 contained in section 15 (7) provisions dealing with priorities on the death, bankruptcy, etc., of an officer, which, except for the addition of the word "insolvency" (in the earlier Act) are the same as those of section 35 of the Friendly Societies Act, 1896; and the definition of "officer" is substantially the same in each of the two Acts. Fry J. (after reading section 15 (7) of the Act of 1875) said[3]: "Now the whole scope of that clause appears to me to "refer to a private individual who takes on himself an office, "and it gives certain rights in the event of his death, his bank- "ruptcy or insolvency, for execution, attachment, or process "against his property or himself, and it is very remarkable that "if it were in the mind of the legislature that an incorporated "company could be the officer, and that priority should be given "in the case of a winding-up, this Act, which was passed long "subsequently to any of the Winding-up Acts, is entirely silent "with respect to the liquidation of the company, or the winding- "up and distribution of the assets of the company. It appears "to me that I am bound to read this clause somewhat strictly, "and for the reason pointed out by Lord Eldon in *Ex parte* "*Ross*,[4] and by the Lord Justice Knight Bruce, when Chief "Judge in Bankruptcy, in *Ex parte Harris*[5]: the right given is "one against the common rights of Her Majesty's subjects, and "therefore those who claim that right must bring themselves "within the express provisions of the statute. The only words "which can be relied on here are those which mention process "against the property of the debtor. It is said that those words "include liquidation. It appears to me to be a very doubtful "proposition; but I decide against the applicant, because I think "that the legislature has considered the officer against whom and "against whose estate the benefit is given, as a private person "and not as a corporation."

These observations must carry great weight in construing the similar section in the Act of 1896. Fry J. was dealing with the case of the treasurer of a society, as an officer for the purposes of the section, and not the case of a trustee. But the relevance of his observations is that the definition sections of the two Acts (unless a contrary intention appears) treat a trustee and a treasurer equally as officers of a society. In truth, however, the question of priorities is not of the same importance in the case of a trustee in the event of the trustee's insolvency (except where personal claims against a trustee are involved) as in the case of

[2] (1879) 11 Ch.D. 768.
[3] Ibid. 771.
[4] (1802) 6 Ves. 802.
[5] (1845) De G. 162.

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an officer such as the treasurer or secretary of a society. In the case of the bankruptcy or liquidation of a trustee, the trust property vested in the trustee is distinguished and does not form part of the property distributable among the insolvent person's creditors. Such officers as a treasurer or secretary are more likely to be indebted to the society for moneys received by them in the course of their duties. It may be, therefore, that the conclusions of Fry J. should not be applied to the case of a trustee of a registered society. There is also, as it seems to me, an indication in section 35 that the expression "officer" in the section is not intended to include a trustee. The section provides that the "heirs, executors, or administrators, or trustee in "bankruptcy" of the officer, or the sheriff, are, upon demand in writing of the *trustees* of the society or branch or of any two of them, to pay the money, and deliver over the property to the *trustees* of the society or branch in preference to any other debt or claim against the estate of the officer. So here is an apparent contrast between the expressions "trustees" and "officer." It is curious that the section refers to the demand of the trustees or "of any two of them." The draftsman seems to have forgotten that section 25 allows a society to have a single trustee.

In the circumstances, in my view, the *West of England* case [6] is not a compelling authority against the validity of the appointment of a corporation to be a trustee.

As regards the other sections in the Act of 1896 dealing with "officers," the mere absence of provisions appropriate to a corporate trustee is not necessarily inconsistent with the appointment of a corporate trustee. Section 25 (3) of the Act (requiring signature of the resolution) is, however, specifically directed to the case of a trustee, and if it is not possible to comply with the provisions of that subsection in the case of a corporation, then it would appear that a corporation cannot be appointed to be a trustee. Now, of course, a corporation cannot sign in person, and any signature of a corporation must be made by an officer or other agent of the corporation. Contracts, letters and other documents are, in practice, effectually so signed. The question is whether signature in this manner will satisfy the requirements of section 25 (3), as, indeed, the proposed amendment anticipates.

There are a number of authorities touching on this question. In cases where the personal element required exclusive operation by an agent, it has been held that a corporation could not comply with the terms of the relevant statute: *Wills* v. *Tozer* [7] (the Commissioners' Clauses Act, 1847); *Hirst* v. *West Riding Union Banking Company Ld.*[8] (Lord Tenterden's Act). But in *In re British Games Ld.*,[9] in which the point turned on the provisions

[6] 11 Ch.D. 768.
[7] (1904) 20 T.L.R. 700.
[8] [1901] 2 K.B. 560; 17 T.L.R. 629.
[9] [1938] Ch. 240; 54 T.L.R. 137; [1938] 1 All E.R. 230.

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of section 6 (1) of the Moneylenders Act, 1927, requiring a note or memorandum in writing of the contract signed personally by the borrower, Simonds J. held that it was a sufficient compliance with the Act if the contract was signed by a person acting under the authority of the company, express or implied. Simonds J. reached this result through the provisions of the Companies Act dealing with the signing of contracts which, if made between private persons, would be by law required to be in writing, signed by the parties to be charged therewith. An acceptance by a trustee of his appointment to that position may not be, technically, a contract, but it seems to me that the same principle applies. In my view, therefore, it is possible for a corporation to comply in this manner with the requirements of section 25 (3) of the Friendly Societies Act, 1896. If this is so, it seems to me that there is nothing in this provision to exclude the appointment of a corporation as the sole trustee of a registered society.

There remains to be considered the argument that in 1875 and in 1896 corporate trustees were practically unknown and were unlikely, in view of the difficulties then existing in regard to joint tenancies; and, therefore, it is quite reasonable that the Acts of 1875 and 1896 should not have contemplated the appointment of corporate trustees. This argument would apply with at least as much force to the settlement of 1866, which was the subject of the decision in *In re Thompson's Settlement Trusts.*[10] None the less, it was held in that case that once the difficulties in regard to joint tenancies had been removed by the Bodies Corporate (Joint Tenancy) Act, 1899, the form of the power of appointing new trustees in the settlement of 1866 was capable of including the case of a corporate trustee. This argument, therefore, must I think fail.

The conclusion which I reach is that there is nothing in the Friendly Societies Act, 1896, to exclude the rule that a " person " includes a corporate body and, accordingly, a corporate body may by appointed a trustee of a registered society; and the proposed amendment is not contrary to the Act. There will be an order that the registrar may be directed forthwith to register such amendment.

*Order accordingly.*

Solicitors: *R. H. Eggar, St. Helens; Treasury Solicitor.*

F. R. D.

[10] [1905] 1 Ch. 229.

[CHANCERY DIVISION.]

1953
*July* 8, 9, 24.

Vaisey J.

# *EARL BEATTY *v.* INLAND REVENUE COMMISSIONERS.

*Revenue—Income tax—Assessment—Discovery—Assessments relating to transfer of assets abroad—Additional assessments—Meaning of "discovery"—Income Tax Act*, 1918 (8 & 9 *Geo.* 5, *c.* 40), *s.* 125 —*Finance Act*, 1936 (26 *Geo.* 5 & 1 *Edw.* 8, *c.* 34), *s.* 18.

Where assessments are made under section 125 of the Income Tax Act, 1918 (now section 41 of the Income Tax Act, 1952), the discovery referred to in that section need not be a complete and detailed or accurate discovery, and where the Commissioners find out, or think that they have found out, the existence of an omission or other error, it is not necessary for them to have probed the matter to its depths, or to define precisely the grounds on which they have made the assessments.

CASE STATED by the Commissioners for the Special Purposes of the Income Tax Acts.

The appellant, Earl Beatty, appealed by way of case stated, against assessments to income tax and surtax made on him for the years 1939–40 to 1945–46 under the provisions of section 18 and Schedule II to the Finance Act, 1936 (now sections 412, 413 and 414 of the Income Tax Act, 1952) and made in respect of the income of the Bretisle Co. Ld., a Canadian company.

The ground on which the assessments were challenged was that, being additional assessments, they had been made in the absence of any such "discovery" as is required by section 125 of the Income Tax Act, 1918 [1] (now section 41 of the Income Tax Act, 1952).

In July, 1938, the appellant's half-brother caused to be incorporated in Canada a Canadian investment company (the above-mentioned Bretisle Co. Ld.) and he transferred the shares and debentures in that company to the appellant. Sums of money were paid by Bretisle Co. Ld. into the account of Earl Beatty's solicitors with the Bank of Montreal in Canada, and in June, 1938, were transferred to the London branch of that bank.

It was contended on behalf of the appellant: (1) that all the "transfers of assets" which operated to bring the income of the Bretisle Co. Ld. within the charge to tax imposed by section 18 of the Finance Act, 1936, were made by persons other than the

[1] Income Tax Act, 1918, s. 125: "(1) If the surveyor discovers—that "any properties or profits chargeable "to tax have been omitted from the "first assessments; or that a person "chargeable has not delivered any "statement, or has not delivered a "full and proper statement, or has "not been assessed to tax, or has "been undercharged in the first "assessments; or that a person "chargeable has been allowed, or has "obtained from and in the first "assessments, any allowance, deduc- "tion, exemption, abatement, or "relief not authorized by this Act, "then and in every such case . . ." [then follow provisions as to the amendment of assessments and additional assessments].

appellant and his wife; (2) that, as respects all the assessments up to and including the assessments for the year 1943–44, the Commissioners had admittedly discovered at the respective times at which such assessments were made that such transfers had taken place; but that the evidence showed that it was not until after the last of such assessments had been made that the Commissioners held the opinion that such transfers operated to bring the said income within the said charge; (3) that it was a necessary inference from the evidence that all the assessments up to and including the assessments for the year 1943–44 were made solely on the basis of a suspicion on the part of the Commissioners that there had been a " transfer of assets " by the appellant or his wife; (4) that, as the said assessments were not at the times at which they were respectively made based on facts which the Commissioners had then discovered or on opinions which they then held, but were based merely on an erroneous suspicion, the Commissioners had not at such respective times made any " discovery " for the purpose of section 125 of the Income Tax Act, 1918 (now section 41 of the Income Tax Act, 1952); (5) that as regards the assessments for the years 1944–45 and 1945–46, these assessments were made as additional assessments, being additional to the " prior " assessments made for those years; that at the times of making of such prior assessments all the relevant facts in relation to Bretisle Co. Ld. were known to the Commissioners; that subsequently no further " dis- " covery " had been made by the Commissioners such as would justify the making of such assessments; (6) that all the assessments under appeal were incompetent and should be discharged.

It was contended on behalf of the Crown: (1) that, before the making of each of the assessments under appeal, the Special Commissioners had discovered, within the meaning of section 125 of the Income Tax Act, 1918, that profits chargeable to tax had been omitted from first assessments, and that accordingly the assessments under appeal were properly made in principle under that section; (2) that the appellant had not discharged the onus on him of proving that there had been no discovery within the meaning of section 125 of the Income Tax Act, 1918; (3) alternatively, that the assessments under appeal were not additional assessments made under section 125 of the Income Tax Act, 1918, but were assessments properly made in principle under section 18 of the Finance Act, 1936; (4) alternatively, that since the Special Commissioners were not satisfied with the particulars furnished under Sch. II to the Finance Act, 1936, the assessments under appeal were properly made in principle under paragraph 7 of the said schedule; (5) (a) that the agreed bundle of correspondence did not reveal that the assessments under appeal were made on the view that there had been a transfer of assets by the appellant; (b) alternatively, that if that bundle of correspondence did reveal that the assessments under appeal had been made on the view that there had been a transfer of

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assets by the appellant, there was no evidence that this view was incorrect; (6) that the assessments under appeal were properly made and (subject to adjustment of the figures) should be confirmed.

The Special Commissioners gave their decision in writing in the following terms: "It was contended on behalf of the appellant that the additional assessments under appeal were not competent, having been made in the absence of any such 'discovery' as is required by section 125 of the Income Tax Act, 1918. Subject to this, it was not disputed that the assessments were correct in principle, the appellant being properly chargeable to income tax and surtax by virtue of section 18 and the second schedule to the Finance Act, 1936. There was, therefore, in the case of the appellant, income chargeable to tax, by virtue of the Finance Act, 1936, which it was common ground had been omitted from the first assessments.

"In these circumstances, the assessments under appeal having clearly been made by virtue of the said provisions of the Finance Act, 1936, it seems to us evident that they satisfy the requirements of section 125, and we so hold on the authority of *Commissioners of Inland Revenue* v. *Mackinlay's Trustees* [2] and in particular on the authority of the reasoning of Lord Normand therein, which was approved and adopted by the Court of Appeal in *Commercial Structures Ltd.* v. *Briggs*.[3]

"The appeals are dismissed and we leave the figures to be agreed."

"Figures having subsequently been agreed in accordance with our decision in principle, we reduced the assessments to the following agreed figures:—[the figures were then stated]

"The appellant immediately after the determination of the appeal declared to us his dissatisfaction therewith as being erroneous in point of law and in due course required us to state a case for the opinion of the High Court. . . .

"The question of law for the opinion of the court is whether the assessments under appeal are competent."

*L. C. Graham-Dixon Q.C.* and *Hilary Magnus* for the appellant.

*John Senter Q.C.*, *J. H. Stamp* and *Sir Reginald Hills* for the Crown.

*Cur. adv. vult.*

Cases referred to in argument: *Williams* v. *Grundy's Trustees* [4]; *Commissioners of Inland Revenue* v. *MacKinlay's Trustees* [5]; *Commercial Structures Ltd.* v. *Briggs* [6]; *Rex* v. *Kensington Income Tax Commissioners*.[7]

[2] (1938) 22 T.C. 305.
[3] [1948] 2 All E.R. 1041; 30 T.C. 477.
[4] [1934] 1 K.B. 524; 18 T.C. 271.
[5] 22 T.C. 305.
[6] 30 T.C. 477.
[7] [1913] 3 K.B. 870; 6 T.C. 279; [1916] 1 A.C. 215; 31 T.L.R. 606; 6 T.C. 613 (H.L.).

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July 24. VAISEY J., reading his judgment: This was an appeal to the Special Commissioners against certain assessments to income tax and surtax made on the appellant, Earl Beatty. That appeal was dismissed, and the assessments were upheld. The appellant now appeals to this court, and asks that the assessments should be discharged. The point, and the only point, in the case is that the assessments were invalid by reason of the absence of any previous "discovery" as required or as alleged to be required by section 125 of the Income Tax Act, 1918. That involves two questions: first, was a "discovery" or was it not an essential pre-requisite in the circumstances; and, secondly, if it was, has there been discovery or was there discovery within the meaning of the section? In a sense, therefore, the appellant's appeal is unmeritorious; on the other hand, the revenue authorities ought not to be allowed to impose or enforce taxation otherwise than in strict compliance with the prescribed procedure.

The assessments in question were made in and after the year 1946 under Sch. D, Case VI, for the years 1939–40 to 1943–44, under the provisions of section 18 of Sch. II to the Finance Act, 1936. They were made in respect of the income of a Canadian company named the Bretisle Co. Ld. The correctness of the actual amounts assessed is not in question.

For each of the relevant years other assessments had been made on the appellant to surtax and also to income tax at the standard rate under the same provisions of the Finance Act, 1936, in respect of income of certain other foreign companies. The appellant did not, and does not dispute that the facts and circumstances stated in the case resulted in his becoming chargeable to income tax and surtax as assessed by virtue of the said provisions of the Finance Act, 1936, as interpreted in the case of *Congreve* v. *Inland Revenue Commissioners*,[1] which was decided in the Court of Appeal on December 9, 1946, and in the House of Lords on May 13, 1948. Notices of the assessments under appeal for the year 1939–40 were issued before the date of the decision of the Court of Appeal, while those for 1940–41, 1941–42, were issued after the decision of the Court of Appeal but before the decision of the House of Lords.

That decision establishes the proposition that transfers to Bretisle on behalf of, although not by, the appellant attracted tax as much as transfers made by himself or his wife, confirming in that respect the decision in the Court of Appeal which had reversed or substantially varied the decision of Wrottesley J. in the court below.

[His Lordship stated the facts, and continued:] Now the facts set out as above mentioned were not known to the assessing Special Commissioners before 1943, but they did become known to them in the course of a correspondence beginning on July 12, 1943.

[1] [1948] 1 All E.R. 948; [1948] W.N. 197; 30 T.C. 163.

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Vaisey J.

I think that the points in issue on this appeal can be elicited from the summary of the contentions of the parties set out in the case. I will take the contentions of the Crown first. It was submitted under a head numbered 3 that the assessments under appeal were not additional assessments made under section 125 of the Act of 1918, but were assessments properly made in principle under section 18 of the Act of 1936. I am inclined to think that that contention is well founded. If it is, there is an end of the case. I was much impressed with the argument of Mr. Stamp on this point and I should have elaborated my reasons for agreeing with it if that had been the only point in the case. But, as almost the whole of the arguments addressed to me were concerned with this matter of discovery or no discovery, I will for the purposes of this judgment assume that section 125 does apply. But in any case I cannot find that section 125 has anything to do with surtax.

In the forefront of the Crown's submissions I find this: That before the making of each of the assessments the Special Commissioners had "discovered" (within the meaning of section 125) that profits chargeable to tax had been omitted from first assessments so that the assessments were properly made in principle under that section. Now this really is, or ought to be, a short and simple point. The Special Commissioners must have made the assessments because they thought that something had not been disclosed by the appellant and therefore not discovered (in the fullest sense) by the Special Commissioners.

Now the facts amount to this: that though the relevant facts had been disclosed by the appellant, their relevance was not appreciated by the Special Commissioners, and the question seems to me to be whether they can be said to have discovered something which they did not understand. They went on asking, if I may so express it, the wrong question—namely, whether there had been transfers to Bretisle by the appellant or his wife. The right question for them to have asked was whether there had been transfers to Bretisle by persons other than the appellant or his wife, though to that unasked question, strangely enough, the answer had already been supplied to them.

I have expressed my reluctance to add to the many pronouncements on the subject of what "discovery" is. To say that it means to "find out" does not seem to me to help very much. Is there perhaps a distinction to be drawn between "finding" and "finding out"? Does a man discover a diamond by finding it in the ground believing it to be a piece of glass, not finding out that what he has found is a diamond? Such speculations as these can be indulged in to an almost unlimited extent.

Looking at the words "If the surveyor discovers" without guidance from other people's opinions, I confess that I should have supposed that the object of those words was merely to prevent assessments being made blindly and officiously in cases where no omission from earlier assessments was in the surveyor's

contemplation or purview or was suspected. Be it observed that he has not to discover the exact quality or quantity of the omission; it would surely suffice if he were to find out that there had been some omission, and it would not matter if it was a much greater or much smaller omission than he had supposed. If that is accepted, why should it be any less a discovery when the actual omission was of some different kind to the supposed omission? Could he not say, "I have discovered that there is "an omission, but I am not yet in a position to say what it is, "either in quality or in quantity, but that is why I have made "these assessments"?

Evidently in the present case omissions were strongly suspected, and the suspicions were acted on by the making of the assessments. It is now known that the suspicions were correct, and that they were justified by the facts already known to the tax authorities. It seems to me that this is a true analogy: a man finds or discovers in his land a diamond; he thinks it is only a piece of glass, but though he did not at first find out that it was a diamond, he had in the true sense discovered it on the day that he found it.

On the part of Lord Beatty, the appellant, it is admitted that at the respective times when the assessments were made, the actual facts of the transfers by his half-brother were known to the Commissioners, although it was not until the last of the assessments had been made that the Commissioners held or came to hold the opinion that such transfers were what operated to bring the income of Bretisle within the charge. It is said that the assessments were made solely on the basis of a suspicion (erroneous in point of fact) that there had been transfers by the appellant or his wife, and hence that there was no "discovery" to satisfy the requirements of the section.

The appellant's contentions are plain enough, but I am of opinion that they place undue emphasis on the necessity for "discovery" in the terms of the section. I think that the discovery need not be a complete and detailed or accurate discovery and that when the Commissioners find out, or think that they have found out, the existence of an omission or other error it is not necessary for them to have probed the matter to its depths or to define precisely the ground upon which they have made the assessments. Here the relevant facts were all known to them; what was lacking was a comprehension of those facts. The facts were there, but the Commissioners, to revert for a moment to my analogy, thought that the diamond which they had found was only a piece of glass; but it was none the less a discovery.

Many cases were brought to my notice, and these on the whole seem to me to support the Crown's contentions. In *Rex* v. *Bloomsbury Income Tax Commissioners*,[2] Lord Reading C.J., in effect,

[2] [1915] 3 K.B. 768, 785; 31 T.L.R. 565; 7 T.C. 59, 65.

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paraphrases "if he discovers" by the words "if he honestly "comes to the conclusion on the information in his possession." Pausing there, did not the Commissioners come to the conclusion that the assessments were justified on the information in their possession? What information? Possibly because they had been told facts which tended to show that Lord Beatty had more income at his disposal than the Commissioners could account for.

In *Rex* v. *Kensington Commissioners*,[3] the paraphrase adopted was if he "comes to the conclusion from the examination he "makes and from any information he may choose to receive"—that is a quotation from Bray J.; and also "has reason to "believe" (Avory J.) and also "finds" or "satisfies himself" (Lush J.).

*Williams* v. *Grundy's Trustees*,[4] and *Inland Revenue Commissioners* v. *MacKinlay's Trustees*,[5] are entirely favourable to the case of the Crown in this appeal. See also *Commercial Structures Ld.* v. *Briggs*.[6]

I cannot see that even on this most technical of all technical points the appellant has any right to succeed, and I dismiss the appeal.

*Appeal dismissed*

Solicitors: *Withers & Co.; Solicitor of Inland Revenue.*

J. L. D.

[3] [1913] 3 K.B. 870, 889, 897, 898.
[4] 18 T.C. 271.
[5] 22 T.C. 305.
[6] 30 T.C. 477.

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[CHANCERY DIVISION.]

1953
*June 4.*

Wynn-Parry J.

* *In re* MERTON. PUBLIC TRUSTEE *v.* WILSON.

[1953 M. 593.]

*Settlement—Power of appointment—Exercise of power in favour of appointor's children — Appointor entitled to income for life—Purchase by appointor of children's reversionary interests—Estate duty—Intention—Validity.*

A parent exercised a power of appointment in favour of two of her children, as a preliminary to purchasing those children's reversionary interests with a view to avoiding estate duty:—

*Held*, that the appointment had been validly exercised.

Observations of Lord Parker in *Vatcher* v. *Paull* [1915] A.C. 372, 378 applied.

ADJOURNED SUMMONS.

By a settlement dated May 5, 1908, Emile Ralph Merton directed the trustees in the events which happened to pay the income of the whole of certain trust funds to his daughter Gladys

Wilson (hereinafter called "Mrs. Wilson") and directed that after her death the trust funds should, subject to the power of appointment of a life interest to any husband of hers who should survive her, be in trust for such of her issue to be born during her lifetime "who if male shall attain 21 years of age or being "daughters shall attain that age or previously marry as she may "at any time by any deed or deeds with or without power of "revocation and new appointment or by will appoint and in "default of appointment . . . shall be in trust for all her children "who being sons attain the age of 21 years or being daughters "attain that age or previously marry in equal shares."

There were three children of the marriage, two daughters and one son, all of whom attained the age of 21 years.

In 1940 the son became of unsound mind and, as there appeared to be no prospect of his recovery, Mrs. Wilson came to the conclusion that it would be useless and wrong to provide for him out of the property comprised in the settlement. She therefore made a generous provision for him, and by a will dated September 21, 1940, appointed the trust fund (in exercise of the special power conferred on her by the settlement) to her two daughters in equal shares. By a subsequent will made on March 8, 1948, she repeated the terms of the appointment, which appeared in the earlier will.

Being advised that, in preference to leaving matters as they stood under her last will, it would be to her daughters' advantage for an irrevocable appointment by deed to be made, Mrs. Wilson, by a deed poll of appointment dated June 16, 1952, in exercise of the power contained in the settlement, appointed that the trust funds should (subject to her life interest therein) be held in trust for her daughters in equal shares.

She was also advised that it was in her power to confer a substantial benefit on her daughters (in the way of reducing the amount of estate duty that would have to be borne by them at her death) by purchasing from them for the full value and in excess of the market value the entire reversionary interest in the capital of the settled property, so that it could be transferred to her as absolute owner.

The amount was fixed by valuers at £13,258 for each daughter and was duly paid by Mrs. Wilson to each of them in cash.

Counsel having advised that there was some doubt, having regard to the authorities, whether Mrs. Wilson was competent by appointment and purchase to entitle herself to more than the share to which the two daughters were entitled in default of appointment and that, accordingly, Mrs. Wilson had only acquired a good title to two-thirds of the trust fund, the Public Trustee, as the present sole trustee of the settlement, took out a summons to ascertain (1) whether Mrs. Wilson had by virtue of the joint effects of (a) her execution of the deed poll of appointment of June 16, 1952, and (b) the subsequent purchase

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by herself on or before July 1, 1952, of the whole of the reversionary interest of each of her daughters under the settlement, become the sole absolute beneficial owner of the whole of the trust fund so that the plaintiff, as trustee of the settlement, ought to transfer or deal with the whole of the trust fund in accordance with her directions; (2) alternatively, whether Mrs. Wilson had become the sole absolute beneficial owner of two-third parts only of the trust fund, so that the plaintiff ought, as such trustee, to treat the remaining one-third part as still subject to the trusts of the settlement and to retain the same accordingly; (3) otherwise, whether and to what extent the power of appointment by the settlement given to Mrs. Wilson had been validly exercised by the deed of appointment.

*Hubert Rose* for the plaintiff, the Public Trustee.
*B. L. Bathurst Q.C.* and *N. C. Armitage* for Mrs. Wilson.
*W. F. Waite* for the two daughters.
*W. J. C. Tonge* for the son.

Cases referred to in argument: *Vatcher* v. *Paull* [1]; *In re Dick* [2]; *Smith* v. *Lord Camelford* [3]; *Noel* v. *Lord Walsingham* [4]; and *In re Simpson.* [5]

WYNN-PARRY J. This summons raises a short and, to my mind, simple question. The first defendant was entitled to a life interest under the settlement mentioned in the title to the summons. The other three defendants were her children. All of them are of age but the fourth defendant, the son, is under a disability. But for that unfortunate circumstance it is difficult to see that this matter would ever have come before the court. The first defendant, in view of the circumstances of the fourth defendant, has made, over the years, provision for him which has rightly been described as extremely generous.

In 1940 the first defendant made a will by which she appointed the capital of the property settled by the settlement in favour of her two daughters pursuant to the special power of appointment reserved to her to that end by the settlement. She deliberately and understandably excluded the son from that appointment. She gives me her reasons which, in addition to the amount of the financial provision she had made for the son, include what appears to me to be a very natural reason, namely, that while it is obviously her duty from a moral point of view to provide income for the son under a disability and to make proper provision for his child, there would have been little sense and no advantage in setting aside more capital for that son. She made a subsequent will which, at the moment,

[1] [1915] A.C. 372.
[2] [1953] 1 Ch. 343; [1953] 2 W.L.R. 477; [1953] 1 All E.R. 559.
[3] (1795) 2 Ves. 698.
[4] (1824) 2 Sim. & St. 99.
[5] [1952] Ch. 412; [1952] 1 T.L.R. 868; [1952] 1 All E.R. 963.

constitutes her last will, in 1948, in which she repeated the terms of the appointment in favour of the two daughters which appears in the earlier will. The evidence shows that the aggregate amount of the capital sums provided for the benefit of the son under a disability, and his son, exceeds the aggregate amount which she has provided for her daughters.

What happened is this. Having been advised that, if she left matters as they stood under her last will, the daughters, on her death, would become liable to pay, or, at any rate, have deducted from their shares, very considerable sums in respect of estate duty, she fell in with a suggestion made by her advisers to make an irrevocable appointment by deed, which was done, and was dated June 16, 1952. A short time thereafter she offered to purchase the reversionary interest of each daughter in the funds so appointed. She tells me in her affidavit, and it is not challenged by Mr. Tonge, and I accept it, that in making that offer she also made it clear to her daughters that they were neither of them under any obligation to accept the offer but might, instead, rest on the irrevocable appointment in their favour. In the event, somewhat understandably, both daughters accepted the mother's offer. The offer in each case was based on the advice of qualified experts who, having arrived at the market price, very wisely advised the mother that her offer should be at a sum substantially in excess of that market value. The result of that evidence quite clearly, to my mind, is that each of the daughters stands to be considerably benefited. Secondly, the intention of the mother, the appointor, was exclusively to benefit the two daughters and, thirdly, she did not desire to benefit the son under a disability because she had, as I have already pointed out, made generous provision for him, and indicated by the terms of the two wills that in no circumstances, whatever might be the outcome of this challenge to the transaction, would she be willing to exercise a power of appointment otherwise than she has done.

Under those circumstances, the simple question arises, is there ground for saying that that transaction is not a perfectly valid transaction? It can only be held to be an invalid transaction, and even then only partially, if it can be shown that there is some inflexible rule established by the authorities, that where the appointor and the appointee stand in the relation of parent and child, the appointor who appoints in favour of the child and then purchases the interest of the child, cannot benefit thereby beyond the interest which the child would have in the fund had the appointment never been made.

Mr. Tonge on behalf of the son under a disability, whose observations were of the greatest assistance to me, was constrained at the outset of his remarks to say that he was unable successfully to challenge this transaction. He directed my attention to some modern authorities, to two of which I propose

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shortly to refer. The first was *Vatcher* v. *Paull*,[1] where Lord Parker said: "The term fraud in connection with frauds on a "power does not necessarily denote any conduct on the part of "the appointor amounting to fraud in the common law meaning "of the term or any conduct which could be properly termed "dishonest or immoral. It merely means that the power has "been exercised for a purpose, or with an intention, beyond "the scope of or not justified by the instrument creating the "power. Perhaps the most common instance of this is where "the exercise is due to some bargain between the appointor and "appointee, whereby the appointor, or some other person not an "object of the power, is to derive a benefit. But such a bargain "is not essential. It is enough that the appointor's purpose "and intention is to secure a benefit for himself, or some other "person not an object of the power." It appears to me that that is a clear direction to the court, in each case, to inquire what is the purpose and intention of the appointor; and if, and only if, it appears from the evidence that the object was to secure a benefit for himself or for some other person not an object of the power, is the transaction to be held to be invalid. Those words direct that the court shall embark on that inquiry and they are, therefore, the reverse of words which are apt to establish or recognise the existence of any inflexible rule.

The other case is the very recent case of *In re Dick*,[2] where Evershed M.R. quoted the words of Lord Parker which I have just read, and continued: "I should not wish to be thought to "lay down that whenever there is any intention, however "secreted in the bosom of the appointor, to benefit some non-"object in some measure, that therefore the exercise of the "power is bad. After all, although the phrase 'fraud on the "'power' does not carry the sense of deceit which the word "'fraud' bears in other contexts, it indicates the doing of "something which is not right, using those words in their broad "sense—at least, a deliberate defeating of what the donor of "the power authorized and intended." Those words appear to me again to recognize the duty of the court to embark on the inquiry to which I have referred, and they are inconsistent with any inflexible rule that the mere circumstance that the appointor, standing in the relation of parent to the appointee, purchases the appointee's share does thereby something which vitiates to any extent the transaction. That is the state of the modern authorities.

There are two old authorities. In *Smith* v. *Lord Camelford*[3] it was said: "Even a well executed appointment could not "take from her one moiety; for though he could entitle himself "to all Lady Camelford could claim, it could be only to that "she could claim absolutely against the other daughter. He "could not make an appointment in truth beneficial to himself:

[1] [1915] A.C. 372, 378.
[2] [1953] 2 W.L.R. 477, 485.
[3] 2 Ves. 698, 714.

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"but in truth he has not." The sidenote against that passage is, "Father having power to appoint among children and purchasing "the share of one cannot by appointment entitle himself to "more than the share of that child in default of appointment." That sidenote is only explained by the passage from the judgment to which I have referred and cannot, either from the language of the judgment which I have read or from the sidenote, be regarded as any authority for the proposition that there is any such inflexible rule as that to which I have referred. Even if there could be extracted from the context any such inflexible rule then, in my view, such a rule would have to give way to the modern authorities and, particularly, to the overriding authority of the speech of Lord Parker in the House of Lords.

Finally, there is another old case, *Noel* v. *Lord Walsingham*.[4] The headnote is: "A father being tenant for life under his "marriage settlement, with power to appoint the shares in "which his younger children were to take a sum to be raised "for their portions, having exercised the power by his will, "afterwards made a provision for one of his daughters, took a "release from her of her portion, and by a codicil revoked the "appointment in his will, so far as it respected her. Held, that "her share did not sink into the freehold, or belong to his "residuary legatee, but that the other younger children were "entitled to the whole fund." At the beginning of his judgment Sir John Leach V.-C. said[5]: "Mr. Paul Cobb Methuen"—that is the settlor—"became the purchaser of the £3,000 which he "had appointed to Lady Walsingham; and that sum not being "more than her equal aliquot share of the £15,000, it might be "difficult to question the validity of that appointment or "purchase, if the interest of any party required it." All I have to say about that passage is, that it appears to be the key to the rest of the judgment and it is couched in language which is quite inconsistent, on examination, with there being any such inflexible rule as that to which I have earlier referred. It therefore appears to me that, on examination, the two older authorities are not inconsistent with the modern authorities. In each case there must be the inquiry by the court, and the court is free as a result of that inquiry to come to such conclusion as appears to be right, being guided only by the principle clearly stated by Lord Parker. The court has to ask itself, what was the appointor's purpose and intention? Was it to secure a benefit for himself or some person not an object of the trust? If the answer is "Yes," there is vice; and if the answer is "No," there is no vice.

In this case I come without hesitation to the conclusion that, on the evidence and in the light of the instruction to be derived from these cases, the transaction was an entirely valid

[4] 2 Sim. & St. 99.

[5] Ibid. 110.

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transaction. It was effective to pass the whole of the interest in the fund to the two daughters, and it was effective by the subsequent step to vest the whole of the interest in the fund in the mother.

*Declaration accordingly.*

Solicitors: *Park Nelson & Co.; Bischoff & Co.*

J. L. D.

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[QUEEN'S BENCH DIVISION.]

1953
*July* 24.

Lord Goddard C.J., Parker and Donovan JJ.

* GODSTONE RURAL DISTRICT COUNCIL *v.* BRAZIL.

*Town and Country Planning—Enforcement notice—Notice not stating period at the expiration of which it came into effect—Information alleging contravention of notice in December,* 1952, *and January* 12, 1953—*Duplicity—Town and Country Planning Act,* 1947 (10 *&* 11 *Geo.* 6, *c.* 51), *s.* 23 (2) (3)—*Town and Country Planning General Development Order,* 1950 (*S.I.* 1950, *No.* 728) *art.* 3 (1), *Sch.* I, *Class IV,* 2.

A local planning authority served on the respondent, an owner of a piece of land, a notice purporting to be an enforcement notice under section 23 of the Town and Country Planning Act, 1947, requiring her to remove a caravan from the land "within seven "days after the expiry of 28 days from the date of the service "of this notice." The respondent having failed to comply with the notice, an information was preferred against her alleging that on December 17 and 30, 1952, and on January 12, 1953, she had used the land in contravention of the notice:—

*Held,* that the notice, having failed to state the date on which it was to take effect, was invalid; further that, in any event, as by virtue of the Town and Country Planning General Development Order, 1950, Sch. I, Class IV, the respondent was permitted to use the land as a site for a caravan for 28 days in any calendar year, no offence had been committed in respect of January 12, 1953, and by including that date with the dates in December, 1952, the information was alleging more than one offence, and was bad.

*Burgess* v. *Jarvis* [1952] 2 Q.B. 41; [1952] 1 T.L.R. 580; [1952] 1 All E.R. 592 followed.

CASE STATED by Dorking justices.

An information was preferred by the appellants, Godstone Rural District Council, against the respondent, Nellie Brazil, alleging that she on December 17 and 30, 1952, and on January 12, 1953, unlawfully used her own piece of land known as "The Platt," situate on the Lone Oak Estate, Smallfield, in the parish of Burstow, as a site for a caravan for the purpose of human habitation without the grant of permission under Part III of the Town and Country Planning Act, 1947, and in contravention of an enforcement notice duly served on her on October 31, 1952.

The following facts were proved or admitted: Before January, 1952, the respondent stationed on the land a caravan for living purposes and resided there until the service of the enforcement notice. On October 31 the appellants served on the respondent a notice purporting to be an enforcement notice under section 23 of the Act of 1947 in the following terms, inter alia: "Whereas it is considered expedient, having regard to the "provisions which will be required to be included in the develop-"ment plan for securing the proper planning of the area and to "any other material consideration that, for restoring the land "to its condition before the development took place, you should "take the steps hereinafter specified within the period also here-"inafter specified. Now therefore, the council do hereby give "you notice, in pursuance of their powers for and on behalf "of the local planning authority under sections 23 and 24 of the "[Town and Country Planning Act, 1947] (a) to discontinue the "use of the said land . . . as a site for the said caravan or mov-"able structure; (b) to remove from the said land the said "caravan or movable structure stationed thereon within seven "days after the expiry of 28 days from the date of the service "of this notice upon you."

The appellants contended that they had served an enforcement notice in accordance with the provisions of section 23 of the Act of 1947; that the respondent, who had not challenged the notice in either of the ways provided by the section, had nevertheless continued to use the land as before and that the offence charged was proved.

The respondent contended that the notice was not an enforcement notice in that it failed to specify the two periods required by section 23, namely, the period not being less than 28 days at the expiry of which it was to come into effect, and the period within which the use was to be discontinued and the caravan removed.

On March 18, 1953, the justices, being of the opinion that the notice failed to specify the two periods required to be specified by law, held that the notice was not an enforcement notice, and that therefore the offence charged was not proved, and dismissed the information.

*L. G. Scarman* for the appellants.
*J. D. James* for the respondent.

The following cases were cited in argument: *Burgess* v. *Jarvis* [1]; *Mead* v. *Chelmsford Rural District Council* [2]; *Perry* v. *Garner*.[3]

[1] [1952] 2 Q.B. 41; [1952] 1 T.L.R. 580; [1952] 1 All E.R. 592.
[2] [1953] 1 Q.B. 82; [1952] 2 T.L.R. 700; [1952] 2 All E.R. 723.
[3] [1953] 1 Q.B. 335; [1953] 2 W.L.R. 271; [1953] 2 All E.R. 285.

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LORD GODDARD C.J. Under section 23 (3) of the Town and Country Planning Act, 1947, an enforcement notice comes into effect at any period not less than 28 days after the service of the notice. In *Burgess* v. *Jarvis* [1] the Court of Appeal decided—and in *Mead* v. *Chelmsford R. D. C.* [2] this court followed that decision—that the enforcement notice must state two periods: first, the period after which the notice comes into effect, and, secondly, the period after the notice has taken effect within which the work has to be done to restore the land to the condition in which it was before the alleged breach of the enforcement notice.

The present notice is defective because it does not say that the notice will take effect at the expiration of 28 days. What it says is: "You are to do the work after the expiration of "28 days." The object of telling a person when the notice is to take effect is to give him notice of the period in which he can appeal. In my opinion, therefore, this notice does not comply with the requirements of such a notice as laid down by the Court of Appeal.

The second point is this: The information charges the respondent ". . . for that she did on December 17 and 30, 1952, and on "January 12, 1953, unlawfully use her own piece of land . . . as "a site for a caravan for the purpose of human habitation with-"out the grant of permission in that behalf under Part III of "the Town and Country Planning Act, 1947, and in contraven-"tion of an enforcement notice." Under the Town and Country Planning General Development Order, 1950, Sch. I, class IV, 2, any person may use their land to put a caravan on for 28 days in any calendar year. Therefore, on the face of it, this information is alleging an offence on January 12, 1953, and 28 days had not expired from that date. Moreover, as it is alleging an offence in 1952 and an offence in January, 1953, it must be alleging more than one offence. Therefore, on all grounds, this information is bad and the justices were right in dismissing this summons.

PARKER J. I agree. In my view, the enforcement notice only sets out one of the periods which is required to be set out by the Act, namely, the period during which the work must be done. Mr. Scarman has contended that it is possible to read and one should read the enforcement notice as specifying the two periods. I cannot agree with that. These notices are served on members of the public who do not know, although no doubt they are expected to know, all the provisions of the Act and, in my view, the notices should set out clearly, first, the period at the expiration of which the notice is to take effect, and secondly, the period after the notice takes effect during which the work is to be done. This enforcement notice does not do so.

[1] [1952] 2 Q.B. 41; [1952] 1 T.L.R. 580; [1952] 1 All E.R. 592.

[2] [1953] 1 Q.B. 32; [1952] 2 T.L.R. 700; [1952] 2 All E.R. 723.

DONOVAN J. I agree, although I was at first disposed to take the view that the enforcement notice was good.

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GODSTONE RURAL DISTRICT COUNCIL v. BRAZIL.

*Appeal dismissed.*

Solicitors: *Sharpe, Pritchard & Co.; Langhams & Letts, for Hart, Scales & Hodges, Dorking.*

J. D. P.

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[QUEEN'S BENCH DIVISION.]

## * CHALLAND *v.* BARTLETT.

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*July* 21.

Lord Goddard C.J., Parker and Donovan JJ.

*Food and Drugs—Milk—Addition of water—Having in "possession for "the purpose of sale"—Act or default of other person—Form of information—Food and Drugs Act,* 1938 (1 *&* 2 *Geo.* 6, *c.* 56), *s.* 83 (3)—*Food and Drugs (Milk, Dairies and Artificial Cream) Act,* 1950 (14 *Geo.* 6, *c.* 35), *s.* 9 (1) (*c*).

The defendant, a dairy farmer, sold milk produced at his farm to the Milk Marketing Board under a contract which provided that the milk should be delivered daily to such places and consignees as the board should direct. The board directed that he should supply and deliver milk to one W., and that the milk should be collected at the farm. Both the defendant and W. used the dairy at the defendant's farm, W. for bottling milk, and after cooling the milk the defendant placed it in churns in the centre of the dairy floor, which was agreed between him and W. as the place of delivery and collection. When the defendant had placed the churns in that position he had completed delivery and done all that was required of him in that regard under the contract and the board's direction. On January 12, 1952, an inspector of weights and measures visited the farm and took samples from two churns of milk placed in the centre of the dairy floor awaiting collection by W. The samples were found to contain added water. The defendant was charged with having in his possession, for the purpose of human consumption, milk to which an addition of water had been made, contrary to section 9 (1) (*c*) of the Food and Drugs (Milk, Dairies and Artificial Cream) Act, 1950. The justices considered that the milk had passed out of his possession when he had placed it in the agreed collecting point, and they dismissed the informations. On appeal by the prosecutor:—

*Held*, that, although the property in the milk in the churns might have passed to, and remained, until collected by W., in the board, when it was placed at the collecting point, the defendant was holding the milk for W. and until it had been collected by W. it was in the possession of the defendant; that the words "have in "his possession for the purpose of sale" in section 9 (1) (*c*) of the Act of 1950, were intended to draw a distinction between milk as an article of commerce and milk kept by the farmer for his own use; and that, therefore, the defendant having had milk for sale in his possession within the meaning of the section, an offence had been proved.

*Kilsby* v. *Horsford* (1949) 93 S.J. 601; 47 L.G.R. 610 applied.
*Oliver* v. *Goodger* [1944] 2 All E.R. 481 doubted.

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CASE STATED by East Sussex justices sitting at Uckfield.

Three informations were preferred by a chief inspector of weights and measures against the defendant, a dairy farmer. The first information alleged that, by virtue of section 83 (3) [1] of the Food and Drugs Act, 1938, he, on January 11, 1953, did have in his possession for the purpose of sale for human consumption, milk to which an addition of water had been made contrary to section 9 (1) (*c*) [2] of the Food and Drugs (Milk, Dairies and Artificial Cream) Act, 1950; the other two informations alleged that he, on January 12, 1953, did have in his possession for the purpose of sale for human consumption milk to which an addition of water had been made contrary to the same section.

The following facts were proved or admitted before the justices: On September 1, 1950, the defendant, the owner and occupier of farm premises where he carried on the business of farming and milk production, entered into a contract with the Milk Marketing Board to sell to the board all milk produced at his farm, except, inter alia, what he lawfully used in his own household or sold by retail under a licence issued by the board or otherwise used with the board's consent. The contract provided that the defendant should deliver the milk daily to such places and consignees as the board should direct; that the board should arrange and pay for transport of the milk from the farm collecting point to the place of delivery, and that the defendant should have the milk ready for collection at the farm collecting point at such times as the board should direct. In the absence of other directions the farm collecting point meant the point at which he usually put his milk for collection. By a notice dated September 13, 1950, the board directed that the defendant should supply and deliver milk produced at the farm to one L. A. Wood, and that the milk would be collected at the farm.

The dairy at the defendant's farm was about 10 feet square; on one side was a milk cooler and in another part of the room a bottling machine. Both Wood and the defendant used the dairy, Wood bottling the milk there and also using a sterilising and bottle-washing machine in an adjoining room which was also part

[1] Food and Drugs Act, 1938, s. 83 (3): "Where it appears to the authority concerned that an offence has been committed in respect of which proceedings might be taken under this Act against some person and the authority are reasonably satisfied that the offence . . . was due to an act or default of some other person and that the first-mentioned person could establish a defence under subsection (1) of this section, they may cause proceedings to be taken against that other person without first causing proceedings to be taken against the first-mentioned person."

[2] Food and Drugs (Milk, Dairies and Artificial Cream) Act, 1950, s. 9: "(1) No person shall—(*a*) add any water . . . to milk intended for sale for human consumption . . . (*c*) sell, or offer or expose for sale, or have in his possession for the purpose of sale, for human consumption any milk to which any addition has been made in contravention of the provisions of this subsection. . . . (3) A person who contravenes any of the provisions of this section shall be guilty of an offence."

of the defendant's farm premises. The dairy had two doors, one leading from the farm road and the other from a path separating the dairy from the cow stall, but it was not possible for anyone in the cowstall to see what was being done in the dairy. The milking was done in the cow stall by either the defendant, his cowman, or both, and taken by them in buckets to the dairy and placed in the drum of the cooler, from which it passed through the cooler into a churn. The filled churns, after measuring, were placed in the centre of the floor of the dairy for collection by Wood; that had been agreed between the defendant and Wood as the place of delivery and collection of the milk, and the defendant, having placed the churns in that position had completed the delivery of the milk to Wood and had done all that he was required and directed to do under the contract and notice of direction.

On January 11, 1953, an inspector of weights and measures saw Wood delivering milk to a house at a distance of about one mile from the defendant's farm and purchased two pints of milk from him for sampling. Having ascertained that the milk had been produced by the defendant, the inspector visited the defendant's farm on the following morning. He saw two churns which had been placed in the agreed place of collection, and the defendant informed him that the milk was ready for Wood to collect. The inspector took a sample of milk from each churn; while he was taking the samples the remainder of the morning's milk was being run off from the cooler into two churns, from each of which he took a sample. While he was there Wood arrived and commenced bottling the milk from the two churns which were complete when the inspector arrived. On analysis the sample of milk purchased from Wood on January 11, 1953, was found to contain at least 3·3 per cent. added water, and the samples taken from the two completed churns on January 12, 1953, contained 1·3 per cent. and 2 per cent. added water. The samples taken from the churns direct from the cooling plant were found to be genuine milk, as were samples taken from an "appeal to the cow" milking at the defendant's farm.

On behalf of the defendant it was contended on the authority of *Oliver* v. *Goodger*,[3] that the milk of which samples were taken in the dairy, having been delivered to the agreed collecting point in accordance with the contract and the notice of direction, was no longer in the defendant's possession at the time when the samples were taken, and that the milk of which a sample was taken from Wood while on his delivery round, on the same authority and using the word "possession" in its meaning in common parlance, was also not in the defendant's possession.

On behalf of the prosecutor attention was drawn to section 83 of the Food and Drugs Act, 1938, in relation to the first information, and it was also contended that the milk from which samples were taken in the dairy was in the possession of the defendant,

[3] [1944] 2 All E.R. 481.

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since it was still on his premises and Wood had not yet arrived to take possession of it.

The justices were of the opinion that the milk contained added water, that at the time the sample was taken from Wood on his delivery round the milk was not in the possession of the defendant, and that the milk of which samples were taken in the dairy had passed out of the possession of the defendant when it was placed by him at the agreed point for collection in accordance with the terms of the contract and the notice of direction, and had so passed out of his possession when the samples were taken, and they dismissed all three informations. The prosecutor appealed.

*Paul Wrightson* for the prosecutor.
*J. H. Gower* for the defendant.

The following cases were referred to in argument: *Oliver* v. *Goodger*[3]; *Kilsby* v. *Horsford*,[4] and *Hibbert* v. *McKiernan*.[5]

LORD GODDARD C.J. stated the facts and continued: The first information, in the opinion of the court, was rightly dismissed for this reason: It is well known that section 83 (3) of the Food and Drugs Act, 1938, allows the local authority if they are satisfied that a breach of the Act is due not to the person who actually sells, but to the person who supplies to the seller, and that the actual seller could put forward a defence, to proceed against the supplier, in this case the farmer. It was quite right, no doubt, to attempt to take proceedings under section 83 (3) of the Act, but such proceedings must be brought on a proper information, which should set out the facts and state that the local authority were satisfied that the breach by the seller was due to the act or default of the defendant. The information that was issued against the defendant charged him with being in possession of the milk. He was not in possession of the milk, possession having long passed to Wood who was retailing it to customers in the street. It may be that it is a technical point because on the merits, or perhaps I should say, the de-merits of this case, there is no doubt that the defendant was responsible; but proceedings under section 83 (3) must be taken in proper form. Mr. Wrightson, who always conducts these cases with propriety, conceded, and it is the opinion of the court, that the information was not in the right form and did not give the justices jurisdiction to deal with the defendant. Therefore, they came to a right decision with regard to that information.

The other two informations related to samples of milk taken at the defendant's dairy.

[3] [1944] 2 All E.R. 481.
[4] (1949) 93 S.J. 601; 47 L.G.R. 610.
[5] [1948] 2 K.B. 142; 64 T.L.R. 256; [1948] 2 All E.R. 860.

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[His Lordship referred to the facts and continued:] The milk was resold to Wood by the board and it was the board who arranged for delivery and gave directions that the milk should be collected at the farm. It seems to me that until Wood took possession of the milk, the milk always was and remained in the possession of the defendant. It must have been in the possesion of somebody because nobody suggests that the milk was abandoned. It was held by the defendant for Wood, and if some trespasser or somebody representing himself as Wood, or a mere thief, had come for the milk, the defendant would not have delivered it to him; he would said: "This is Wood's milk; you "must get authority from him." Although it may be that the property in the milk had passed to the board and remained in the board till it had been delivered to Wood, it seems to me that the milk was in the possession of the defendant until it had been collected by Wood.

The Food and Drugs (Milk, Dairies and Artificial Cream) Act, 1950, s. 9 (1) (*c*), uses the words "have in his possession "for the purpose of sale," and I daresay an argument was put to the justices that as the sale was complete in the sense that as soon as the milk was appropriated to the contract the property passed to the Milk Marketing Board, the milk was not in the defendant's possession for the purpose of sale; that is not, I think, the meaning of the Act. The intention of the Act is to draw a distinction between an article of commerce to be sold to other people and one kept by the farmer for his own personal use. If a farmer keeps milk on his premises for his own personal use, and prefers milk and water to milk, there is no reason why he should not have it. Anybody is permitted to add water to milk which they themselves own, and one knows that if very rich milk is being kept for young children, water is added. In my opinion, the expression "have in his possession for the "purpose of sale" in the Act is used simply to show that the section is referring to milk which is treated as an article of commerce and not kept for the farmer's own use.

The justices were referred to *Oliver* v. *Goodger*.[1] In that case, which does seem at first sight to be very like the present case, a Divisional Court consisting of my predecessor, Lord Caldecote C.J., Humphreys and Birkett JJ., decided that no offence had been committed. This court, five years later, in *Kilsby* v. *Horsford*,[2] found great difficulty in understanding fully the decision in *Oliver* v. *Goodger*.[3] Certainly, that case is not one which has been followed, and I cannot help thinking that if the effect contended for successfully before the justices should be given to that decision, it would drive a coach and four through, at any rate, one section of the Act. In *Kilsby* v. *Horsford*[4] we distinguished *Oliver* v. *Goodger*[5] on the ground that there the

[1] [1944] 2 All E.R. 481.
[2] (1949) 93 S.J. 601; 47 L.G.R. 610.
[3] [1944] 2 All E.R. 481.
[4] 93 S.J. 601.
[5] [1944] 2 All E.R. 481.

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milk had been put on the road outside the farm and had, at any rate, left the farm premises; therefore the court said, to use Lord Caldecote's words, there was evidence entitling the justices to come to the decision they reached, that the milk was no longer in the possession of the farmer. I say quite frankly, though I recognize that I am bound by that case, that I feel great doubt whether it was right, and I myself should not have decided it in that way; but, as I said in *Kilsby* v. *Horsford*,[6] whether or not *Oliver* v. *Goodger*[7] was rightly decided, it "was distinguishable "on the ground that the milk was there found to be at a point "outside the farm premises." I said in *Kilsby* v. *Horsford*[8] that the milk was as much in the possession of the farmer as if it had been in his barn because there the delivery point was within the curtilage of the farm; *Kilsby* v. *Horsford*[8] was not cited to the justices here, and they not unnaturally thought that they were bound by *Oliver* v. *Goodger*.[9] But I think that they did not come to a correct decision with regard to those two informations, the appeal must be allowed and the second and third informations must go back to the justices with an intimation that the offence was proved.

PARKER J. I agree.

DONOVAN J. I agree.

*Appeal allowed in part.*

Solicitors: *Sharpe, Pritchard & Co. for H. S. Martin, Lewes; Langhams & Letts for Dawson & Hart, Uckfield.*

J. F. L.

[6] 93 S.J. 601.
[7] [1944] 2 All E.R. 481.
[8] 93 S.J. 601.
[9] [1944] 2 All E.R. 481.

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[QUEEN'S BENCH DIVISION.]

1953
*July* 29.

Lord Goddard C.J., Parker and Donovan JJ.

## *BEWLAY & CO. LD. *v.* LONDON COUNTY COUNCIL.

*Metropolis—Dangerous structure—Notice requiring owners to "take "down, repair or otherwise secure"—Summons for failure to comply with notice—Discretion of court—London Building Acts (Amendment) Act,* 1939 (2 *& 3 Geo.* 6, *c. xcvii*), *s.* 64 (1).

On a complaint under section 64 (1) of the London Building Acts (Amendment) Act, 1939, for failure to comply with a dangerous structure notice requiring the owner of premises "to take down "repair or otherwise secure" the structure, a court of summary jurisdiction has a discretion as to which of the three alternatives it shall order to be carried out.

SPECIAL CASE stated by a metropolitan magistrate.

A complaint was preferred by the respondents, the London County Council, against the appellants, Bewlay & Co. Ld., as

owners of 27 Store Street, Holborn, W.C., alleging that on May 19, 1952, a notice was served on the appellants under the London Building Acts (Amendment) Act, 1939, Part VII, requiring them forthwith to take down, repair or otherwise secure such portions of the main front wall, and the balconies on the main rear wall of the structure, as were fractured, sagged out of perpendicular, loose, insecurely supported or otherwise insecure, and to do any further work rendered necessary by the foregoing, and that the appellants failed to comply wholly with such notice as speedily as the nature of the case permitted.

The following facts were proved or admitted: The appellants were the lessees of the premises and as such were "owners" within section 5 of the London Building Act, 1930, and section 1 of the London Building Acts (Amendment) Act, 1939. The second and third floor of the premises was occupied by a tenant who was protected by the Rent Restrictions Acts. On May 19, 1952, a dangerous structure notice was served by the respondents on the appellants in the terms set out in the complaint. After the service of the notice the appellants shored up the premises by means of external supports and buttresses, and the premises had remained so shored up since. The appellants attempted unsuccessfully to persuade the statutory tenants to vacate the premises and to find them suitable alternative accommodation. It was proved that the premises, which were about 80 years old, were a dangerous structure and if not shored up would be a danger to the inmates. On November 4, 1952, the respondents took out a summons under section 64 [1] of the Act of 1939 for failure to comply with the notice.

The appellants contended that they had not failed to comply with the notice as speedily as the nature of the case permitted; that the magistrate had a discretion whether to make the order asked for or not, and it was submitted that that discretion should be exercised in the appellants' favour for the following reasons: (1) The building was only fit to be pulled down; (2) the expense involved in repairing the premises would be out of all proportion; (3) that the premises were dangerous to the inmates and that, if the district surveyor gave a certificate under section 67 of the Act of 1939, then the statutory tenants could be vacated and the premises could be pulled down; (4) that the district surveyor had refused to give such a certificate; (5) that it would be highly dangerous to carry out the work with tenants in occupation; (6) that in the circumstances the order asked for was not reasonable having regard to the condition of the premises.

[1] London Building Acts (Amendment) Act, 1939, s. 64 (1): "If the "owner or occupier on whom [a "dangerous structure notice] is served "... fails to comply with the notice "... as speedily as the nature of the "case permits a court of summary "jurisdiction on complaint by the "council may order the owner within "a time to be fixed by the order to "take down repair or otherwise "secure to the satisfaction of the "district surveyor the structure or "such part thereof as appears to the "court to be in a dangerous state."

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The respondents contended that the power vested in the court under section 64 (1), being for the protection of the public, must be exercised if the conditions specified in the subsection had been satisfied, and even if the power was discretionary there was, in the circumstances, no ground on which the magistrate could refuse to make the order. It was further contended that the only order which the magistrate had power to make was one directing the owner "to take down repair or otherwise secure" the structure, and that such an order would leave it open to the appellants, if so minded, to demolish the structure and so avoid the expense of repair.

The magistrate, although of the opinion that the premises were not such as economically would warrant the expenditure required to put them in a safe condition, felt compelled to hold, in the circumstances, that he had no alternative but to interpret the words "may" order in section 64 (1) as "must" order and, accordingly, he made the order asked for.

*E. J. Rimmer Q.C.* and *Norman Wiggins* for the appellants.
*H. E. Francis* for the respondents.

The following cases were cited in argument: *London County Council* v. *Jones* [2]; *Torrens* v. *Walker*.[3]

Lord Goddard C.J. This is a special case which the court directed a metropolitan magistrate to state, arising out of proceedings taken by the respondents, London County Council, against the appellants, Bewlay & Co. Ld., as owners of a structure known as 27 Store Street, Holborn. The proceedings were taken as the result of sections 62 and 64 of the London Building Acts (Amendment) Act, 1939. Section 62 provides: "(1) The district surveyor upon completing any survey of a "structure required to be made under subsection (2) of section 61 "(Information as to and survey of dangerous structures) of this "Act shall certify to the council his opinion of the state of the "structure. (2) If the certificate is to the effect that the structure "is not in a dangerous state no further proceedings shall be "taken with respect thereto but if it is to the effect that the "structure is in a dangerous state the council may shore up or "otherwise secure the structure and may erect a proper hoard "or fence for the protection of passengers and shall cause notice "in writing to be served on the owner or occupier of the structure "requiring him forthwith to take down repair or otherwise secure "it as the case requires." Section 64 provides: "(1) If the "owner or occupier on whom notice is served under section 62 ". . . of this Act fails to comply with the notice or the notice as "amended or confirmed in accordance with the decision of the "two surveyors or the award of the arbitrator as the case may

[2] [1912] 2 K.B. 504.

[3] [1906] 2 Ch. 166.

"be as speedily as the nature of the case permits a court of "summary jurisdiction on complaint by the council may order "the owner within a time to be fixed by the order to take down "repair or otherwise secure to the satisfaction of the district "surveyor the structure or such part thereof as appears to the "court to be in a dangerous state." The magistrate made an order directing the appellants to take down, repair or otherwise secure the premises. The appellants' case was that they were willing to take down the structure, but not to repair it, because to do repairs would cost far more than the structure was worth.

The difficulty arose from the fact that there were some statutory tenants in the house, and the district surveyor refused to exercise the power he has under section 67 (1) of certifying that it was necessary to remove them. The appellants say that by the notice they are ordered to do one of three things, whereas if they had been ordered merely to take down the premises they would be protected because an Act of Parliament has made provisions with regard to the tenants. If, on the other hand, the appellants are ordered to take down or repair, it could hereafter be said, if they took down the premises: "You ought to "have exercised the option given you by the order in a way "which would not work to the detriment of the people who are "in possession of the house."

The magistrate has found that: "The premises are not such "as economically would warrant the expenditure required to put "them in safe condition and a reasonable state of repair. In "normal times the building would doubtless have been demolished "for the reason that it is not worth repairing from an economical "point of view." But he has held that he is bound to make an order in the exact terms of the section, that is to say, "to take "down repair or otherwise secure." In the opinion of the court the magistrate was wrong in holding that he had no discretion. He has a discretion to say, on hearing the complaint, whether the owner should take down or whether he should repair or whether he should otherwise secure. I am not saying that in a proper case the magistrate may not confirm the order in the words "take down repair or otherwise secure," but in the present case it is clear as a matter of English that the magistrate can order the owner to do one of the three alternatives. Therefore, the case must go back to the magistrate with an intimation that in the opinion of the court he was wrong in holding that he had not a discretion as to which of these three alternatives he would order, and that, as he has found that the premises would not warrant the expenditure required to put them in safe condition, and that in normal times the building would doubtless have been demolished, it is open to him in the exercise of his discretion, and in view of those findings of fact to order that the

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premises should be taken down. For these reasons we think that the appeal must be allowed and the case must go back to the magistrate with that expression of opinion.

Parker J. I agree.

Donovan J. I agree.

*Appeal allowed.*

Solicitors: *Bartlett & Gluckstein; Solicitor, London County Council.*

J. D. P.

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[chancery division.]

1953
*July* 16, 17.

Roxburgh J.

* *In re* LIVESEY. LIVESEY *v.* LIVESEY.

[1952 L. 3025.]

*Settlement—Portions—Satisfaction—If settlor shall "give or secure to" any child sums for "advancement or preferment in the world"—Gifts by will of freehold and leasehold property and mortgage investments—How affected by direction as to portions—Testamentary bounty.*

By clause 9 of a settlement made in 1904, it was provided that if the settlor "should give or secure" to or with any child for whom a portion was intended to be provided "any sum or sums [for "certain purposes which did not arise] or otherwise for his her or "their advancement or preferment in the world" then, unless the settlor should in writing otherwise direct, such sum or sums of money should be taken in substitution pro tanto and to the amount thereof for the portion.

The settlor had three sons. He died in 1951 and by his will he gave to one of his younger sons certain freehold and leasehold properties in Sheffield and certain mortgage investments, and to the other certain farms and a mortgage for £30,000.

The eldest son took out a summons to ascertain (inter alia) how these gifts were to be dealt with, having regard to the provisions contained in clause 9 of the settlement:—

*Held*, that, on the authorities, a clause of this kind was applicable to a testamentary disposition; that, on the construction of clause 9, it was settled by authority that the phrase "advancement "or preferment in the world" referred to something more restricted than mere bounty; and that these gifts, there being no evidence that they were made for any of the purposes specified, were mere bounty and did not come within the directions as to portions contained in clause 9.

*Onslow* v. *Michell* (1812) 18 Ves. 490 and *Lowther* v. *Bentinck* (1874) L.R. 19 Eq. 166, applied.

Adjourned summons.

By clause 9 of a settlement made by Algernon Montague Livesey on January 30, 1904, it was provided: "If the said

" Algernon Montague Livesey shall give or secure to or with any " child or children for whom a portion or portions is or are " intended to be hereby provided as aforesaid any sum or sums " of money on his, her or their marriage or for the payment of " his her or their debts or otherwise for his her or their " advancement or preferment in the world then unless the " said Algernon Montague Livesey shall in writing otherwise " direct such sum or sums of money shall be taken in " substitution (pro tanto and according to the amount thereof) " for the portion or respective portions intended to be provided " for the child or respective children severally so advanced as " aforesaid and such amount only (if any) shall be appropriated " for the portion of any child so advanced by the said Algernon " Montague Livesey as aforesaid as together with the amount " of such advancement will make up and complete the portion " hereby or by appointment as aforesaid provided for such " children and the remainder or balance of such portion or the " whole of such portion if the amount of the advancement shall " equal or exceed the amount of the portion shall sink into the " estate for the benefit of the inheritance unless the said Algernon " Montague Livesey shall in writing declare his intention to " purchase the same for his own benefit in which case the same " shall form part of his personal estate."

The settlor had three sons. He died on December 31, 1951, and by his will he gave to one of his younger sons his freehold and leasehold properties in Sheffield and such of the mortgage investments, which he inherited from an uncle as should be in existence at the time of his death. He gave to the other of his younger sons certain farms in the county of Lincoln and " the " mortgage for £30,000 charged on the settled estates at Stourton " and elsewhere and of which I am now the life tenant under my " marriage settlement dated the 30th day of January, 1904."

The eldest son of the settlor took out a summons to ascertain (inter alia) the effect of the provisions of clause 9 of the settlement of January 30, 1904, on the above-mentioned testamentary gifts to the two younger sons.

*Geoffrey Cross Q.C.* and *R. Gwyn Rees* for the plaintiff.

*Sir Lynn Ungoed-Thomas Q.C.* and *T. A. C. Burgess* for the defendants, the two younger sons of the settlor.

Cases referred to in argument: *Onslow* v. *Michell*[1]; *Cooper* v. *Cooper*[2]; *Lowther* v. *Bentinck*,[3] and *In re George's Will Trusts*.[4]

ROXBURGH J. By a settlement made on January 30, 1904, between the settlor, Algernon Montague Livesey of the first

[1] (1812) 18 Ves. 490.
[2] (1873) L.R. 8 Ch. 813.
[3] (1874) L.R. 19 Eq. 166.
[4] [1949] Ch. 154; [1948] 2 All E.R. 1004.

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part, and trustees of the second and third parts, the settlor created a term in the usual form to secure portions for his younger children, of whom there were two. The plaintiff in this summons is his eldest son, and the defendants are the two younger children. The question which now remains—and it is a difficult question—arises in this way: By clause 9 of the settlement: "If the said Algernon Montague Livesey shall give or "secure to or with any child or children for whom a portion or "portions is or are intended to be hereby provided as aforesaid" —and, of course, the two defendants are children for whom a portion was intended to be provided and was provided—"any "sum or sums of money on his her or their marriage"—that does not arise, and is quite plain—"or for the payment of his "her or their debts"—that also does not arise. Then come the difficult words: "or otherwise for his her or their advancement "or preferment in the world then unless the said Algernon "Montague Livesey shall in writing otherwise direct such sum "or sums of money shall be taken in substitution"—that is how it reads [His Lordship read the remainder of the clause.]

That is the clause. It is a clause with a long history, though this is not in all respects the common form of the clause; but it is a clause on which there is an amazing dearth of authority.

The settlor died on December 31, 1951, and by his will he gave among other things to Amyatt, one of the younger sons, who are the defendants to this application, his freehold and leasehold properties situate in the city of Sheffield and such of the mortgage investments which "I inherited from my late uncle "Arnold Philip Marshall as shall be in existence at the time of "my death." To his son Evelyn, the other defendant, he gave "my four private farms in the County of Lincoln and the mort-"gage for £30,000 charged on the settled estates at Stourton "and elsewhere and of which I am now the life tenant under my "marriage settlement dated 30th day of January, 1904."

Mr. Cross submitted, with much force, that the mortgage investments which the testator inherited from his late uncle must be brought into account against Amyatt's portion, and the mortgage for £30,000 must be brought into account against Evelyn's portion. I must confess that the case has caused me much difficulty.

Mr. Cross contends that these mortgage investments in the first case or this mortgage in the second case constitute a sum or sums of money which have been given. On the whole I think he is right so far, though I have doubt even about that. I have not any idea what "secure to or with" means, but Mr. Cross's contention is that the word "give" applies to these two mortgages, and I am prepared to accept that submission.

I should have hesitated, but for authority, to believe that a clause in this form had any application at all to a testamentary disposition, but I think the course of authority, such as it is, is

sufficiently strong to compel me to hold that a clause so worded does apply to a testamentary disposition.

There remains the final question. The words in the will are "I give" in each case, and these mortgages are in each case coupled with other gifts, which Mr. Cross does not contend have to be set against the portion.

In those circumstances I feel compelled to hold that, so far as I know from the documents, these gifts are mere bounty. I cannot see any reason for thinking, for instance, that the gift of the mortgage investments differs from the gift of the freehold and leasehold properties situate in the city of Sheffield in any manner whatsoever. I regard them both as mere testamentary bounty.

Mr. Cross put his case in two alternative ways. First of all he said that, on the true construction of the settlement, even mere bounty has to be brought into account. He submitted in the alternative that the sum, if it was "substantial," must be presumed to be an advancement in the absence of any evidence. It certainly is substantial in this case, and therefore there is no need to consider what might be meant by the vague phrase "substantial," or to consider any question of uncertainty. It is only fair to say that Mr. Cross disclaimed the idea that one could apply his doctrine to some sum, say, of £100, or something of that sort. He disclaimed that, but he said that where the gift is substantial, it must be presumed to be an advancement in the absence of any evidence. That, I think, is the dual way in which he put his case.

His first authority is *Onslow* v. *Michell*,[1] which certainly at first sight is helpful to him, and which has, I think, throughout been his sheet anchor, though it is an anchor one prong of which at any rate no longer sustains any ship. The clause there was: "If the said parents, or either of them, should in their or either "of their lifetime settle, give, or advance, unto, for or upon any "child or children of the marriage, entitled to portions under "the appointment therein before contained, any sum or sums "of money, lands, tenements, goods or chattels, for or towards "his, her, or their advancement or preferment in marriage or "otherwise, then such sum or sums of money, and the value "of such lands, tenements, goods or chattels, so to be received "by, or advanced or given to, or settled upon, such child or "children respectively, should be accounted, deemed and taken, "as part, if less, and if as much or more, for the whole of the "portion or portions thereby provided for them, as aforesaid, "unless the said parents, or the survivor of them, should, by "writing, signify or declare the contrary."

Then the parent made a certain disposition in favour of the child in question by will, and the real contest in that case was whether, having regard to the quite definite reference in that case

[1] 18 Ves. 490.

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to " in their lifetime "—which does not, of course, occur in the present case—the clause was applicable to a testamentary disposition.

As far as I can see, that was the only point which was really dealt with, and the Master of the Rolls decided that it did apply to a will, and I must confess surprise at that decision on that particular settlement. Perhaps I should have been shy at making observations about so great a judge as Sir William Grant, if it were not for the fact that in *Cooper* v. *Cooper*[2] Lord Selborne, when dealing with cases of which *Onslow* v. *Michell*[3] was one, said: " When examined, these cases are found to present " a most remarkable example of the extraordinary manner in " which the use of precedents has, sometimes, caused the courts " of this country, first to slide into manifest error, and afterwards " to follow that error under the notion that they are bound to " do so."

That is the prong which will no longer hold the ship, but of course that is not the point with which I am concerned. That point is whether in that case on those words it was proper to hold that the settlement applied to the testamentary disposition at all.

The point with which I am concerned was not discussed, as I said, in *Onslow* v. *Michell*,[4] and did not arise, or at any rate did not arise in any acute form in any of the later cases, because they are concerned with clauses which contain the much wider word " benefit."

At first sight I thought that *Onslow* v. *Michell*[5] was very strongly in Mr. Cross's favour, but I am not at all sure how Sir William Grant construed the settlement in that case.[3] He certainly has not told posterity how he did it, and bearing in mind that the word " give " occurs in the settlement in that case, he may have treated the words " or otherwise " as not limited by " for their advancement or preferment in marriage "; in other words, not treated it as meaning their advancement or preferment in marriage or their advancement or preferment otherwise, which is what at first I thought it meant. But he may have thought that, having regard to the word " give," the words " or otherwise " were quite general, and were not limited in any way by the words " or their advancement or preferment in " marriage."

I cannot say that he did, but what I can say is that he did not say that he did not, and he did not deal with this point at all. He did not have the advantage, which I have, of a much later decision, *Lowther* v. *Bentinck*.[6] I need not read the whole of that decision, but it shows quite plainly that words relating to advancement or preferment are much narrower than mere

[2] L.R. 8 Ch. 813, 825.
[3] 18 Ves. 490.
[4] Ibid.
[5] Ibid.
[6] L.R. 19 Eq. 166.

bounty. I think that there is no escape from that. There may be doubt as to what exactly the phrase "advancement or preferment in the world" means, but it is, I think, settled by authority that it is something more restricted than mere bounty. Therefore, in my judgment, whatever these words mean, they would not cover a payment which was mere bounty.

If that be my view, then Mr. Cross argues: "the sum is so large that it must have been for advancement or preferment in the world." That does not seem to me to be an acceptable argument. Certainly there is no existing authority for any such argument, and in my view it is a question of fact. The settlor has thought fit to limit the categories of sums of money which have to be brought into account. He has made the purpose of the payments the test in every case except marriage, with which we are not concerned. It is for the payment of his or her or their debts, or otherwise for his, her or their advancement or preferment in the world.

Mr. Cross appears for the plaintiff and he is claiming against the two defendants that they must bring these sums into account. In my judgment, he must prove that these moneys were for the purpose, or one of the purposes, specified. If he is unable to produce any evidence, then he fails to prove his case.

As I say, I have no doubt that these gifts were, according to the will, mere bounty, that is to say, so far as the documents can answer the question they were mere bounty; but I can well believe that the facts were different from the inference which I shall draw from the will per se. They may well have been, and they probably were; but in my judgment the burden is on Mr. Cross to prove it, and there is no presumption of law, that because a payment is substantial—whatever that word may exactly mean, though I agree, certainly it covers this case—it is to be presumed to be an advancement or preferment in the world, unless the contrary is proved.

Accordingly, in my judgment, the plaintiff's case fails.

*Declaration accordingly.*

Solicitors: *Royds, Rawstorne & Co.; Waterhouse & Co. for Watson, Esam, Barber & Brayshaw, Sheffield.*

[COURT OF APPEAL.]

C. A.

1953
*July* 8, 9, 13.

Singleton, Denning and Morris L.JJ.

* ORMROD AND ANOTHER *v.* CROSVILLE MOTOR SERVICES LD. AND ANOTHER. MURPHIE, THIRD PARTY.

[1952 O. No. 62.]
[1952 O. No. 80.]

*Negligence—Vicarious liability—Agency—Motor-car driven by friend of owner—Accident—Car driven at owner's request—Mutual purpose—Negligence of car driver—Responsibility of owner.*

As the result of a collision between a motor-car and an omnibus owing (partly) to the negligent driving of the driver of the car, he and his wife, who was a passenger therein (the plaintiffs) were both seriously injured and damage was done to both vehicles. The male plaintiff, a friend of the owner of the car, was driving it from Birkenhead to Monte Carlo to meet the owner, who was taking part in a motor rally, and the intention was that after the completion of the rally the owner and the plaintiffs should go for a holiday together in Switzerland. It was agreed that before meeting the owner of the car the plaintiffs should visit a friend in Normandy, and with that object they left a few days earlier than they would otherwise have done. The accident occurred while the plaintiffs were on the way to Dover for the purpose of crossing to France. In third-party proceedings by the first defendants (the owners of the omnibus) against the owner of the car for the damage done to the omnibus:—

*Held*, that the owner of the car was vicariously responsible for the damage done to the omnibus since at the time of the accident the male plaintiff was driving the car in the joint interest of the owner and himself, and was accordingly the agent for the owner who was therefore liable to the first defendants for his negligence.

Decision of Devlin J. on the question of the liability of the third party [1953] 1 W.L.R. 409; [1953] 1 All E.R. 711 affirmed.

APPEAL from Devlin J., sitting at Chester Assizes.

The plaintiffs in these consolidated actions, Elsye Johnstone Ormrod and her husband, Arthur Noel Ormrod, brought an action for damages for personal injuries to them both as the result of the alleged negligent driving of a motor-omnibus belonging to the first defendants, Crosville Motor Services Ld., and driven by their servant, the second defendant, Gerald Reginald Clarke. The defendants alleged that the accident was due to the negligent driving of the car by the male plaintiff, and counter-claimed for damage done to their omnibus. They also took third-party proceedings against Henry Bruce Murphie, the owner of the car, alleging that he was vicariously responsible for the male plaintiff's negligence, and it is on the issue of third-party liability only that the case calls for a report.

On January 20, 1952, the plaintiffs left Birkenhead in a Healey motor-car belonging to the third party with the object of going to Dover for the purpose of crossing to France. The third party, in another car, was taking part in the Monte Carlo car rally. It was agreed between the male plaintiff and the third party that he

(the male plaintiff) and his wife should use the Healey car to drive to Monte Carlo so as to arrive before the end of the rally, and that after meeting the third party there the three should go for a holiday together to Switzerland. A suitcase belonging to the third party was carried in the car and it was agreed that the plaintiffs should go to Monte Carlo in their own time and that they should visit friends at Bayeux on the way. In these circumstances they started two or three days earlier than they otherwise would have done. Soon after leaving Birkenhead the Healey car, driven by the male plaintiff, collided with the defendants' omnibus, with the result that both plaintiffs sustained serious injuries and both vehicles were damaged. Devlin J. held that the collision was entirely due to the negligent driving of the male plaintiff and gave judgment for the defendants. On the question of the third party's liability to the first defendants for the damage done to the motor-omnibus he held, following the decision of du Parcq L.J. in *Hewitt* v. *Bonvin*,[1] that at the time of the accident the arrangement made between the male plaintiff and the third party amounted to a request by the latter to the male plaintiff to drive the car and that as the car was wanted for the purpose of a joint holiday that was enough to give the third party such an interest in the arrival of the car that the driving became an act done for his benefit. Devlin J. accordingly gave judgment for the first defendants against the third party. In the case of claim by the plaintiffs for personal injuries, Devlin J. provisionally assessed the amount in each case at £2,500. The male plaintiff appealed against the finding of negligence against him; the female plaintiff, on the ground that if the male plaintiff's appeal succeeded, the amount of damages assessed in her case was too small; and the third party appealed against the decision that he was vicariously responsible for the negligence of the first plaintiff if that finding was sustained on appeal.

*Miss Rose Heilbron Q.C.* and *H. E. Hooson* for the appellants.

*Christopher Shawcross Q.C.*, *W. L. Mars-Jones* and *Esyr Lewis* for the respondents.

*S. Scholefield Allen Q.C.* and *R. G. Clover* for the third party.

On the hearing of the appeal, the court, after considering the evidence given before Devlin J. on the question of liability, granted an application made on behalf of the plaintiffs for leave to call further evidence on the ground that such evidence was not reasonably available to them in the court below. They then proceeded to hear the appeal of the third party against the decision that he was vicariously responsible for the negligence of the male plaintiff, should the finding of Devlin J. on the question of his liability be affirmed, and the following judgments on this point were delivered.

[1] [1940] 1 K.B. 188; 56 T.L.R. 43.

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SINGLETON L.J. In my view the appeal of the third party fails. The male plaintiff was driving the third party's car. He was taking it from Cheshire to Monte Carlo for the purpose of the third party, or for the joint purpose of both. It was the third party's car, and an arrangement had been made that the motor-car should be in Monte Carlo before the rally, which the third party was attending with another car, was finished. When the rally was over, the purpose of the parties, the two plaintiffs and the third party, was that they should go for a holiday in the car to Switzerland. In pursuance of that arrangement the male plaintiff set out, and he was driving down towards Chester on the journey to Dover when the accident happened.

Evidence was given to show that the male plaintiff had left his home earlier than he needed because he proposed to make a call at Bayeux in Normandy, and I take it that that evidence was accepted by the judge; but at the time when the accident happened he was taking the direct route from his home, as arranged, to the coast in order that the car might be taken across into France. In those circumstances Devlin J. held that the male plaintiff, at that time, was the agent of the third party.

It has been said more than once that a driver of a motor-car must be doing something for the owner of the car in order to become an agent of the owner. The mere fact of consent by the owner to the use of a chattel is not proof of agency; but the purpose for which the car was being taken down the road on the morning of the accident was, either that the car should be used by the owner or that it should be used for the joint purposes of the owner and the plaintiffs when it reached Monte Carlo.

In those circumstances, it appears to me that the judgment of Devlin J. that at the time of the accident the male plaintiff was the agent of the third party was right, and the third party's appeal on that head should be dismissed.

DENNING L.J. It has often been supposed that the owner of a vehicle is only liable for the negligence of the driver if that driver is his servant acting in the course of his employment. But that is not correct. The owner is also liable if the driver is his agent, that is to say, if the driver is, with the owner's consent, driving the car on the owner's business or for the owner's purposes. In the present case the driver was, by mutual arrangement, driving the car partly for his own purposes and partly for the owner's purposes. The owner wanted the car taken to Monte Carlo, and the driver himself wanted to go with his wife to Monte Carlo, and he intended to visit friends in Normandy on the way. On this account he started two or three days earlier than he would have done if he had been going solely for the owner's purposes. Mr. Scholefield Allen says that this should exempt the owner from liability for the driver's negligence, because the accident might never have happened if he had started later. He says that the owner would not have been

liable for any negligence of the driver on the trip from Calais to Normandy and should not be liable for negligence on the early start. I do not think that this argument is correct. The law puts an especial responsibility on the owner of a vehicle who allows it out on to the road in charge of someone else, no matter whether it is his servant, his friend, or anyone else. If it is being used wholly or partly on the owner's business or for the owner's purposes, then the owner is liable for any negligence on the part of the driver. The owner only escapes liability when he lends it out or hires it out to a third person to be used for purposes in which the owner has no interest or concern: see *Hewitt* v. *Bonvin*.[1] That is not this case. The trip to Monte Carlo must be considered as a whole, including the proposed excursion to Normandy, and, as such, it was undertaken with the owner's consent for the purposes of both of them, and the owner is liable for any negligence of the driver in the course of it. I agree that the appeal should be dismissed.

MORRIS L.J. I entirely agree.

[On July 13 further evidence for the plaintiffs was given on the question of liability, and rebutting evidence on behalf of the defendants. In the result the court reversed the decision of Devlin J. and held that the male plaintiff and the second defendant were each responsible for the accident to the extent of 50 per cent. They also found that the assessment of the female plaintiff's damages at £2,500 was correct and dismissed her appeal.]

Solicitors: *Field, Roscoe & Co., for Berkson & Berkson, Birkenhead; Stanley & Co., for A. W. Mawer & Co., Liverpool; Jaques & Co., for Dodds, Ashcroft & Cook, Liverpool.*

P. B. D.

[1] [1940] 1 K.B. 188; 56 T.L.R. 43.

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[CHANCERY DIVISION.]

## *LOMAX (INSPECTOR OF TAXES) *v.* NEWTON. GRIFFITHS (INSPECTOR OF TAXES) *v.* MOCKLER.

1953
*July* 17, 21.
Vaisey J.

*Revenue—Income tax—Expenses—Army officer—Expenses including mess subscription—Whether "wholly, exclusively and necessarily" laid out in performance of duties as officer—Income Tax Act,* 1918 (8 & 9 *Geo.* 5, *c.* 40), *Sch. E, r.* 9.

The respondent in the first appeal was an officer in the territorial army: he claimed that the following expenses should be allowed as deductions for the purpose of computing his income tax on the ground that they were incurred "wholly, exclusively, and neces-sarily" in the performance of his duties as an officer within the

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meaning of rule 9 to Sch. E to the Income Tax Act, 1918: (1) annual mess subscription, (2) share of mess guests' expenditure, (3) payments to batman at week-end and annual camps, (4) hire of camp furniture, (5) amounts paid for hotel accommodation at conferences and exercises in excess of detention and ration allowances, (6) cost of tickets at sergeants' and other ranks' dances, sergeants' annual dinner club, etc.

The respondent in the second appeal was an officer in the regular army; he claimed a similar deduction under rule 9 in respect of his annual mess subscription. Under the King's Regulations in force at the material time, every officer had to be a member of his regimental mess.

The commissioners allowed all the items as deductions under rule 9, and the Crown appealed from their decisions:—

*Held*, (1) that the words of rule 9 were stringent and exacting, and compliance with each and every of them was obligatory if the benefit of the rule was to be claimed, and that with the exception of the hotel expenditure there was not sufficient evidence to support the commissioners' findings that these expenses were within rule 9, and the appeals, subject to that exception, should be allowed and the cases remitted for adjustment;

(2) that the item of hotel expenditure was rightly allowed, but as a precedent in other cases such expenses should only be allowed in respect of necessaries and not extend to "extras" involving extravagance or personal indulgence.

*Nolder* v. *Walters* (1930) 46 T.L.R. 397; 15 T.C. 380 followed.

APPEALS from decisions of the Commissioners for the General Purposes of the Income Tax Acts.

In the first appeal the respondent, who was a territorial officer, claimed to be allowed to deduct the following items as expenditure "wholly, exclusively and necessarily" laid out in the performance of his duties as an officer within the meaning of rule 9 of Sch. E to the Income Tax Act, 1918[1]: (1) "annual mess subscription, "£8," (2) "share of mess guests' expenditure for the year, "£9 16s.," (3) "payments to batman at week-end and annual "camps, £3 10s.," (4) "hire of camp furniture, £1 5s.," (5) "amounts paid for hotel accommodation at conferences and "exercises in excess of detention and ration allowances, Harro-"gate, 4 days, £3; Buxton, 3 days, £3," and (6) "cost of tickets "at sergeants' and other ranks' dances, sergeants' annual dinner "club, etc., £2 15s."

The respondent to the second appeal was a regular officer in the Royal Army Pay Corps; he claimed to deduct under rule 9 the sum of £11 7s., being the amount of his annual mess subscription in the year of assessment 1950–51.

The commissioners allowed all the items in both appeals, and the Crown appealed from those decisions.

[1] Income Tax Act, 1918, Sch. E, r. 9: "If the holder of an office or "employment of profit is necessarily "obliged . . . in the performance of "the duties of the office or employ-"ment . . . to expend money wholly, "exclusively, and necessarily in the "performance of the said duties, there "may be deducted from the emolu-"ments to be assessed the expenses so "necessarily incurred and defrayed."

*Sir Reginald Manningham-Buller Q.C., S.-G.* and *Sir Reginald Hills* for the Crown.

*John Senter Q.C.* and *Hilary Magnus* for the respondent to the first appeal.

The respondent to the second appeal was not represented and did not appear.

The cases cited in argument are set out in the judgment.

*Cur. adv. vult.*

LOMAX *v.* NEWTON.

July 21. VAISEY J., reading his judgment: Before coming to the particular items of expenditure, I would observe that the provisions of rule 9 of Sch. E are notoriously rigid, narrow and restricted in their operation. In order to satisfy the terms of the rule it must be shown that the expenditure incurred was not only necessarily, but wholly and exclusively incurred in the performance of the relevant official duties. And it is certainly not enough merely to assert that a particular payment satisfies the requirements of the rule, without specifying the detailed facts upon which the finding is based. An expenditure may be "necessary" for the holder of an office without being necessary to him in the performance of the duties of that office; it may be necessary in the performance of those duties without being exclusively referable to those duties; it may perhaps be both necessarily and exclusively, but still not wholly so referable. The words are indeed stringent and exacting; compliance with each and every of them is obligatory if the benefit of the rule is to be claimed successfully. They are, to my mind, deceptive words in the sense that when examined they are found to come to nearly nothing at all.

The items of expenditure in this case were originally eleven in number; of these, one was withdrawn and four were disallowed by the commissioners. I have to consider the remaining six, which were found by the commissioners to have been incurred by the respondent wholly, necessarily and exclusively in the performance of his duties as a major in the Hallamshire Battalion, and the question is whether there was evidence before the commissioners on which they could properly have come to that decision.

The contention of the Crown in this appeal is that there was no such evidence, and that all these items should have been disallowed.

The first item is "Annual mess subscription, £8." This was a payment which all officers in this battalion were required to make. The proceeds of the subscriptions were used to "provide "a mess." The respondent's contribution was said not to include any part of the cost of the wine or food supplied to the officers. No mention, however, is made of other amenities, such as armchairs, cigarettes and stationery. On those facts—and there were no others—I can find no evidence on which it was possible for the

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commissioners to find that this £8 was expended wholly or indeed at all in the performance of the respondent's duties as an officer.

Secondly, there is "Share of mess guests' expenditure for the "year, £9 16s." This is explained by the statement that the cost of entertaining official regimental guests was shared by the officers in amounts fixed by reference to their ranks. No doubt the respondent was under an obligation to make his proper contribution to this as well as to the mess funds. But both payments must, in my judgment, be referable more to his personal and social obligations than to the performance of his official duties. It is, to my mind, irrelevant to say that he would have been asked to resign his commission if he had refused to incur this expenditure. The same consequence would presumably have ensued if he had omitted to procure and wear decent civilian clothing when not in uniform, but that consideration would not have justified an allowance under the rule in respect of his ordinary tailor's bill.

On the third item, "Payments to batman at week-end and "annual camps, £3 10s.," and the fourth item, "Hire of camp "furniture, £1 5s.," I have felt a good deal of hesitation because (unlike the first and second items) I think that evidence to justify these allowances might well have been forthcoming. But the difficulty in the respondent's way is the insufficiency of the evidence on these matters, and as the onus of proof was upon him I cannot see that the commissioners could properly have allowed these items. It was not enough for him merely to say that the expenditure was essential to the performance of his duties; the test is whether it was made in the performance of those duties, and the respondent did state in evidence that it was so made. His evidence was corroborated in general terms by his commanding officer, but I have only my own imperfect knowledge on such points as: (a) what the duties of a batman are, (b) for what services he receives pay from the officer employing him, (c) what is the appropriate amount of such payment, (d) were they really in the nature of a gratuity or "tip," (e) what camp furniture has to be hired, and (f) what is the proper cost of hiring it. I must disallow these two items, though I rather regret having to do so.

The fifth item is "Amounts paid for hotel accommodation "at conferences and exercises in excess of detention and ration "allowances, Harrogate, 4 days, £3; Buxton, 3 days, £3." This is explained as being the actual cost to the respondent over and above the ration and detention allowance granted. No doubt his attendance at these conferences and exercises was compulsory, and he had no choice, I am told, of the hotels at which he had to put up, and no doubt the supplementing of the prescribed allowances is a serious burden on a territorial officer. The case of *Nolder* v. *Walters* [1] comes rather near to this point. I will

[1] (1930) 46 T.L.R. 397; 15 T.C. 380.

read the headnote: "An aeroplane pilot employed by a limited "company claimed deductions in the assessment of his remunera- "tion to income tax under Sch. E in respect of various items "of expenditure. *Held*, that no deduction could be allowed in "respect of (a) the upkeep of a motor-car to convey the pilot "between the aerodrome and his home, or (b) a telephone at "his home: but that a decision of the General Commissioners "allowing a deduction for an excess of actual subsistence expenses "when away from home on duty over subsistence allowance "granted by the company could not be disturbed as being "erroneous in law." My chief difficulty as regards this item is the paucity of the evidence. The commissioners have, however, found as a fact that this was expenditure necessarily, exclusively and wholly incurred in the performance of the respondent's duties, and I cannot say that they were wrong in bringing this fifth item within the rule. *Bolam* v. *Barlow* [2] and *Ricketts* v. *Colquhoun* [3] may be rather difficult to reconcile with *Nolder* v. *Walters*,[4] but I decide this matter on the ground that I must not disturb a finding of fact which was a possible finding both as to quantum and otherwise. I am by no means sure that I should myself have decided this point as the commissioners did. While I feel bound to regard this item of £6 as having been admitted on a finding of fact which I cannot disturb, I venture to recommend that, as a precedent in other cases, it should be applied with very great caution. A hotel bill is certain to include charges for "extras" involving some measure of extravagance and personal indulgence as well as charges for necessaries, and it is really only the latter which should have been taken into consideration by the commissioners in the present case. In view of their finding, however, I suppose that I must assume that that is what they did.

The sixth and last item is "Cost of tickets at sergeants' and "other ranks' dances, sergeants' annual dinner club, etc., £2 15s." I agree that participation in the social life of the battalion was part of the social duties of the respondent, but was it any part of his official duties? Was the respondent at the sergeants' dance in the proper sense of the expression "on duty"? I think not. I am quite unable to see how this item can be brought within the rule. I apply to it descriptions from the contentions of the Crown as set out in the case, and say that they are expenses incurred from tradition and custom, accepted voluntarily by the officers of the unit and containing elements of personal choice and benefit, and therefore not within the rule.

In addition to the cases which I have already mentioned, other decisions were cited to me, but none of them, in my judgment, assists the respondent or me. *Charlton* v. *Corke* [5] was a case of a minister in the Scottish Church whose position is not perhaps very closely analogous to that of a territorial officer; all I would say about that decision is that I find it difficult to reconcile with

[2] (1949) 31 T.C. 136.
[3] [1926] A.C. 1; 42 T.L.R. 66.
[4] 46 T.L.R. 397.
[5] 1890, 27 S.L.R. 647.

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either *Ricketts* v. *Colquhoun* [6] or *Bolam* v. *Barlow*.[7] Another case to which similar considerations apply is *Jardine* v. *Gillespie*.[8]

I must allow this appeal, except as to £6 (item No. 5), calling attention not for the first time to the extreme and possibly unintentional narrowness of the rule, and also, if I may venture to do so, to the question of whether the allowances to territorial officers in such matters as those to which the present case relates do not require to be somewhat increased.

I am told that the Crown has undertaken to pay the respondent's costs in this appeal, and I will direct that such costs be taxed as between solicitor and client. The case will be remitted to the commissioners for adjustment.

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VAISEY J. It appears that under the King's Regulations in force at the relevant time every officer must be a member of his regimental mess, subscriptions to which were (a) annual subscriptions to defray the ordinary expenses of the mess, and (b) monthly subscriptions to meet incidental expenses. The subscription under (a) is a compulsory charge against every officer, and the proper amount in the case of the respondent was the sum which I have mentioned. The Crown appeals against the finding of the commissioners, which was based merely on the facts which I have stated, with the further fact that refusal to pay the annual subscription would have resulted in disciplinary action being taken against the respondent. They accepted his contention that the expense in question (namely, the payment of the £11 7s.) was incurred "wholly, exclusively and necessarily in the performance of [his] duties."

The words of the statute which I have just quoted are notoriously narrow in their application. They require that the expenditure must be not only necessary but must also relate to the performance of the officer's duties "exclusively." To that aspect of the matter the commissioners do not appear to have directed their attention, or at any rate not to have given any, or sufficient, weight. The inspector pointed out at the hearing that the payment provided an element of private benefit to the respondent, a fact which was, indeed, obvious and incontrovertible. I would venture to make this observation respecting cases such as the present: that it is not enough for the commissioners to be able to find that a particular expense is incurred wholly, exclusively and necessarily in the performance of the official duty, that is to say, merely setting out the statutory expression; they should surely find the exact facts upon which their conclusion is based. The onus is on the taxpayer to bring himself within the statutory words, and it is the duty of the commissioners to state with sufficient particularity the facts upon which they find, if they do

[6] [1926] A.C. 1.
[7] 31 T.C. 136.
[8] 1907 S.C. 77; 5 T.C. 263.

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find, that he has succeeded in his attempt. It is not the function of this court to disturb a finding of fact unless such finding is a mere asseveration, unsupported by properly reasoned considerations. But in the present case the finding is no more than a verbal affirmation of the respondent's submissions and contentions. On the authority of the cases to which the commissioners were referred, and of the case which I have just decided (*Lomax (Inspector of Taxes)* v. *Newton*), I must allow this appeal and reverse the finding of the commissioners.

The Crown do not ask for costs, and indeed would be willing to defray any that the respondent has incurred; the case will be remitted for adjustment accordingly.

*Appeals allowed except as to the hotel bills of the first respondent.*

Solicitors: *Solicitor of Inland Revenue; Ellis, Peirs & Co. for Pye-Smith & Son, Sheffield.*

I. G. R. M.

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[COURT OF APPEAL.]

C. A.

1953
*July* 23.

Somervell, Jenkins and Hodson L.JJ.

## * EMBERSON *v.* ROBINSON.

[Plaint No. J. 561.]

*Landlord and Tenant—Rent restriction—Possession—Plaintiff becoming landlord by purchase — Agreement to purchase in June,* 1939 — *Deposit paid—Plaintiff called up for war service—Purchase completed after demobilization in* 1945 — *Whether plaintiff became landlord by purchase before or after September* 1, 1939—*Rent and Mortgage Interest Restrictions (Amendment) Act,* 1933 (23 *&* 24 *Geo.* 5, *c.* 32), *s.* 3 (1), *Sch.* I (*h*) (*as amended by the Rent and Mortgage Interest Restrictions Act,* 1939 (2 *&* 3 *Geo.* 6, *c.* 71), *Sch.* I).

For the purposes of section 3 of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, the court shall, by Sch. I to that Act, give judgment for the recovery of possession of a dwelling-house to which the Rent Restrictions Acts apply without proof of alternative accommodation where the court considers it reasonable so to do, if "(*h*) the dwelling-house is reasonably required by "the landlord (not being a landlord who has become landlord by "purchasing the dwelling-house or any interest therein after Sep-"tember 1, 1939), for occupation as a residence for—(i) himself . . ."

In June, 1939, the plaintiff entered into an agreement with the then owners of a newly built dwelling-house to purchase the house. He signed as purchaser, and paid a deposit. Shortly afterwards he was called up for war service, and was not demobilized until 1945, when he completed the purchase, paying the balance of the purchase price. In the interval the vendors had let the premises to the defendant, from whom the plaintiff in the present action claimed possession. The defendant contended that the plaintiff had become

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landlord by purchase after September 1, 1939, and was therefore not entitled to possession without proof of alternative accommodation:—

*Held*, approving the decision of the county court judge, that the plaintiff became landlord by purchase when he signed the binding agreement in June, 1939, and what happened in 1945 was only a completion of a contract made before September 1, 1939, and, therefore, he was entitled to possession.

APPEAL from Judge Reginald Clark, Q.C., sitting at Ilford County Court.

In June, 1939, the plaintiff, Mr. Emberson, entered into an agreement with the then owners of a newly built house to purchase the same. He paid a deposit and the balance of the purchase-money was set out in the agreement, which contained a provision that vacant possession would be given on payment of the balance of the price and completion of the purchase. At the end of August, 1939, the plaintiff, who was in the Territorial Army, was called up for service and was not demobilized until 1945. In November, 1939, the vendors let the premises to the present defendant, Mrs. Robinson. On leaving the Army the plaintiff paid the balance of the purchase price and the ownership of the house was transferred to him. He was desirous of occupying the premises himself, but the tenant refused to give up possession, contending that the plaintiff had become landlord by purchase after September 1, 1939, and therefore could not claim the benefit of paragraph (*h*) of Sch. I to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933.

The case came before the county court judge on May 5, 1953, and he granted an order for possession to the plaintiff, holding that the plaintiff had become the landlord by purchase before September 1, 1939. The defendant appealed.

*P. A. W. Merriton*, for the defendant, referred to *Epps* v. *Rothnie* [1]; *Baker* v. *Lewis* [2]; *Fowle* v. *Bell* [3]; *Powell* v. *Cleland* [4]; *Littlechild* v. *Holt* [5]; *Lucas* v. *Lineham* [6]; *Barratt* v. *Marshall*,[7] and *Newton* v. *Biggs*.[8]

*A. E. Holdsworth* for the plaintiff was not called upon for argument.

SOMERVELL L.J. There is only one point in this case, and that is whether the plaintiff was or was not a landlord who had become landlord by purchasing the dwelling-house after September 1, 1939. The judge held that he had not become landlord by purchasing after that date, in the circumstances. [His Lordship

[1] [1945] K.B. 562; 61 T.L.R. 533; [1946] 1 All E.R. 146.
[2] [1947] K.B. 186; 62 T.L.R. 716; [1946] 2 All E.R. 592.
[3] [1947] K.B. 242; 62 T.L.R. 711; [1946] 2 All E.R. 668.
[4] [1948] 1 K.B. 262; 63 T.L.R. 626; [1947] 2 All E.R. 672.
[5] [1950] 1 K.B. 1; 65 T.L.R. 270; [1949] 1 All E.R. 933.
[6] [1950] 1 K.B. 548; 66 T.L.R. (Pt. 1) 641; [1950] 1 All E.R. 586.
[7] 54 Ir.L.T. 214.
[8] [1953] 2 W.L.R. 203; [1953] 1 All E.R. 99.

stated the facts and continued:] Mr. Merriton, for the defendant, submitted that there were two points: First, was the completion in 1945 a completion of the contract entered into in June, 1939, or should it be regarded as a new contract, and secondly, whether, having regard to the circumstances, the landlord purchased in 1939, at the date of the agreement, or 1945, at the date of completion?

I think it is convenient to take the second point first. Assume a case where a binding contract was signed before September 1, 1939, and everything proceeded with the speed which was contemplated and the completion took place after September 1, 1939. Would the purchaser have become a landlord by purchasing after September 1? I think he would not. The relevant date in applying the exception to these facts would be the date when he signed the binding contract. I derive support for that conclusion from a case in the Irish courts, which does not, of course, bind us, of *Barrett* v. *Marshall*.[1] In that case the same point arose and Dodd J. held "that the purchaser became landlord, and the "vendor ceased to be landlord, when the contract of sale was "signed on May 3, 1920. What remained was merely carrying "the contract into complete effect."

The question then is whether the circumstances of this case lead to some different conclusion. That, I think, may be put in the way that Mr. Merriton put the first question: Was what happened in 1945 a completion of the 1939 contract, or should it be regarded as a different contract involving different subject-matter? There are two points which are relied on, and both of them seem to me to be important. It is emphasized, in the first place, that the original contract was a contract for vacant possession. It is plain that if a vendor enters into a contract to give vacant possession he does not fulfil his contract if he tenders a house without vacant possession. It is also emphasized that the vendor in November, 1939, let the house, and it is not suggested that either the plaintiff knew of that letting until 1945 or—though I do not think this is material—that the then tenant was told anything about the plaintiff's right under the contract which had been entered into. Both those points obviously require consideration, but I have come to the conclusion that the completion which took place in 1945 should be regarded as a completion under the contract of 1939.

The length of time taken to complete was obviously due to the war. The plaintiff went to the war and he might, of course, have been killed. He did not tender the purchase price within what would be normally a reasonable time, but the vendor does not appear to have taken any point about that. He was content that the matter should remain open and he did not seek to repudiate the contract owing to delay and sell to anybody else. The house was not, of course, left empty, but was let to the

[1] 54 Ir.L.T. 214.

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defendant. There might have been a dispute about that, but there was not, and when the parties came together in 1945 the plaintiff clearly waived the right which he had under the original contract to demand vacant possession. He may well have been grateful to the vendor for having kept the matter open and not having treated him as in breach because of the delay. The transaction undoubtedly went through in circumstances other than those which were originally contemplated, but when one reads the correspondence, and sees how the completion took place, I think the right view is that which the county court judge took, namely, that it ought to be regarded, for the purpose of the application of the exception, as a completion of the original contract of June, 1939.

In those circumstances, for the reasons which I have given, I do not think that the plaintiff falls to be regarded as a landlord who became landlord by purchase after September 1, 1939. That was the view which the county court judge took and it was not suggested before us, if he was right on that point, that there were any other grounds on which his decision should be disturbed. For these reasons I would dismiss the appeal.

JENKINS L.J. I agree.

HODSON L.J. I agree.

*Appeal dismissed.*

Solicitors: *Gedge, Fiske & Co., for Mullis & Peake, Romford; G. Houghton & Son, Romford.*

A. W. G.

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[CHANCERY DIVISION.]

1953 *July* 28.

Vaisey J.

* *In re* LITTLE, DECD.

BARCLAYS BANK LD. *v.* BOURNEMOUTH AND EAST DORSET HOSPITAL MANAGEMENT COMMITTEE AND OTHERS.

[1952 L. No. 2278.]

*National Health Service—Hospital—Gift to named hospital for particular purpose—Nationalization—Effect on gift—National Health Service Act*, 1946 (9 & 10 *Geo.* 6, *c.* 81).

The testatrix gave her residuary estate on trust to "the trustees "for the time being of the . . . Cornelia and East Dorset Hospital "and by them to be appropriated for or towards the building funds "of the said hospital."

She made her will in 1945; the National Health Service Act, 1946 came into force in 1948, and she made a codicil after the Act came into force without altering her will. On a summons to determine the effect of the gift having regard to the Act of 1946:—

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*In re* LITTLE, DECD.

*Held*, that the gift should go to the appropriate hospital management committee, with a direction that it was to be used for the building fund purposes of that particular hospital.

*In re Morgan's Will Trusts* [1950] Ch. 637; 66 T.L.R. (Pt. 1) 1037; [1950] 1 All E.R. 1097 and *In re Glass* [1950] Ch. 643 n.; [1950] 2 All E.R. 953 n. followed.

ADJOURNED SUMMONS.

The testatrix, Susan Little, made her will on February 1, 1945, and a codicil to that will on November 2, 1948, bringing her testamentary intentions up to date, without having in terms confirmed her will. She died on June 27, 1951; the vesting date under the National Health Service Act, 1946 (namely July 6, 1948) was accordingly after the date of the will, but before the date of the codicil.

By her will the testatrix appointed the plaintiff bank her executors, and she gave, among other legacies, £1,000 to the Cornelia and East Dorset Hospital, free of legacy duty to endow a bed in her name in perpetuity in the women's medical ward of that hospital. That £1,000 had been paid over to the appropriate hospital committee, earmarked for this hospital, and there was an undertaking to associate the name of the testatrix with the bed in the women's medical ward.

The testatrix gave her residuary estate on the usual trusts for payment of debts, funeral and testamentary expenses and legacies, and the ultimate residue was directed to be paid to "the trustees for the time being of the said Cornelia and East "Dorset Hospital and by them to be appropriated for or towards "the building funds of the said hospital."

On the coming into force of the National Health Service Act, 1946, the funds and endowments of the Cornelia and East Dorset Hospital (now known as the Poole General Hospital) were taken over by the Bournemouth and East Dorset Hospital Management Committee, the first defendants.

The question on the summons was whether the residuary gift to the Cornelia and East Dorset Hospital took effect as a legacy to defendant management committee, and if so whether it was subject to any undertaking by the committee as to its application.

*A. H. Droop* for the plaintiff bank.

*E. M. Winterbotham* for the Bournemouth and East Dorset Hospital Management Committee.

*J. A. Plowman* for other defendants interested in the estate of the testatrix.

*Denys Buckley* and *B. J. H. Clauson* for the Attorney-General.

The cases cited in the argument are set out in the judgment.

VAISEY J., having stated the facts: At the date of the death of the testatrix there were no trustees or acting trustees for

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the hospital, and all the building funds of the hospital which existed at the date when the testatrix made her will were taken over by the defendant management committee, along with the other endowments of the institution.

The question which has been raised is: Does this legacy go to the defendant hospital management committee, as undoubtedly it would have done if the testatrix had left it to be applied for the general purposes of this hospital, or does the fact that she has given it not only as a gift to a particular hospital but to a particular purpose of a particular hospital, make any difference?

I do not think on the whole that it makes any difference. Mr. Buckley, for the Attorney-General, has pointed out that this is a charitable gift, and it is no less charitable now than it was before the vesting date under the National Health Service Act, 1946. It is not a gift for the general purposes of a previously existing independent charity, but it is a gift for a genuine and ordinary purpose of a pre-existing charitable organization; and I should be introducing differences where there is no difference in principle, if I were to hold that this gift failed because of the admitted fundamental change of circumstances and conditions introduced by the National Health Service Act, 1946.

Notwithstanding the violence which has been done to trusts of this character—and when I use that word I am not for one moment saying that there is anything wrong or improper about the act of the Legislature—but once it is realized that the effect of the legislation is to transfer all the funds of these individual hospitals out and out, and then to constitute a central fund, it does not seem to me that any further step is really taken when funds for particular purposes are allowed to be so taken over and used for the purposes of and under the authority of the Act.

It is obvious that the form of the gift has been transformed by the Act, by allowing these funds, given to trustees who do not exist to be appropriated for or towards building funds which do not exist. I think that one must exercise a little care before assuming that that is of no importance, but the overriding charitable intention nevertheless prevails.

Mr. Plowman for the next-of-kin, who claim that the gift has failed by reason of the change in circumstances, has called my attention to *In re Meyers*,[1] but it is not possible to go into these fine distinctions, and I think that the well-known cases of *In re Morgan's Will Trusts*[2] and *In re Glass*[3] govern this case, and I can see no sound reason for distinguishing this case from them.

As a rule the direction is, as I understand it, to pay the fund given to a particular hospital over to the appropriate hospital committee upon an undertaking, which I believe is now common form, to use that fund for the benefit of the named object. In

[1] [1951] Ch. 534; [1951] 1 T.L.R. 435; [1951] 1 All E.R. 538.

[2] [1950] Ch. 637; 66 T.L.R. (Pt. 1) 1037; [1950] 1 All E.R. 1097.

[3] [1950] Ch. 643n.; [1950] 2 All E.R. 953n.

this case I desire to go a little further, and, the Attorney-General approving, I direct that this residue should be handed over to the appropriate management committee, which is the Bournemouth and East Dorset Hospital Management Committee, on their undertaking to use the fund for the building fund purposes in connexion with this Cornelia and East Dorset Hospital. That does not mean only for the erection of new buildings, because I think that it would probably include the maintenance and improvement of existing buildings.

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*Declaration accordingly.*

Solicitors: *Peacock & Goddard for Trevanion & Curtis, Poole; Sharpe, Pritchard & Co. for J. S. Tapsfield, Bournemouth; Taylor, Jelf & Co. for R. S. Hawkins, Poole; Treasury Solicitor.*

I. G. R. M.

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[COURT OF APPEAL.]

## *ROSENFELD *v.* NEWMAN AND OTHERS.

C. A.

1953 *July* 29.

[1952 R. No. 736.]

Evershed M.R., Birkett and Morris L.JJ.

*Estoppel—Abandonment of claim for possession based on trespass in county court—Landlord's election to rely on claim under Rent Acts—Dismissal of claim—Defendants held not contractual or statutory tenants—Proceedings for possession in High Court based on trespass—Whether landlord estopped from asserting trespass.*

The plaintiff, the owner of a dwelling-house occupied by the defendants, brought proceedings for possession in the county court on the ground of trespass and, by amendment to the particulars of claim, on the alternative ground that if, contrary to his contention, the defendants were protected by the Rent Acts, the house had been sublet or assigned to them by the original tenant without his consent. The annual value of the house exceeded £100 and the defendants objected that the county court judge had no jurisdiction so far as the claim of trespass was concerned. The plaintiff thereupon elected to proceed on the alternative ground, and the county court judge said that "owing to lack of jurisdiction I am compelled "to hold that the plaintiff's claim fails as there is no evidence that "the defendants are contractual or statutory tenants." In proceedings for possession on the ground of trespass brought by the plaintiff in the High Court, in which each party contended that the county court proceedings and findings raised an estoppel against the other, Parker J. held that, the plaintiff having elected to proceed in the county court on his alternative claim that the defendants were tenants, it was not open to him in the High Court to prove that they were trespassers, and the plaintiff was estopped from asserting his claim. Parker J. found, as a fact, that the defendants had never been tenants. On appeal:—

*Held* that, on the true construction of the plaintiff's amended particulars of claim and having regard to the course of the proceedings and to the decision of the county court judge, the plaintiff had not in fact abandoned his claim in trespass nor had he finally

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elected to treat the defendants as tenants; accordingly, he was not estopped from proceeding in the High Court for possession and he was entitled to an order for possession.

Decision of Parker J. [1953] 1 W.L.R. 558; [1953] 1 All E.R. 840 reversed.

APPEAL from Parker J.

The plaintiff, M. Y. Rosenfeld, was the owner of a dwelling-house, No. 149 Parnell Road, Bow, which he let in 1940 to two families named Ball and Tracey; rent books were made out, and until June, 1951, remained in their names. In 1941 the first two defendants, Mr. and Mrs. R. D. Newman, occupied one downstairs room in the house and their daughter-in-law, the fourth defendant Mrs. A. E. Newman, lived upstairs with the Traceys. When the third defendant, Mr. A. E. Newman, returned from war service, he and his wife, the fourth defendant, occupied the upstairs premises. In 1942 the Balls left the premises, and in 1946 the Traceys left. On January 4, 1951, old Mrs. Tracey, who had stayed on in the house, died. After June, 1951, no further rent was paid.

On October 24, 1951, the plaintiff commenced proceedings for possession in Bow County Court against the defendants on the ground of trespass, and by his claim he stated that the annual value of the property did not exceed £100. The defendants pleaded, in effect, that they had become tenants and were protected by the Rent Restrictions Acts, whereupon the particulars of claim were amended and a paragraph 4 added, as follows: "If, contrary to the plaintiff's contention, the defendants are "protected by the Increase of Rent and Mortgage Interest "(Restrictions) Acts, the plaintiff reasonably requires possession "of the said dwelling-house as a residence for himself." The facts not sufficiently supporting that plea, paragraph 4 of the claim was subsequently amended to read: "If, contrary to the "plaintiff's contention, the defendants are protected by the "Rent Restrictions Acts, the plaintiff relies on the first schedule "to the Act of 1933," alleging that "on a date unknown to "the plaintiff one of the original tenants without the consent "of the plaintiff sublet or assigned the whole premises to the "defendants or one of them."

In fact the annual value of the house exceeded £100, and when the matter came on for hearing before Judge Andrew at Bow County Court counsel for the defendants objected that the judge had no jurisdiction to determine the claim so far as it was based on trespass. The judge's notes stated: "On Mr. Buckee's "objection that the rent exceeds £100 a year and that I have "no jurisdiction, Mr. Merriton" [counsel appearing for the plaintiff] "elects to proceed on the alternative ground set out "in paragraph 4 (as amended) of the amended particulars of "claim."

Having heard evidence and the submissions of counsel on both sides, the judge dismissed the claim with costs, and in giving his

reasons said: "Owing to lack of jurisdiction I am compelled "to hold that the plaintiff's claim fails—as there is no evidence "that the defendants are contractual or statutory tenants."

The plaintiff then brought this action for possession in the High Court alleging that the defendants were trespassers, who had been since June 20, 1951, and were before that date, wrongfully in possession of the house, and he claimed possession, damages for trespass and mesne profits.

The defendants contended that as the plaintiff had elected in the county court to abandon the plea of trespass and to proceed against them on the basis that they were tenants, and since that claim had been dismissed, he was estopped in the action from denying that they were his tenants by a tenancy to which the Rent Restrictions Acts applied. The plaintiff denied that he was estopped and contended that, in view of the judge's finding that there was no evidence whether the defendants were contractual or statutory tenants, the defendants were estopped from asserting that they were either contractual or statutory tenants.

Parker J. dismissed the action, holding that the plaintiff had finally elected to treat the defendants as tenants and it was not open to him to call evidence to show that they were trespassers. The judge stated that, if he were wrong on that matter, he would be forced to hold on the evidence that the defendants had at no time become tenants of the plaintiff.

The plaintiff appealed.

There being some dispute as to what had in fact been the extent of the plaintiff's election in the proceedings in the county court, the plaintiff in the Court of Appeal asked leave to put in evidence the indorsement which Mr. Merriton, the counsel then acting for the plaintiff, had made on his brief. The defendants not objecting, that indorsement, together with certain subsequent correspondence with the county court judge, was admitted in evidence. The question of the admission of such evidence, so far as relevant, is fully dealt with in the judgment of Evershed M.R.

*S. P. Khambatta Q.C.*, *S. W. Magnus* and *P. A. W. Merriton* for the plaintiff.

*H. T. Buckee* for the defendants.

The following cases were referred to in argument: *Scarf* v. *Jardine* [1]; *Gunter* v. *Davis* [2]; *Jones* v. *Lewis* [3]; *Marginson* v. *Blackburn Borough Council* [4]; *Morel Brothers & Co. Ld.* v. *Westmorland (Earl of)* [5]; *Cargill* v. *Bower.* [6]

[1] (1882) 7 App.Cas. 345.
[2] [1925] 1 K.B. 124.
[3] [1919] 1 K.B. 328.
[4] [1939] 2 K.B. 426; 55 T.L.R. 389; [1939] 1 All E.R. 273.
[5] [1904] A.C. 11; 20 T.L.R. 98.
[6] (1878) 10 Ch.D. 502.

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EVERSHED M.R. There has been a considerable confusion both in this case and in the previous litigation in the county court in 1951. In my view the whole difficulty has been occasioned by the fact that the true nature of the claim in the county court, and in particular in paragraph 4, as finally amended, of the plaintiff's particulars of claim, was never (as I think) clearly apprehended when the case was tried in the county court. I do not wish to attach blame to anybody or to suggest that there is not everything to be said for trying to limit the issues to be fought in any action, but if there be a moral in this case it is that when parties do attempt to limit the issues and to confine themselves to one of several, it is highly desirable that the counsel concerned, and the judge as well, should first have clearly defined and, if necessary, recorded what is the issue which the court is called on to decide. I think the advantage of precision was indeed illustrated during the hearing in this court, when we were asked by Mr. Khambatta (for the plaintiff) to look at the indorsement made by Mr. Merriton on his brief in the county court case, for I am not sure that it was apprehended, when the application was made and when Mr. Buckee (very properly, as I think) thought fit to assent to it, that what the court was doing was receiving, as evidence of a matter of fact which had not been before the court below, something which was, strictly speaking, not admissible in evidence.

This is an appeal from an order of Parker J. in an action in which the plaintiff, as owner of a house known as No. 149 Parnell Road, Bow, sought an order for possession against the defendants (who consisted of a man, his wife and his son and daughter-in-law) on the footing that they had no right, title or interest in the premises and were therefore trespassers. The nature of the defence (and it was substantially the same defence which had been raised in the previous proceedings) was that two of the defendants were in possession as tenants, either as assignees of the previous tenants or otherwise.

The result of the decision of Parker J. is at first sight remarkable; for upon the question whether the defendants had any right, title or interest the judge intimated quite plainly that his view on the evidence was that the defendants at no time had such a right, title or interest. But the judge held, in effect, that the plaintiff was estopped from alleging in these proceedings that the defendants were trespassers, so that the action failed. The effect of the order, therefore, appears to be that at one and the same time the judge has said that the defendants are not tenants and never have been, and have no right or title to the premises, and at the same time that the plaintiff has no right to eject them on the footing that they are not tenants. Thus a position of stalemate is achieved.

The ground upon which the judge arrived at his decision was that in the proceedings in the county court (which were also ejectment proceedings) the plaintiff's then counsel, Mr. Merriton,

had deliberately and clearly elected to abandon any claim based on the allegation of no title in the defendants and, having so abandoned that right or claim (as Mr. Buckee has strenuously argued) the consequences follow that he cannot now retract his election, because, in the event, his choice has turned out to be unsuccessful; and there is no doubt that, if the election were made clearly and unequivocally, the consequences must follow.

Mr. Buckee has referred us to a number of cases, but I do not think the law is in doubt. *Scarf* v. *Jardine*,[1] referred to by Parker J., was a case in which one who claimed as a creditor of a firm had the choice either of saying that the debt was a debt of the firm (which had been newly constituted) or that the debt was owed to him by a previous partner. But the House of Lords held that these two claims were inconsistent, and that the plaintiff could not sue both the new firm and the retired partner at the same time. Similarly, in *Morel Bros. & Co. Ld.* v. *Earl of Westmorland*,[2] it was held that, if a creditor has a claim against a wife or a husband in respect of necessaries supplied to the wife, he can choose which of the two, husband or wife, he sues, but if he takes judgment against the wife he cannot then sue the husband.

If those principles are applicable in the present case a similar result no doubt would follow. But the question is, are they applicable? My view is, with all respect to the judge, that upon the facts they plainly are not. In the Bow County Court the nature of the proceeding was, in substance, the same as that now before the court, namely, an action in ejectment. By his particulars of claim the plaintiff had said that he was entitled to, and claimed possession of, the dwelling-house " in which property " the defendants are without any right or title." He then alleged (erroneously) that the annual value of the property did not exceed £100, and he claimed possession. There was an informal answer to that claim by the first defendant, Mr. Newman, and then the plaintiff amended his claim. He amended it twice, and the second amendment may have had something to do with the unfortunate consequences which followed. His first amendment had, as paragraph 4, the following: " If, contrary " to the plaintiff's contention, the defendants are protected by " the Increase of Rent " etc. " Acts . . . the plaintiff reasonably " required possession of the said dwelling-house as a residence " for himself." Having seen that alternative claim, the defendants then put in a formal defence in which, having denied the right of the plaintiff to possession generally, they proceeded as follows: " The defendants admit that they are tenants of the " property protected by virtue of the Increase of Rent " etc. " Acts . . . but they deny that the plaintiff reasonably requires " possession of the said dwelling-house as a residence for himself " and maintain that greater hardship " would flow from an order

[1] (1882) 7 App.Cas. 345.

[2] [1903] 1 K.B. 64, affirmed [1904] A.C. 11 (H.L.).

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for possession than if no order were made. Strictly, there was no allegation of tenancy which the defendants could admit, but that I pass by. The allegation that the plaintiff wanted the house reasonably for his own occupation was without foundation, because at some later stage the claim was again amended and the former assertion of reasonable requirement for the plaintiff was abandoned and, therefore, can be disregarded as though it had never been made. Eventually, paragraph 4 alleged as follows: "If, contrary to the plaintiff's contention, the defendants are protected by the Increase of Rent and Mortgage Interest Restrictions Act, 1930 to 1939, the plaintiff relies on the First Schedule of the Act of 1933. On a date unknown to the plaintiff one of the original tenants without the consent of the plaintiff sub-let or assigned the whole of the premises to the defendants or one of them." The reference to the First Schedule was obviously a reference to paragraph (*d*) in that schedule. By the Act of 1933 and the schedule the court is given power, if it thinks it reasonable so to do, to make an order for possession against a tenant if "(*d*) the tenant without the consent of the landlord has at any time after" (a named period) "assigned or sublet the whole of the dwellinghouse or sublet part of the dwellinghouse, the remainder being already sublet." It is obvious that, if this action had been brought in the nineteenth century under the old rules of pleadings which are enshrined in the second edition of Bullen and Leake, this paragraph 4 would not have appeared in the statement of claim, which would have stood broadly as originally drawn. The defendant would then have raised a plea that he was a tenant or entitled to the protection of the Acts, and this paragraph would have come in by way of replication, for it is not in truth anything other than a plea in anticipation of a defence. Nor is it (and this is the view of the judge who tried the case) inconsistent with the first plea—that the defendants were trespassers. Paragraph 4 is saying: "If the defendants are not, as I say they are, mere trespassers, and if they say they are entitled for any reason to the protection of the Rent Acts, then my answer to that defence is that they acquired their interest, if any, by a letting or an assignment to them, without the consent of the landlord, of the whole of the premises, and therefore, if they are not mere trespassers, an order for possession under the Act ought to be made by the judge." Observe, that the allegation is not that the defendants themselves were ever, directly, tenants of the landlord, in the sense that the landlord ever made a contract of tenancy with them, but that at some date unknown, one of the original tenants—as we know from the facts of the case, a person of the name either of Ball or Tracy—without the consent of the landlord, sublet to the defendants or assigned to them the whole of the premises.

When the case came before the county court judge the point was taken by Mr. Buckee—quite rightly, on the facts, as is now

conceded—that the allegation in paragraph 2 that the annual value did not exceed £100 was wrong, for the annual value (or at least the rent) did exceed that sum. The result of that submission was to deprive the county court of jurisdiction in the case save in so far as the case could be treated as falling within section 17 (2) of the Rent Act of 1920, namely, as being a proceeding "arising out of" the Rent Acts. The joint effect of section 40 and section 48 of the County Courts Act, 1934, is plainly that the county court's jurisdiction to try an ejectment action is strictly limited to cases where the value of the land in question or the rent payable in respect thereof does not exceed £100 per annum. It is to be noted, however, that for other classes of action (videlicet actions in contract or tort) though there is again a strict limit of jurisdiction, which cannot, of course, be exceeded even with the consent of the parties, by section 42 provision is made by which, where a plaintiff is suing, let us say, in contract for a sum in excess of the limit of the jurisdiction, he may abandon the excess. He is then deemed to be suing only for the amount of the statutory limit. Section 42 (3) provides: "Where any action, in which the plaintiff has "abandoned part of his claim under this section, is heard in a "county court, the plaintiff shall not recover an amount exceed-"ing two hundred pounds or one hundred pounds, as the case "may be, and the judgment of the court in the action shall be in "full discharge of all demands in respect of the cause of action." It follows, therefore, by the terms of the statute, that, in the case of a contract, if, in order to give jurisdiction, a plaintiff abandons the excess over the limit, he abandons that excess for good and all, and the amount adjudged is a full discharge of the total claim. There is no similar provision (and obviously could not be under the framework of the Act) in regard to ejectment actions, but it may be that the presence of section 42 and the provision of that section about an abandonment affected the minds of counsel and of the judge when he came to deal with Mr. Buckee's point, namely, that the claim for ejectment was beyond the county court judge's jurisdiction because of the value of the land.

There being some issue on what exactly occurred in the county court, we were permitted by Mr. Buckee to look at Mr. Merriton's indorsement. For my part, I do not think that this additional piece of evidence assists the court. In view of certain further correspondence with the judge, which was also put in (as secondary evidence, presumably, of the same fact), the result leaves the matter wrapped in the same obscurity in which it first started. It only remains to say that whatever may have been in Mr. Merriton's mind is, of course, far less important than what was the reasonable apprehension, by the judge and the counsel opposed to him, of the words which he (Mr. Merriton) used; but I may safely take it that the effect of what he has done is necessarily reflected in and recorded by the notes that the

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judge made at the trial. I use that phrase deliberately, because this matter is not solved merely by looking at the judge's note of what happened when the objection was taken by Mr. Buckee. The note is: "On Mr. Buckee's objection that the rent exceeds "£100 a year and that I have no jurisdiction, Mr. Merriton elects "to proceed on the alternative ground set out in paragraph 4 (as "amended) of the amended particulars of claim."

The whole burden of Mr. Buckee's case is that the so-called "alternative ground" was the allegation that, the defendants being treated as in occupation of the house by right of contract, the question for the judge was whether one of the terms of the First Schedule of the Act of 1933 had been brought into play, so as to give the judge power, if, and only if, he thought it reasonable to exercise it, to make an order for possession. But paragraph 4 did not, at any rate primarily, make any such allegation because I think paragraph 4 said that (as an alternative to the plaintiff's first claim and by way of anticipation of a defence under the Rent Acts) the defendants were in possession by what I obliquely call an unlawful subletting or assignment by somebody else, and that they had no right to remain there, and, therefore, that in any event an order could be made against them. It is, of course, notoriously easy to be wise after the event, and if the judge had then and there said: "Let us see "what is the issue you want me to try," and the two counsel had an agreed issue written down and clearly stated, no further trouble could have arisen. But the significant thing is that, so far from the issue being what Mr. Buckee said was the only issue that remained to be tried, the action then proceeded, and the question debated in the evidence was whether, as a matter of fact, the defendants ever had any contract of tenancy or right to a contract of tenancy at all—whether they ever became, by assignment, subletting or otherwise, "tenants" of these premises, which was the one thing which had to be admitted in order to found the jurisdiction under the Rent Acts.

After the trial had lasted some time the county court judge concluded: "Owing to lack of jurisdiction I am compelled to hold "that the plaintiff's claim fails, as there is no evidence that the "defendants are contractual or statutory tenants." So that the end of the matter was that the case stood as it had started: the judge found, as a fact, that there never was any contract of tenancy to which the defendants were entitled, any evidence upon which the defendants could say they had become or were tenants —in other words, that they were trespassers, having no right or title. The judge accordingly held—not, observe, "because Mr. "Merriton has elected not to sue on that ground," but "owing "to lack of jurisdiction"—that he was unable to make the order asked. That was the end of the county court proceedings. The plaintiff, not unnaturally, then issued his proceedings in the High Court and claimed simply ejectment against the defendants on the footing that they were trespassers. The point was taken:

"You, the plaintiff, cannot do that; you are estopped by what "occurred in the county court. You have elected to abandon for "ever the claim that the defendants are trespassers and are not "there by right of contract." It is indeed a Gilbertian situation, because the allegation is that the plaintiff abandoned the right to assert that which the judge in the county court action (where the plaintiff is supposed to have made his abandonment) found as a fact. But the judge was persuaded that that plea was well-founded and that the plaintiff had abandoned any claim to allege as a fact that the defendants were trespassers.

The case really falls within a small compass, and I think the clue is to be found in the proper interpretation and apprehension of paragraph 4 of the particulars of claim. Once the true significance of that paragraph is understood, it seems to me to follow that no such abandonment can here, in justice or in common sense, be taken to have been made. It is not a case within the authorities to which Mr. Buckee has referred where there are inconsistent rights or claims, or where a man, in the well-known phrase, basing himself on assumpsit "Godlike waives the tort." That it is not that kind of case follows, in my judgment, first, from the nature of paragraph 4; secondly, from the fact that (as recorded by the judge) what Mr. Merriton elected to do was to proceed on his paragraph 4 as pleaded; thirdly, from the fact that the case thereupon was tried out by the county court judge to discover whether, as a fact, there was any such tenancy; and, last, by the nature of the judge's conclusions, refusing relief to the plaintiff, not on the ground of the plaintiff's election, but on the ground of his own want of jurisdiction.

In the High Court the evidence again was gone into, and, although it was not in the circumstances necessary to express a conclusion, the judge stated[3]: "If I am wrong [on the "point about the estoppel] I should be forced to hold on the "evidence that the defendants at no time have become tenants "of the plaintiff." The long and rather confusing proceedings which have occurred have at any rate made one fact doubly clear: two judges have found, in two actions, that the defendants at no time were tenants of the plaintiff, and (as I think, on the county court judge's finding) at no time were tenants of anybody. The result, however, is that the conclusion of the judge cannot be sustained. I differ with hesitation from Parker J., but I think that the matter does turn on the effect of paragraph 4 of the particulars of claim and, therefore, that the appeal ought to be allowed. It seems to me that the plaintiff is entitled to an order for possession. I cannot conceive that once more this matter should be tried out, in view of the judge's and the county court judge's findings.

[3] [1953] 1 W.L.R. 558, 562; [1953] 1 All E.R. 840.

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BIRKETT L.J. I agree with the judgment of the Master of the Rolls, and, as all the matters have been stated with the utmost clearness, I do not propose to add many words for myself. The discussion which took place before us as to what occurred in the county court and what was the intent of the things that happened clearly show that there was the greatest confusion and misunderstanding. It is said on the one side that if the events in the county court are looked at dispassionately it is plain that there was a complete abandonment of the claim to treat the defendants as trespassers. On the other side it is said that if the facts are looked at it will be shown plainly that that situation was never intended and never occurred.

Parker J. took the clear view that there had been such an abandonment, and, as my Lord has pointed out, one of the strange matters in this case, if that is right, is that, although Parker J. stated that it was plain that in the county court the issue proceeded upon the footing and the assumption that Mr. Merriton had said "I will argue it on the basis that they are tenants," nevertheless the whole of the evidence, as I understand it, was devoted simply and solely to trying to establish that they were tenants, which, according to the contention upon the one side, was the very assumption upon which the case proceeded and no other. Parker J. said [4]: "Mr. Buckee (who was there) assures "me that he understood it, and it was understood as, a "final election; and, indeed, his submissions to the county "court judge at the end of the case bear that out. He "took his stand on the basis that the plaintiff was pro-"ceeding on the alternative claim—that is, on the assumption "and on the admission that the defendants were tenants." If the assumption and the admission are "I abandon my claim that "you are trespassers: I will treat the case on the footing, which "I admit, that you were tenants," I think it is very strange that the whole time was spent debating only the question whether the defendants were or were not tenants. Parker J. said that he thought there was some confusion in the county court judge's mind. He said: "In giving his reasons the learned county court "judge said: 'Owing to lack of jurisdiction I am compelled to "'hold that the plaintiff's claim fails as there is no evidence that "'the defendants are contractual or statutory tenants.'". It had already been submitted that because he had no jurisdiction to deal with the trespass claim, that would not be dealt with. It is plain that the whole of the evidence went to the question: Are the defendants proving they are tenants? The county court judge said: "No, they do not prove that, and I am really back "where we started: I am without jurisdiction"; Parker J. says [5]: "I find it very difficult to ascertain what was passing "through the county court judge's mind, but clearly there was

[4] [1953] 1 W.L.R. 558, 561. [5] Ibid. 561.

" some confusion: before me both sides in effect rely on what " took place in the county court as creating estoppels."

It is easy to sit here and appear to criticize what happened at the time, but it is clear that, if there had been more precision as to what was the issue which was being fought, many of the subsequent difficulties would have been avoided. There is, however, one clear thing which illuminates every part of the case, and that is the true construction of paragraph 4 in the amended particulars of claim, and I can add nothing to the exposition which was given by the Master of the Rolls upon that matter.

I hope Mr. Buckee will not think that I did not follow his careful argument, but I think that the law relating to election is clear and that this case does not turn on that but on the true construction of paragraph 4. I agree with the interpretation which the Master of the Rolls has given to that paragraph, which in my opinion is the heart and centre of this case. I agree that the appeal should be allowed.

MORRIS L.J. I also entirely agree. Parker J. proceeded on the basis that in the county court action the plaintiff had abandoned his claim in trespass and had finally elected to treat the defendants as tenants. If that basis had been established, then I think that the judge would have arrived at a correct conclusion. But when the proceedings in the county court are fully analyzed, then I think it appears that in the county court proceedings there was no final election by the plaintiff to treat the defendants as tenants.

Parker J. had every reason to be perplexed, as to the basis on which matters proceeded in the county court. Parker J. said: " It seems to me that that "—that is, the basis of tenancy —" must be the basis on which the matter proceeded." I agree with all that has been said in appreciation of the difficulties of counsel when a sudden development occurs in a case, and I think that what happened in the county court was that, when it was decided to proceed to consider paragraph 4 of the particulars of claim in the county court proceedings, there was no real appreciation as to what was involved in the plea in that paragraph.

I agree fully with the analysis of the matter that has been made by the Master of the Rolls, and I could not in any way add to what has been said. The result was that at the end of the hearing in the county court, after the judge had heard the evidence and heard much argument, the parties, so to speak, " came out by that same door wherein they went." They found themselves exactly where they started. They found that what had been advanced by the evidence and in argument on behalf of the plaintiff was really in support of a claim to possession on the ground that the defendants were trespassers. The result, therefore, in my judgment, is that nothing that took place at

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the county court did amount to an election to treat the defendants as tenants. That being so, it seems to me that the claim of the plaintiff in the High Court was not defeated as submitted by the defendants.

*Appeal allowed.*

Solicitors: *Bennett, Hobson & Co.; Breeze, Benton & Co.*

B. A. B.

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[QUEEN'S BENCH DIVISION.]

1953 *July* 22, 28.

Lord Goddard C.J., Parker and Donovan JJ.

## * REGINA *v.* BERKSHIRE COUNTY COUNCIL. *Ex parte* BERKSHIRE LIME CO. (CHILDREY) LD.

*Road Traffic—Licence—Mechanically propelled vehicle—Lime-spreader—Used for carrying lime and spreading on agricultural land—Application for excise licences—Whether "agricultural engine" or "goods vehicle"—Vehicles (Excise) Act,* 1949 (12, 13 & 14 *Geo.* 6, *c.* 89), *ss.* 4 (1), (2) (*a*), 5, 27—*Finance Act,* 1950 (14 *Geo.* 6, *c.* 15), *s.* 13, *Sch. III.*

A company which owned three mechanically propelled lime-spreaders used for carrying lime from quarries and for spreading the lime on agricultural land applied to a county council for licences for the lime-spreaders as "agricultural engines" under section 4 (2) (*a*) of the Vehicles (Excise) Act, 1949, as amended by section 13 of the Finance Act, 1950. The county council refused to grant the licences, treating the lime-spreaders as "goods vehicles" and taxable as such under section 5 of the Act of 1949.

On a motion for an order of mandamus directing the county council to hear and determine the application:—

*Held,* refusing the order, that the county council was right in treating the lime-spreaders as goods vehicles as they were used on the road for carrying goods, namely lime, and agricultural vehicles were not entitled to be used for carriage although they might in certain circumstances specified in section 4 (2) of the Act be used for haulage.

*Per* Donovan J. The Act of 1949 contemplates that an "agricultural engine" may also be a "goods vehicle," and if a vehicle is a goods vehicle within the statutory definition it is to be taxed under section 5 whether it is also an agricultural engine or not.

MOTION for order of mandamus.

The applicants, the Berkshire Lime Co. (Childrey) Ld., carried on business as quarry owners and merchants of and dealers in lime. Part of the company's business consisted in contracting with farmers to do agricultural work on their farms in the way of lime spreading. For that purpose the applicants owned three

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[Reported by Mrs. E. M. WELLWOOD, Barrister-at-Law.]

mechanically propelled lime-spreaders which were four-wheeled vehicles with a driver's cab and special bodies mounted on the chassis, the bodies being constructed to enable the vehicles, while moving, to spread the material loaded on them (such as lime, slag, salt, artificial manures) over the soil. On January 21, 1953, the applicants applied to the local taxation officer of the Berkshire County Council for the grant of excise licences for the lime-spreaders as "agricultural engines" under section 4 (2) (*a*) of the Vehicles (Excise) Act, 1949, as amended by section 13 and Sch. III to the Finance Act, 1950. On February 6 the local taxation officer informed the applicants that the vehicles were, in the opinion of the Ministry of Transport, whom he had consulted, goods vehicles within the meaning of the Act and that therefore they could not be taxed as agricultural engines, and this was confirmed by the clerk to the Berkshire County Council on February 18 and March 13, 1953.

Thereupon the applicants moved for an order of mandamus directing the Berkshire County Council to hear and determine their application. They contended that the county council was wrong in determining that the lime-spreaders were goods vehicles and not agricultural engines within the meaning of the Act, as the only load carried on them was required to be thereon for the purpose of enabling it to be spread over farmland belonging to farmers with whom the company had contracted to do agricultural work, namely, lime spreading.

*Leonard Caplan* for the applicants.

*J. P. Ashworth* for the Berkshire County Council.

Case cited in argument: *Pearson* v. *Boyes*.[1]

*Cur. adv. vult.*

July 28. LORD GODDARD C.J. The point which has to be determined is this: are these vehicles to be regarded as agricultural engines as the applicants contend or as goods vehicles as the county council contends? The difference in the duty payable is very considerable according as to whether they fall into one class or the other. The vehicles in question are of a composite nature consisting of an internal combustion engine and driver's cab mounted on a chassis on which is also imposed a large receptacle for the purpose of holding lime. The receptacle is fitted with a device for enabling the lime to be spread on the agricultural land over which the vehicle is driven and the applicant's business is to carry lime to the fields of the farmers who may employ them and then spread it.

Section 4 of the Vehicles (Excise) Act, 1949, describes the duty chargeable in respect of the mechanically propelled vehicle to which the section applies, and section 4 (2), as amended by

[1] [1953] 1 W.L.R. 384; [1953] 1 All E.R. 492.

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Lord Goddard C.J.

Sch. III to the Finance Act, 1950, is in these terms: "This "section applies to the following mechanically propelled vehicles, "that is to say, (*a*) locomotive ploughing engines, tractors, agricul- "tural tractors and other agricultural engines which are not used "on public roads for hauling any objects except as follows . . ." and then in the following five paragraphs are set out the articles which and the circumstances in which they may be hauled by these agricultural tractors and engines. The subsection goes on to deal with a variety of other vehicles, such as those designed and constructed for trench digging and excavations and as mobile cranes which may be used under certain conditions on public roads, mowing machines and certain other vehicles which it is unnecessary to mention. Section 5 of the Act provides for the duties payable in respect of a goods vehicle, and by section 27 "goods vehicle" means "a mechanically propelled vehicle . . . "constructed or adapted for use and used for the conveyance of "goods or burden of any description, whether in the course of "trade or otherwise."

In considering into which category these lime-spreaders, which are undoubtedly used for agricultural purposes but are also constructed and used for the conveyance of lime, fall, it is necessary to refer to section 1 of the Act. That reads: "Subject to the "provisions of this Act (*a*) there shall be charged in respect of "mechanically propelled vehicles used on public roads in Great "Britain the duties of excise provided by the next five following "sections of this Act." It is clear, therefore, that the main purpose of the Act is to tax vehicles used on public roads. So long as a vehicle is not used on a road it escapes tax altogether. Once it comes on to a road it becomes liable to tax unless it can be brought within an exemption. Section 4 (2) is dealing with mechanically propelled agricultural vehicles which may from time to time come on to the public roads. They will remain taxable at the lower rate so long as they only are used on the roads for the purpose of hauling, but if they are on the roads, and are used for carrying goods, I can find no ground for saying that they are not taxable as goods-carrying vehicles. They must not be used on public roads for hauling any objects except those set out specifically in the subsection, and this subsection so far as it relates to agricultural vehicles is dealing with haulage and nothing but haulage. The Act clearly distinguishes between haulage and carriage. An agricultural vehicle is entitled to haul under certain conditions but is not entitled to be used for carriage, and that seems to me to dispose of the case and to show that the county council are right in the view that they have taken. In my opinion the motion fails and must be dismissed.

PARKER J. I agree.

DONOVAN J. I agree. I add a few observations in order to deal with Mr. Caplan's specific arguments.

There is no definition in the Act of "an agricultural engine." Mr. Caplan suggests as a definition: "A machine by which power "is applied to the doing of farming work, e.g., ploughing, sowing, "manuring, etc." It is unnecessary for the purposes of the present case either to adopt or reject this definition, though, for my own part, I would not quarrel with it.

"Goods vehicles" are defined by section 27 of the Act, in terms which Lord Goddard C.J. has already quoted. In my opinion it is not possible to say that "agricultural engines" and "goods vehicles" are, within the meaning of the Act, mutually exclusive terms. The Act itself contemplates the contrary, for section 4 (3) provides that some only of the vehicles charged under section 4 shall not be chargeable under section 5. These excepted vehicles are mobile cranes. It follows that an "agricul- "tural engine" may also be a "goods vehicle."

In my opinion that is true of the vehicles here in question, for they plainly carry goods, namely the lime, which is going to be supplied to the farmer together with the service of spreading it. The lime which is to be so supplied and so spread cannot be regarded as akin to the petrol carried by a lorry for its own propulsion as Mr. Caplan suggests.

In these circumstances why is the lime-spreader not chargeable under section 5? The answer suggested is that section 5, unlike section 4, begins with the words "Subject to the provisions "of this Act," and this makes section 4 paramount. If the words quoted were otherwise empty of content there might be something to be said for this construction, but they are not. They refer, inter alia, to the numerous exemptions from duty contained in section 7. There are in addition clear indications in the statute that if a vehicle comes within section 5 as a goods vehicle it is to be taxed as such. The first is that contained in section 4 (3), exempting, out of the whole category of section 4 vehicles, only mobile cranes from chargeability under section 5. Another is section 1 (3), which specifically exempts vehicles chargeable under section 2 with chargeability under section 3 or section 5. It would be unnecessary to provide this specific exemption from section 5 if the opening words of that section were enough. Here it is material to observe that the words "Subject to the provisions of "this Act" do not appear in section 2 any more than they do in section 4. Another indication is section 13, providing that if a vehicle has been taxed under one category, and is used for a purpose which brings it within another, taxed at a higher rate, the higher rate is to become chargeable.

These considerations make it clear in my view that if a vehicle is a goods vehicle it is to be taxed under section 5 whether it is also an agricultural engine or not. For the reasons already stated I think the lime-spreader is a goods vehicle within the statutory definition. In this connexion it is not uninteresting to observe

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that local authorities' water carts which spread water on the streets are specifically named in Sch. IV to the Act as goods vehicles. For these reasons I agree that the motion should be dismissed.

*Order refused.*

Solicitors: *Rider, Heaton, Meredith & Mills for Ormond & Fullalove, Wantage; Treasury Solicitor.*

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*July* 17.

Lord Goddard C.J., Parker and Donovan JJ.

* REGINA *v.* METROPOLITAN POLICE COMMISSIONER. *Ex parte* PARKER.

*Metropolis—Hackney carriage—Cab-driver's licence—Decision to revoke by commissioner—Reference by commissioner to licensing committee—Licensee refused leave to call a witness—Licence revoked—Whether certiorari would issue—London Cab Order,* 1934 (*S.R. & O.* 1934, *No.* 1346), *para.* 30.

The Commissioner of Police, having become satisfied, by reason of the report of two police constables that the applicant was no longer a fit person to hold a cab-driver's licence, assented to a proposal by the assistant-commissioner that the applicant should be brought before the licensing committee and confronted with the two police officers, and that the licence should be revoked unless anything transpired before the committee which in their opinion might lead the commissioner to reconsider his decision to revoke the licence. After the meeting, at which the two constables and the applicant appeared, the assistant commissioner informed the applicant that his licence had been revoked. The applicant moved for an order of certiorari on the ground that as he was not allowed to call a witness whom he alleged would have been able to rebut the allegation of the police, there had been a denial of natural justice:—

*Held,* that the decision to revoke the applicant's licence by virtue of the power given to the commissioner by para. 30 of the London Cab Order, 1934, was the decision of the commissioner himself; and that, as he was not exercising any judicial or quasi-judicial function, but was merely acting as a disciplinary authority, and since he made no order which the court could quash, an order for certiorari would not issue.

*Semble per* Parker and Donovan JJ. that, had the commissioner appointed the committee to inquire whether there was sufficient evidence to revoke the licence and report on the facts to him, the committee might have been acting judicially, and, therefore, been bound to consider the matter in accordance with the rules of natural justice.

MOTION for an order of certiorari.

The applicant, Albert Arthur Parker, was first licensed as a cab driver in 1936. According to a letter written by the Assistant Commissioner of Police to the applicant's solicitors: "Since Mr. "Parker was first licensed as a cab driver on October 8, 1936, he

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[Reported by Miss C. J. ELLIS, Barrister-at-Law.]

" has been convicted on many occasions of traffic offences, and " other breaches of the law, committed during his employment " as a cab driver. He was repeatedly warned of the possible " consequences if he continued to offend. Despite these warnings " he continued to incur convictions and as a result his cab-driver's " licence was suspended for one month in 1947, and again for " three months in 1951."

The applicant was last granted a cab-driver's licence on May 21, 1951, by the Commissioner of Police for the Metropolis pursuant to powers conferred on him by the London Cab Order, 1934. It was subsequently brought to the commissioner's attention that the applicant was alleged by the police to have allowed his cab to be used by prostitutes for the purpose of carrying on their trade on October 4, 1952. The commissioner therefore decided to revoke the applicant's licence under paragraph 30[1] of the London Cab Order, 1934. In his affidavit he stated: " On October 20, " 1952, I became satisfied by reason of circumstances arising after " the said licence was granted that the said Albert Arthur Parker " was not a fit person to hold such a licence. I thereupon " assented in writing to a proposal by Henry Dalton, Assistant " Commission ' B ' Department Metropolitan Police that the " said Albert Athur Parker should be brought before the licensing " committee and that he should be confronted with the police " constables Robert Key and Carl Scarborough. The said com- " mittee is a departmental committee set up by me to assist me " in such matters. I further instructed the said assistant com- " missioner orally that the said Albert Arthur Parker's said licence " should be revoked unless anything transpired before the said " committee which in their opinion might lead me to reconsider " my decision to revoke the said licence."

On October 23, 1952, the applicant and the two police officers came before the assistant commissioner and two other members of the licensing committee. The applicant asked leave to call as a witness, one Charles Gray, whom the applicant claimed had hired his cab on October 4, at the material time, to take him (Gray) to a restaurant and there wait for him. The committee refused the applicant's request to call Gray. Nothing transpired before the committee which in their opinion might lead the commissioner to reconsider his decision and the assistant commissioner accordingly informed the applicant that his licence had been revoked, which revocation was confirmed by letter dated October 23, 1952.

The applicant moved for an order of certiorari to quash the order made by the commissioner on October 23, revoking his licence, on the ground that, as he was not given an opportunity

[1] London Cab Order, 1934, para. 30: " A cab-driver's licence shall be " liable to revocation or suspension by " the Commissioner of Police if he is " satisfied, by reason of any circum- " stances arising or coming to his " knowledge after the licence was " granted, that the licensee is not a " fit person to hold such a licence."

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to call a witness whom he claimed would have been able to give evidence to rebut the police allegations that he was allowing prostitutes to use his taxicab for the purposes of their trade on October 4, 1952, the commissioner was not exercising his functions judicially and there had been a denial of natural justice.

*Paul Wrightson* for the applicant.
*J. H. Buzzard* for the respondent.

The following cases were cited in argument:—*Board of Education* v. *Rice* [2]; *Rex* v. *Port of London Authority, ex p. Kynoch Ld.* [3]; *Rex* v. *Wandsworth Justices, ex p. Read* [4]; *Rex* v. *Paddington and St. Marylebone Rent Tribunal, ex p. Bell, London and Provincial Properties Ld.* [5]; *Osgood* v. *Nelson* [6]; *Rex* v. *Hendon Rural District Council, ex p. Chorley* [7]; *Reg.* v. *Manchester Legal Aid Committee, ex p. Brand* [8]; *Rex* v. *Metropolitan Police Commissioner, ex p. Holloway* [9]; *Rex* v. *Metropolitan Police Commissioner, ex p. Pearce* [10]; *Carltona Ld.* v. *Works Commissioners* [11]; *Fletcher* v. *Ilkeston Corporation* [12]; *Rex* v. *Secretary of State for Home Affairs, ex p. Budd* [13]; *Russell* v. *Duke of Norfolk* [14]; *Reg.* v. *Bowman* [15]; *Reg.* v. *Sharman, ex p. Denton* [16]; *Rex* v. *Woodhouse* [17] on appeal *Leeds Corporation* v. *Ryder.* [18]

LORD GODDARD C.J. stated the facts and continued: When the application was made for leave to move for certiorari both Parker J. and I expressed considerable doubt whether or not that remedy would lie. The argument which has taken place today has confirmed me in the opinion that I then expressed that certiorari will not lie. Certiorari is a remedy of a very special nature. I am not dealing with the class of case in which it can be used to remove a case from one court to another, but for the purpose of quashing an order it lay originally only to a court, and in Short & Mellor and other works dealing with the old form of the writ of certiorari it will be seen exactly what function that writ performed. The writ called on an inferior court to return to this court the order or record which the inferior court had made and which it was sought to challenge. Those orders, being removed into this

[2] [1911] A.C. 179; 27 T.L.R. 378.
[3] [1919] 1 K.B. 176; 35 T.L.R. 103.
[4] [1942] 1 K.B. 281; 58 T.L.R. 88; [1942] 1 All E.R. 56.
[5] [1949] 1 K.B. 66; 65 T.L.R. 200; [1949] 1 All E.R. 720.
[6] (1872) L.R. 5 H.L. 636.
[7] [1933] 2 K.B. 696; 49 T.L.R. 482.
[8] [1952] 2 Q.B. 413; [1952] 1 T.L.R. 476; [1952] 1 All E.R. 480.
[9] [1911] 2 K.B. 1131; 27 T.L.R. 573.
[10] (1910) 80 L.J.K.B. 223; 104 L.T. 135.
[11] [1943] 2 All E.R. 560.
[12] (1931) 96 J.P. 7.
[13] [1942] 2 K.B. 14; 58 T.L.R. 212; [1942] 1 All E.R. 373.
[14] (1949) 65 T.L.R. 225; [1949] 1 All E.R. 109.
[15] [1898] 1 Q.B. 663; 14 T.L.R. 303.
[16] [1898] 1 Q.B. 578; 14 T.L.R. 269.
[17] [1906] 2 K.B. 501; 22 T.L.R. 603.
[18] [1907] A.C. 420; 23 T.L.R. 721.

court, it was then for this court to examine them and see whether or not they were orders which were made in accordance with law. One of the most common cases in which certiorari was moved was to see whether there had been an excess of jurisdiction. There have been many cases recently dealing with certiorari and the grounds on which an order can be quashed, but it has always been an order of a tribunal of some description. Formerly, no doubt, certiorari did not lie except to what could be called a court, but in recent years with the development of administrative law under which government departments are given wide powers of holding inquiries and then making orders which may affect the property of persons or citizens, the remedy of certiorari has been considerably extended. The principles on which it will be granted are to be found most clearly stated in the judgment of Atkin L.J. in *Rex* v. *Electricity Commissioners, ex p. London Electricity Joint Committee Co.* (1920) *Ld.*[1]

One argument which Mr. Wrightson put forward and specially stressed when he applied for leave to move, was that mandamus would lie to the Commissioner of Police in respect of hackney carriage licences, and he sought to argue from that, before us, that as mandamus would lie, certiorari would lie; but there is an essential fallacy in his argument. Mandamus will lie to any person who is under a duty imposed by statute or by the common law to do a particular act, and if a person refrains from doing the act or refrains from wrong motives from exercising a power which it is his duty to exercise, this court will by order of mandamus tell him to do it. Mandamus may go to individuals. It may go to corporations and goes quite independently of whether the individual or body to which it is addressed is or is not a court.

The position of the Commissioner of Police in respect of these hackney carriage licences ought, I think, to be stated. The Metropolitan Public Carriage Act, 1869, put the duty of licensing cabs and drivers on the Secretary of State, who delegated his powers to the Commissioner of Police. By regulation 1 of an Order of the Secretary of State dated December 30, 1907, it was provided that so far as the granting of licences was concerned they should be "subject to the following exceptions:— "(*a*) a licence shall not be granted to any person under the age "of 21 years, and any licence so granted shall be void. (*b*) The "commissioner may at his discretion refuse a licence to any "person who has been convicted of a felony, misdemeanour, or "of cruelty to animals, or who, having previously held a licence "for a cab or a stage carriage, has had such previous licence "revoked or suspended." It was decided by the Court of Appeal in *Rex* v. *Metropolitan Police Commissioner, Ex parte Holloway*,[2] that that regulation limited the discretion of the commissioner in this respect: He was not obliged to refuse a licence to a

[1] [1924] 1 K.B. 171; 39 T.L.R. 715.

[2] [1911] 2 K.B. 1131; 27 T.L.R. 573.

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person who had been convicted of felony or misdemeanor, but could only do so on the grounds which were set out in the regulation. He had not, in other words, an unfettered discretion. If any citizen of 21 years of age can apply to the commissioner for a licence, unless one of the exceptional circumstances which are dealt with in the Act apply to him, he is entitled to have one granted to him subject to the right of the commissioner to revoke the licence.

The present position with regard to the revocation of a licence is to be found in paragraph 30 of the London Cab Order, 1934, and the regulations issued under the order that I have just cited clearly show that a licence may be revoked or suspended. Indeed, leaving out of account such very exceptional things as irrevocable licences granted under seal and possibly licences coupled with an interest, the very fact that a licence is granted to a person would seem to imply that the person granting the licence can also revoke it. The licence is nothing but a permission, and if one gives a man permission to do something it is natural that the person who gives the permission will be able to withdraw the permission. As a rule, where a licence is granted, the licensor does not have to state why he withdraws his permission. Unless he has given a licence for a definite period, thereby giving some contractual right, he can withdraw it.

[His Lordship read paragraph 30, and continued:] In the present case, facts having come to the commissioner's knowledge with regard to the alleged repeated use of Parker's cab by disorderly women, the commissioner decided to withdraw the licence. Mr. Wrightson, in my opinion, very properly conceded that if the commissioner had simply said: "I withdraw your "licence," he could not have argued that the commissioner was bound to hold an inquiry or to hear evidence. The very wording of the order makes it clear that anything in the nature of a judicial inquiry or putting the commissioner in the position of a judge or quasi-judge is quite impossible to maintain. He can withdraw the licence or suspend it by reason of any circumstance which comes to his knowledge. In other words, he can act on hearsay if he likes, and I suppose in very many cases he does act on a complaint. He may get a series of complaints from passengers with regard to any particular cabman and he may say: "This is the tenth or twelfth complaint I have had with regard to this cabman; I will withdraw his licence." In most cases, I expect the commissioner would satisfy himself as far as he can that the circumstances that come to his knowledge are true. One always in these cases gives an official in the position of the Commissioner of Police, who is entrusteed by the Secretary of State and by Parliament with very important duties, credit for acting in a proper and fair manner, and certainly one would assume that he did until the contrary was shown.

[His Lordship read the commissioner's affidvit, and continued:] It is impossible to find on the wording of the order

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under which the commissioner acted that he was either in the position of a judge or of a quasi-judge; exactly what a quasi-judge is nobody has ever attempted to define, but I suppose it is a person who has to decide on evidence and come to a conclusion on facts whether in dispute or indisputable. One thing that weighs with me is that in considering whether a tribunal is a judicial tribunal or quasi-judicial tribunal, one would expect to find that the tribunal had to make an order or something in the nature of an order, because otherwise there is nothing to be brought up to be quashed in this court. The motion is to bring up an order of the commissioner. There is nothing here to show that there ever was an order. It was simply a decision of the commissioner that by reason of facts coming to his knowledge, he was satisfied that the licensee was not a fit person to hold the licence, and that is all. Therefore, it does not seem to me that there was any order. In all the cases which have been cited to us, and which were considered by the court in *Reg.* v. *Manchester Area Committee for Legal Aid, ex parte Brand*,[3] one finds that a department of State has either passed a resolution or made an order consequent on a resolution which can be quashed or to which some objection can be taken. Here, in my opinion, it is impossible to say that the commissioner—if he acted alone—was in a judicial or quasi-judicial position. He was in fact exercising a disciplinary authority. Where a person, whether he is a military officer, a police officer or any other person whose duty it is to act in matters of discipline, is exercising disciplinary powers, it is most undesirable, in my opinion, that he should be fettered by threats of orders of certiorari and so forth, because that would interfere with the free and proper disciplinary exercise of the powers that it may be expected he would otherwise use. I cannot see that the fact of asking the assistant commissioner to have the applicant before him and let him be confronted with the two police officers amounted to anything more than giving the man a chance by cross-examination or confrontation with the police officers of extracting some fact which if it was then brought to the commissioner's notice might have influenced him before the decision was actually promulgated through the mouth of the assistant commissioner.

For these reasons, in my opinion, there is no ground for saying that the withdrawal of the licence granted by the commissioner to the applicant was a judicial act, nor that it was done by a judicial or quasi-judicial person. Consequently, certiorari will not lie and this application fails.

PARKER J. I agree that this motion fails, and I can give my reasons very shortly. Under the London Cab Order, 1934, paragraph 30, the commissioner is given very wide powers, and it is

[3] [1952] 2 Q.B. 413; [1952] 1 T.L.R. 476; [1952] 1 All E.R. 480.

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clear that he may revoke a licence if he is satisfied by reason of any circumstances arising or coming to his knowledge after the licence is granted that the licensee is not a fit person. Accordingly, he is in no way bound to hear evidence or to hold an inquiry or cause any inquiry to be held. Should he decide to revoke, and should he revoke, a licence on the report, for instance, of a police constable alone, this court could not interfere whether by certiorari or otherwise. Indeed, as I understand it, Mr. Wrightson very properly conceded that that was the position.

In the present case, as my Lord has said, the commissioner having decided to revoke the licence, gave the applicant an opportunity of appearing before the departmental committee and being confronted with the police constables. Can it make any difference, then, that he in fact says: "I am satisfied, but will "you, the committee, confront the applicant with the police "constables and report back to me if you think there is anything "more I ought to consider." In my view, if he is not bound to hear any evidence from the applicant himself or on his behalf, nor can that committee itself be bound to do so. A different position might arise—I only say might arise—if the commissioner were to say, in effect: "I have not the necessary evidence "on which to decide this question, and I will cause an inquiry "to be held and have a report on the facts." But that is far away from the facts of this case, where the commissioner has come to his decision that the licence should be revoked, but is merely giving the applicant an opportunity of, in effect, cross-examining the constables concerned. In those circumstances, I find it unnecessary to consider all the cases that have been cited as to when certiorari will lie. It is clear that it does not lie in the present case.

I should add that Mr. Wrightson further argued that the remedy of certiorari should lie in this case in that the decision here was not the decision of the commissioner, so he says, but the decision of the assistant commissioner or of the committee in question. In my opinion, there is nothing in this contention, because it seems to me clear on the facts that the decision here was and would in any event be, whatever the committee did, the decision of the commissioner himself, and the fact that that decision is communicated orally by the assistant commissioner or somebody else cannot in any way invalidate the decision of the commissioner. For these reasons I agree that this motion fails.

DONOVAN J. I agree. Had the commissioner himself straightaway acted on the view he had formed that the applicant was not fit to hold a licence and at once revoked it, it is admitted on behalf of the applicant that the writ would not lie, this being purely an administrative act. Having regard to the language of paragraph 30 of the London Cab Order, 1934, I think that admission is right. Instead of doing that, however, the commissioner

referred the matter to a committee, giving instructions that the applicant should be confronted with the two police officers and that the licence should be revoked unless something transpired which, in the committee's view, might lead to a re-consideration by the commissioner of his decision. I agree that that involved hearing the applicant and the two police officers and coming to a view whether the latters' allegations had in any way been shaken.

The question here is whether in discharging their duty the committee were performing a judicial or quasi-judicial act. It can, of course, with some degree of persuasiveness be argued that they were. They were in a sense hearing two sides to a dispute, namely, whether the applicant had allowed his cab to be used for improper purposes; and so it is said that although the act of revoking the licence may be an administrative one, yet if the commissioner causes an inquiry to be held first at which evidence is taken and weighed, then the rules of natural justice must be observed and each side must be allowed to call witnesses, particularly the man whose livelihood is at stake. That argument has obvious force, and if the commissioner had set up an inquiry, as Parker J. has just said, charging it to hear evidence, and report its finding to him, so that he might decide whether to revoke the licence or not, then in my view such a committee would be acting judicially, and would have to observe the rules of natural justice. Suppose, on the other hand, the commissioner having already taken a decision to revoke the licence, called in two or three members of his staff and said: "I have decided to revoke "this licence, but before I implement that decision, just see "Parker and the two policemen and hear what each has to say, "and then if you think I ought not to revoke, let me know," would the ensuing inquiry then be a judicial or quasi-judicial one? If so, then one is at or very near the position when every policeman taking notes of the statements made by each party to a street collision or some other untoward happening which might lead to a prosecution, would be said to be acting in a judicial or quasi-judicial role. On the contrary, as it seems to me, he is performing an administrative act simply for the purpose of reporting to his superiors, and none the less so because it involves hearing, noting and reporting allegation and counter-allegation. If that be right, the question here is whether the licensing committee were really doing anything more. In the circumstances of this case, I think they were not. They were to see the policemen and the applicant. They were to hear their allegations and counter-allegations and to report if they thought the result would or might change the commissioner's decision to revoke. In doing that they were, in my opinion, simply taking a share in the administrative acts culminating in the revocation of the licence, and that share did not involve that they were taking part in judicial or quasi-judicial proceedings. Had it been otherwise, I think the applicant should have been allowed to call the witness

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Gray, whose evidence that the taxi-meter showed 8s. 3d. at midnight conflicts with the evidence of the officers that it showed nothing. This was a material issue, since if Gray convinced the committee that he was right, the reliability of the two police officers as witnesses would have been at least to some degree affected. That point, of course, does not arise once the conclusion is reached that this is not a proper case for the issue of the writ.

I would add on the alternative argument that the commissioner in this case wrongfully delegated his power of revocation to the assistant commissioner or the licensing committee, that on the facts as disclosed by the commissioner's affidavit, the commissioner took the decision to revoke and simply communicated it through the assistant commissioner, and in this I see no delegation of authority. I agree that the application must be dismissed.

*Application dismissed.*

Solicitors: *Philip Conway, Thomas & Co.; Solicitor, Metropolitan Police.*

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[QUEEN'S BENCH DIVISION.]

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*July* 20, 21.

Lord Goddard, C.J., Parker and Donovan JJ.

* REGINA *v.* STATUTORY VISITORS TO ST. LAWRENCE'S HOSPITAL, CATERHAM; *Ex parte* PRITCHARD.

*Mental Deficiency—Detention order—Defective under* 21 *years of age—Consideration of defective's case by statutory visitors—Visitors' report of opinion to board of control — Recommendation that detention order be extended—Whether certiorari will lie—Reports—Disclosure—Mental Deficiency Act,* 1913 (3 & 4 *Geo.* 5, *c.* 28), *s.* 11 *—Mental Deficiency Regulations,* 1948 (*S.I.* 1948, *No.* 1000), *regs.* 99, 102.

By section 11 of the Mental Deficiency Act, 1913, a detention order made under the Act "(1) . . . shall expire at the end of one "year . . . unless . . . (2) . . . the [Board of Control], after con- "sidering such special reports . . . hereinafter mentioned . . . con- "sider that the continuance of the order is required . . . (4) The "special reports . . . shall be—(*a*) A special report by the visitors ". . . after having seen the defective as to his mental condition "and the means of care and supervision which would be available "if he were discharged, and stating whether, in the opinion of the "visitors, the defective is still a proper person to be detained . . ."

On June 19, 1952, a metropolitan magistrate made an order under section 8 of the Mental Deficiency Act, 1913, for the detention of the applicant, then aged 19 years, who had pleaded guilty to a charge of larceny. The applicant was detained in an institution and on May 29, 1953, the statutory visitors considered her case in accordance with their duties under section 11 (4) of the Act. The applicant's mother desired to be present at the meeting of the visitors and to be heard by counsel, but the visitors, although allowing her and her counsel to be present (except when the daughter was examined), did not hear her. After examining the applicant the visitors reported to the board their opinion recommending her

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continued detention. On an application for an order of certiorari to bring up and quash the report of the opinion of the visitors:—

*Held* that, by contrast with their duties under section 11 (3), which applied only on a reconsideration of a case when a defective came of age when it was the visitors' duty to decide whether the detention order was to be continued, the duties of the visitors under section 11 (2) in making the special report described by section 11 (4) were to see the defective and to report on his mental condition and the means of care and supervision available were he to be discharged, and to report to the board their opinion whether he was still a proper person to be detained; the decision whether the detention order should be extended was the decision of the board alone, the visitors' report being no more than an expression of opinion and material for the board to consider in coming to that decision. The applicant in the present case not having attained the age of 21, the visitors were acting under section 11 (4) and, therefore, having no power to come to a decision and not being a body whose duty it was to act judicially they were not a body to whom the writ of certiorari in respect of their report would lie.

*Rex* v. *Boycott* [1939] 2 K.B. 651; [1939] 2 All E.R. 626 distinguished.

*Per* Lord Goddard C.J. Quaere whether the document in *Rex* v. *Boycott* was capable of being the subject of an order of certiorari.

It is necessary that persons holding official appointments who are required to make reports concerning the homes and parents of defectives of the kind necessary for enabling the visitors to form an opinion should be able to report frankly and freely without fear of their reports being disclosed in a court of law or shown to other persons. Such reports are of a highly confidential and private nature and therefore, although they should be in court and submitted for the consideration of the court and there is no question of Crown privilege, their contents should not be disclosed unless the court so orders, when opportunity will be given to the other side to examine them.

APPLICATION for an order of certiorari.

In June, 1952, the applicant, a girl then aged 19 years, pleaded guilty to a charge of larceny before a metropolitan magistrate, who remanded her for a week for a report and on June 19, 1952, made an order for her detention under section 8 of the Mental Deficiency Act, 1913. The applicant appealed to quarter sessions who upheld the magistrate's order, and on August 19, 1952, she was taken to St. Lawrence's Hospital, Caterham, where she was detained. On May 29, 1953, eleven months after the making of the detention order, the statutory visitors assembled to consider the applicant's case and to report to the Board of Control in accordance with their duties under section 11 [1] of the Act. The applicant's mother desired to be

[1] Mental Deficiency Act, 1913, s. 11: "(1) An order made under "this Act that a defective be sent to "an institution or placed under "guardianship shall expire at the end "of one year from its date, unless "continued in manner hereinafter "provided: Provided that in the case "of any institution the Board may by "order direct that orders that persons be sent thereto shall, unless "continued as hereinafter provided, "expire on the quarter day next after "the day on which the orders would "have expired under the above provision. (2) An order shall remain "in force for a year after the date "when under the preceding provisions

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present at the visitors' meeting and to make representations by counsel, but the visitors, although they allowed the mother and her counsel to be present, did not hear her nor did they allow the mother or counsel to be present when they examined the applicant. The visitors considered the applicant's case and reported to the Board of Control their opinion recommending that the detention order be continued.

The applicant, acting by her mother and next friend, moved the court for an order of certiorari to bring up and quash the report of the opinion reached by the visitors on May 29, 1953, and further, and in the alternative, to bring up and quash any order of the Board of Control subsequently made on considering the report of the opinion when determining whether or not to extend the detention order: on the grounds that the visitors, in failing, inter alia, to enquire from the mother and lawful guardian of the applicant what means of care and supervision would be available to her if she were discharged, had failed to carry out their duty under section 11 (4) (*a*) of the Mental Deficiency Act, 1913; that the opinion of the visitors was not arrived at judicially in that neither the applicant's mother nor her counsel were allowed to address the visitors before they reached their opinion, nor to be present while the visitors examined the applicant; that the proceedings held by the visitors were null and void on account of denial of natural justice by the exclusion of the applicant's mother and her counsel; and that the report of the opinion formed by the visitors was not a special report prepared in compliance with the provisions of section 11 of the Act; and that, therefore, the Board should not consider the report when

" of this section it would have expired, " and thereafter for successive periods " of five years, if at that date and at " the end of each period of one and " five years respectively the Board, " after considering such special " reports and certificate as is herein- " after mentioned and the report of " any duly qualified medical practi- " tioner who, at the request of the " defective or his parent or guardian " or any relative or friend, has made " a medical examination of the defec- " tive and the means of care and " supervision which would be avail- " able if the defective were discharged " consider that the continuance of the " order is required in his interests and " make an order for the purpose: " Provided that, where a defective " was, at the time of being sent to " the institution or placed under " guardianship, under twenty-one " years of age, the case shall be re- " considered by the visitors appointed " under this Act within three months " after he attains the age of twenty- " one years. . . . (4) The special " reports above mentioned shall be— " (*a*) a special report by the visitors " made within one month after having " seen the defective as to his mental " condition and the means of care and " supervision which would be avail- " able if he were discharged, and " stating whether, in the opinion of " the visitors, the defective is still a " proper person to be detained in his " own interest in an institution or " under guardianship; (*b*) a special " report as to the mental and bodily " condition of the defective made, in " the case of a person detained in an " institution, by the medical officer of " that institution . . . accompanied " by a certificate that the defective is " still a proper person to be detained " in his own interest . . . and the " person sending the special report " shall give to the Board such further " information concerning the defective " . . . as they may require. . . ."

determining whether or not the detention order should be extended.

*Sir Frank Soskice Q.C.* and *P. J. H. Benenson* for the applicant.

*F. H. Lawton* and *T. F. Southall* for the visitors.

*S. B. R. Cooke* for the Board of Control.

The following cases were referred to in argument: *Rex* v. *Boycott* [2]; *Rex* v. *Postmaster-General* [3]; *Reg.* v. *Manchester Legal Aid Committee* [4]; *Everett* v. *Griffiths* [5]; *B. Johnson & Co. (Builders) Ld.* v. *Ministry of Health* [6]; and *Rex* v. *London County Council.* [7]

LORD GODDARD C.J. stated the facts, referred to section 11 of the Mental Deficiency Act, 1913, and continued: The proviso to subsection (2) does not arise in this case because the applicant has not yet attained the age of 21 years; when she does, that proviso and the provisions of subsection (3) will come into force. It is to be observed that on the clear words of subsection (2) it is the Board of Control that has to come to a decision whether or not the detention order should be extended, and the subsection tells the board what they are to consider in coming to their decision—that is, "such special reports and certificate as is "hereinafter mentioned." By subsection (4) the special report must be made by the visitors who have to see the defective and to report on his condition, and also on the means of care and supervision which would be available if he were discharged, and who have to state whether in their opinion the defective is a proper person to be detained in his own interest in an institution or under guardianship.

Here it is sought to bring up and quash the special report by the visitors. The first thing that has to be borne in mind in all these cases is the scope of the order of certiorari. In these days this court has no desire to limit the scope of the order, but before modern legislation so enormously increased the number of orders and inquiries which are made by various government departments, it only used to apply to what was, strictly speaking, an inferior court. The writ of certiorari which used to be issued from this court was directed to the inferior tribunal, calling on it to return into this court the record and orders it had made, or the judgment given, or the particular process which it was desired to question, in order that this court might examine the order that was made and see whether it was in accordance with law

[2] [1939] 2 K.B. 651; [1939] 2 All E.R. 626.
[3] [1928] 1 K.B. 291; 43 T.L.R. 228.
[4] [1952] 2 Q.B. 413; [1952] 1 T.L.R. 476; [1952] 1 All E.R. 480.
[5] [1921] 1 A.C. 631; 37 T.L.R. 481.
[6] [1947] 2 All E.R. 395; [1947] W.N. 251.
[7] [1931] 2 K.B. 215; 47 T.L.R. 227.

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or not. In modern times the scope of the order of certiorari has been considerably increased. Atkin L.J. said in *Rex* v. *Electricity Commissioners, ex parte London Electricity Joint Committee Co.* (1920) [1]: "Wherever any body of persons having "legal authority to determine questions affecting the rights of sub-"jects, and having the duty to act judicially, act in excess of their "legal authority they are subject to the controlling jurisdiction "of the King's Bench Division exercised in these writs." It will be observed that the persons must have "authority to "determine," and they must be persons who have a duty to act judicially. Their orders, if they act in excess of their authority, can be reviewed by this court under the order of certiorari which has now taken the place of the writ, but it is essential to remember, as we tried to emphasize only last week in *Reg.* v. *Metropolitan Police Commissioner* [2] that there must be something that can be called a determination which will affect the rights of the party, and there must be a tribunal whose duty it is to act judicially. It is not easy to give a definition of exactly what is meant by "act judicially," but, in my opinion, for this purpose the expression refers to a body which is bound to hear evidence from both sides. Although there need not be anything strictly called a lis, it must be a body which has to hear submissions and evidence and come to a judicial decision in approximately the way that a court must do. Unless there is an order or a determination which the body has made, the order of certiorari will not lie. Many attempts are constantly made in this court nowadays to enlarge the order of certiorari beyond that which can possibly be admitted. It is very important that bodies, given wide powers affecting the property of Her Majesty's subjects, should be controlled and kept within the bounds of the jurisdiction which has been conferred by Parliament. But if Parliament has put duties upon persons or has given them certain powers, it is not for this court to take away those powers unless it is found that they have been exceeded. The first question, therefore, which we have to decide is whether the persons to whom this order is sought to be directed are a tribunal at all.

It appears clear, despite the strenuous argument of Sir Frank Soskice and the numerous authorities to which he has referred, that the visitors are not, for this purpose, a tribunal, and have no power to give a decision. The decision whether the applicant is to remain in the hospital after the year has elapsed, that is to say, after August 19, is the decision of the Board of Control, and the visitors' reports prescribed in the Act are no more than evidence or material which is put before the board to enable the board to come to a decision. The visitors have no power under section 11 (2) to say that the applicant is to be detained after a year; their duty is to see her, to ascertain the means of care and

[1] [1924] 1 K.B. 171, 205; 39 T.L.R. 715.

[2] Ante, p. 1150.

supervision which would be available if she were discharged, and then to state whether, in their opinion, she is a proper person to be detained in her interests in the institution.

Much reliance was placed on *Rex* v. *Boycott*,[3] which was said to be conclusive of this case. That case was decided under section 31 of the Act of 1913, and deals with an entirely different matter, and in my opinion, has no application to the present case. I think that there are certain matters with regard to that decision which some day may be considered by the Court of Appeal, but I notice that counsel for the respondents appeared to admit that the order was one which could be subject to certiorari. Humphreys J. in that case said[4]: "In my opinion "the order of certiorari ought to go in this case in regard to all "three documents. In regard to the most important of those "three—namely, the certificate of October 5—as I understood "the argument of Mr. Morris, he was not in a position to "contend that, if that document was one which could not be "allowed to stand, and ought not to stand, it was not a document "which, in the circumstances, would fall within the language "used by Lord Justice Atkin in *Rex* v. *Electricity Commis-*"*sioners, ex parte London Electricity Joint Committee Co.* (1920) "*Ld.*[5] to which my Lord has referred. Therefore, as I understood "his argument, he was admitting (and certainly not contending to "the contrary) that, if that document was a document exhibiting "the defects which it was alleged to exhibit, it might be the "subject of this order of certiorari."

Speaking for myself, I do not feel convinced that the admission made by counsel in that case was right. But, as I understand that decision the court treated the certificate as a document which they could bring up and quash because it decided the question whether the boy was an imbecile; there was also in that case a letter which the court thought should be brought up because it appeared to the court that it decided whether the local education committee should make provision for the child or not. That case is binding on this court, and if the same point came up again we should have to give effect to the decision; but in the present case we are dealing with quite another section which is worded in a different manner.

When the visitors assembled to consider the case, the applicant's mother desired to be heard by the visitors, and she wanted to be represented by counsel. The visitors did not hear counsel; although they allowed the mother and her counsel to come into the room; nobody suggests that they heard her in the way in which they would have been bound to hear her if they had been a tribunal.

Where, however, do we find that there is any obligation on the visitors to hear anybody? They are not entrusted with the duty of coming to a decision. Whether or not it would be

[3] [1939] 2 K.B. 651; [1939] 2 All E.R. 626.

[4] [1939] 2 K.B. 651, 660.

[5] [1924] 1 K.B. 171.

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desirable that the mother should be allowed to attend at the meeting held by the visitors and make representations is not a matter for this court; it is a matter for Parliament, and Parliament has not provided for it. I can find nothing in the section which requires the visitors to hold an inquiry at which the mother is entitled to be present, or indeed, at which anybody is entitled to be present—except the patient whom the visitors have to see to form their opinion of him. Moreover, there is nothing in the section read as a whole which by any stretch of construction could mean that the visitors have to receive evidence or hear representations. The visitors have to form an opinion and report to the board, and this report is intended for the guidance of the board in considering whether the board are going to make an order for the detention of the patient under this Act. The board is told by Parliament what evidence and what matters they must consider when they come to a decision; they must have before them a certificate from the doctor of the institution or some other doctor who may be appointed for that purpose with regard to the condition of the girl, and, if the parent or guardian chooses to have the opinion of a medical practitioner that also is included by section 11 (2) in the matters which have to be considered by the board, but the decision has to be the decision of the board and not that of the visitors. To say that the visitors' report, which is a report of their opinion, and is nothing more nor less than a piece of evidence, can be brought up to be quashed by this court by means of certiorari would be extending the doctrine relating to certiorari to an unlimited and an unfortunate extent. I have never heard of a case in which this court has ever granted certiorari to bring up a report and it is abundantly clear that the visitors are not a body to whom certiorari will lie in this respect because they have no power to come to a decision.

Representations, can, no doubt, be made to the board and the secretary of the board has filed an affidavit in opposition to this motion setting out the procedure followed by the board, which shows the care taken before an order is extended, and no doubt the board's desire is to consider most carefully everything that can be placed before them. I am not expressing any opinion whether or not the board will have enough material before them—that is a future question—and in what circumstances, if any, certiorari will lie to the board, because that is not a matter with which we are at present concerned.

Reliance was placed by Sir Frank Soskice on regulation 99 of the Mental Deficiency Regulations, 1948, which, he said, recognizes that the report of the visitors is a decision. I do not think that it does; regulation 99 is dealing not only with the visitors acting under section 11 (4), but also under section 11 (3), which deals with the reconsideration by the visitors within three months after the patient attains the age of 21 if the order for his detention was made before he attains 21. Subsection (3) provides: "On

" such reconsideration the visitors shall visit the defective or " summon him to attend before them and inquire into his mental " condition and the means of care and supervision which would " be available if he were discharged and into all the circumstances " of the case, and, if it appears to them that further detention " in an institution or under guardianship is no longer required in " the interests of the defective himself, shall order him to be dis- " charged: Provided that, if the visitors do not order his dis- " charge, the defective or his parent or guardian may, within " fourteen days after the decision of the visitors has been com- " municated to the defective and his parent or guardian, appeal " to the Board." That subsection deals with the case where the patient is not entitled to be discharged by reason of the order expiring, but merely because he has arrived at the age of 21; in that case the visitors reconsider the case and decide whether to discharge him or not, and if they do not order his discharge then his parents can appeal to the board. That is simply a provision as to what is to happen when a person who has been committed under age comes of age, quite irrespective, it seems to me, of the period for which the order is to remain in force under subsection (2). Regulation 99 is, as the marginal note " Procedure on con- " sideration or reconsideration of cases of patients by visitors " shows, giving an omnibus form of directions to the visitors both when they are inquiring under subsection (2) and under subsection (3), but their duties and powers under the subsections are quite different. Therefore regulation 99 does not help the applicant in this case. The result is that, in my opinion, certiorari will not lie, and this application is misconceived and must be dismissed.

Before I part with this case, I want to say a word on a matter of some importance. Two reports, one from the medical officer of the institution, and one from the officer of the London County Council Public Health Department, both of which were properly before the visitors, were made exhibits to the affidavit, a very proper affidavit, which two of the visitors made, and Mr. Lawton told us that the reports were disclosed on his advice, so that no suggestion could be made that the visitors were concealing anything from the court. I think, however, it should be understood that such reports are of a highly confidential nature. I do not suggest that Crown privilege can be claimed for them, but these are reports which persons holding official appointments are directed to make to enable the visitors to carry out the duty of forming an opinion. It is obvious that in making these reports matters of a confidential nature have to be dealt with such as the condition of the homes and what opinion they formed of the parents of the patients, and also of the condition of the patients themselves. It is most desirable that officers who have to make this kind of report to a body such as the visitors for the purpose of being laid before the Board of Control should be able to do so quite frankly and freely without the fear that their reports will be disclosed

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in courts of law or shown to various people in circumstances which might lead to action of libel. The right course in such circumstances as these where reports have been before the visitors is that the visitors should mention the facts and submit those reports for the consideration of the court if the court orders them to be disclosed. But we do not think that it was ever intended that they should be treated as other than highly confidential, and they are not to be brought out unless the court thinks that a good purpose would be served. The court, if they thought fit, would order them to be shown to the other side, and, if necessary, would allow an adjournment for them to be considered. Although I can well understand why the reports were produced, and without attaching any blame to Mr. Lawton for the advice which he gave to the visitors for the guidance of the authorities in these matters, we do not think that, unless the court is of the contrary opinion, these reports ought to be disclosed.

PARKER J. I agree, and I would only add that in my opinion it cannot be too clearly understood that the remedy by way of certiorari only lies to bring up to this court and quash something which is a determination or a decision. In the passage which my Lord has already quoted from *Rex* v. *Electricity Commissioners* [6] it is perfectly plain that Atkin L.J. was dealing with a determination of questions affecting the rights of subjects; Scrutton L.J. in *Rex* v. *London County Council* [7] said: "The "writ of certiorari is a very old and high prerogative writ drawn "up for the purpose of enabling the Court of King's Bench to "control the action of inferior courts and to make it certain that "they shall not exceed their jurisdiction; and therefore the writ "of certiorari is intended to bring into the High Court the decision "of the inferior tribunal, in order that the High Court may be "[satisfied] whether the decision is within the jurisdiction of the "inferior court."

There has been a great deal of discussion and a large number of cases extending the meaning of the word "court." A number of such cases were referred to in a decision of this court in *Reg.* v. *Manchester Legal Aid Committee*,[8] but nothing in that case was intended to, or did in any way, enlarge the scope of the remedy by way of certiorari so far as it affects the point that there must be a decision or determination. The sole question in debate in that case was as to the scope of the court, or tribunal, or body of persons, and it had nothing to do with the question whether it was or was not necessary to have a determination or decision.

In the present case, as the notice of motion itself states, the court is being asked to quash the report of the opinion reached by the statutory visitors. Turning to section 11 of the Act of

[6] [1924] 1 K.B. 171, 205.
[7] [1931] 2 K.B. 215, 233.
[8] [1952] 2 Q.B. 413; [1952] 1 T.L.R. 476; [1952] 1 All E.R. 480.

1913, Parliament itself has pointed, it seems to me, the contrast between the duties of the visitors under subsection (2) which is the case here, and under subsection (3). Subsection (3) is dealing clearly only with the case of reconsideration when a patient comes of age and enables the visitors to arrive at a decision. Parliament there uses the word "decision," and the visitors can order the discharge or can decide that the patient must continue to be detained, and in the latter event there is a right of appeal to the board. When they are acting under that subsection the visitors are clearly coming to a decision whereas under subsection (2) all they have to do is to report to the Board of Control whether in their opinion the defective is still a proper person to be detained in his own interests in an institution. Having made that report, it is then for the board, and for the board alone, to come to a decision on the matter and to make, if they so decide, a continuation of the detention order.

Sir Frank Soskice has pointed to the use of the word "decision" in the regulations and in particular in regulations 99 (2) and 102. So far as regulation 102 is concerned, it is perfectly plain that the regulation, when it says that the visitors shall communicate their decision on the case to the board, is dealing only with the case of reconsideration under subsection (3). Regulation 99, paragraph 2, provides that before making any decision the visitors shall consider a report as to a number of different matters; by the marginal note to that regulation, however, it appears that it is an omnibus provision dealing both with the way in which the visitors are to carry out their duties under subsection (2) and as to how they are to carry out their duties under subsection (3). So far as subsection (3) is concerned, "decision" is the word used by the Act itself.

Sir Frank Soskice also referred to, and strongly relied on, *Rex* v. *Boycott*.[9] As my Lord has said, in that case it was conceded, rightly or wrongly, that the certificate in question was a document with regard to which certiorari would lie; but, quite apart from that, the case arose under different sections of the Act, in particular, under section 31 which empowered, and indeed, made it the duty, of the local education authority to ascertain what children within its area were incapable of receiving further benefit at school. It was further provided, by invoking the Elementary Education (Defective and Epileptic Children) Act, 1899, that in arriving at that decision they were required to have a certificate by a duly qualified practitioner approved by the education department to the effect that the child was a defective, and it was that certificate which was quashed. By regulations made under that Act it was further provided that the education authority having got that certificate, had to consider the matter. If they thought that there was any doubt, they

[9] [1939] 2 K.B. 651; [1939] 2 All E.R. 626.

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had, under section 31 (1), to refer the matter for the determination of the Board of Education; but, if they were satisfied that there was no doubt, they had to send on the certificate with a covering letter to the proper department of the local authority, the mental deficiency committee. In *Rex* v. *Boycott* [9] that procedure was followed out and on October 10, 1938, as it appears from the report,[10] the education committee wrote to the mental deficiency committee saying: "I am directed to forward here-" with copy of the report of Doctor Norman Boycott on form "306 M with regard to this boy and am to request that the "committee under the Mental Deficiency Act will be so good "as to consider the advisability of arranging for the boy to be "medically examined with a view of his certification." So that it may be—I am not deciding it—that the matter was conceded before the court, but it may be that the decision there could be justified on the basis that that letter, coupled with the report, was the decision of the local education authority under section 31, that there was no doubt requiring the matter to be referred to the Board of Education, and that they had ascertained that the child was incapable of deriving any further benefit.

Reference was also made to *Rex* v. *Postmaster-General*,[11] where the certificate of the Post Office medical officer certifying that a workman was suffering from telegraphist's cramp was quashed on the ground that the medical officer in question was not the person laid down by the Act. That case was again relied on as being a case of a certificate being quashed, but it is to be observed that although that certificate did not completely conclude the matter, in that the workman who had got that certificate still had to show that his condition resulted from his employment, nevertheless it was final and conclusive on the point that the workman was suffering from cramp, which was the first condition of his obtaining compensation.

In my view, this motion fails on the ground that there is no decision or determination to be quashed, and, accordingly, it is unnecessary for me to consider the further matter whether the visiting justices could be said to be under any duty in a case such as this to hear the mother or any representation on her behalf. I agree that this motion fails.

DONOVAN J. I agree; in particular I agree with the reasons expressed by the other members of the court for distinguishing the present case from *Rex* v. *Boycott*,[12] to which reasons I can usefully add nothing.

*Application dismissed.*

Solicitors: *Harold Miller & Co.; Wontner & Sons; Solicitor, Ministry of Health.*

J. F. L.

[9] [1939] 2 K.B. 651; [1939] 2 All E.R. 626.
[10] [1939] 2 K.B. 651, 658.
[11] [1928] 1 K.B. 291.
[12] [1939] 2 K.B. 651.

[COURT OF APPEAL.]

## * HAWES AND ANOTHER *v.* EVENDEN.

C. A.

1953
*July* 22.

Somervell, Jenkins and Hodson L.JJ.

*Landlord and Tenant — Rent restriction — "Tenant" — Mistress of deceased tenant—Children born of association—Whether member of tenant's family—Test to be applied—Increase of Rent and Mortgage Interest (Restrictions) Act*, 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 12 (1) (*g*).

On the death of the tenant of rent controlled premises the landlords applied for an order for possession, which was refused, the county court judge holding that the defendant, an unmarried woman, was entitled to remain in occupation as a member of the deceased tenant's family, under section 12 (1) (*g*) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. The defendant had lived with the tenant as his mistress for some 12 years, and had given birth to two children by him. She had not assumed the tenant's surname, but the children used it, and the tenant had acknowledged their paternity and, when able to do so, had brought their clothes. In recent years the defendant, by her own earnings, had helped to keep the home together. On appeal by the landlords:—

*Held*, that the evidence justified a finding that the tenant, the defendant and the children had lived together as a family, and therefore the defendant was a member of the tenant's family under, and entitled to the protection of, section 12 (1) (*g*).

The approach indicated by Cohen L.J. in *Brock* v. *Wollams* [1949] 2 K.B. 388 at p. 395; [1949] 1 All E.R. 715 applied.

APPEAL from Judge Done, sitting at Clerkenwell County Court.

The plaintiffs, Charles Walter Hawes and John Hurley Costello, were the owners of a dwelling-house at Islington, and they sued for possession of three rooms of which one Randall had been the tenant up to the time of his death. For some 12 years Randall and the defendant, Lilian Maud Evenden, had occupied the rooms as man and wife, though they were not married, and two children had been born of the association. Miss Evenden had not assumed Randall's name, the reason which she gave being that all the neighbours knew that she was not married. Randall, however, acknowledged the paternity of the children, who used his surname, and, when he was able, he bought clothes for them. On Randall's death the defendant, Miss Evenden, claimed to be entitled to retain possession of the three rooms as a member of the tenant's family within section 12 (1) (*g*) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920.

The county court judge refused the landlords' claim to possession and granted a declaration in the defendant's favour.

The plaintiffs appealed.

*Roger Willis* for the plaintiffs.

*Miss Norwood* for the defendant.

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The following cases were referred to in argument: *Brock* v. *Wollams* *; *Gammans* v. *Ekins* †; *Perry* v. *Dembowski* ‡; *Carter* v. *Emson* §; *Langdon* v. *Horton*.¶

SOMERVELL L.J. In this case the county court judge refused an order for possession, holding that the defendant, Miss Evenden, was entitled to the protection of section 12 (1) (*g*) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, which provides that: "The expression 'tenant' includes the "widow of a tenant . . . who was residing with him at the time "of his death, or, where a tenant . . . leaves no widow or is a "woman, such member of the tenant's family so residing as "aforesaid as may be decided in default of agreement by the "county court." The tenant here was a Mr. Randall. He died. For some 12 or 13 years before his death the defendant had lived with him as his mistress. Two children had been born. One was adopted by other parents, and the youngest, who is about eight years of age, was living in the house in question with her father and mother at the time of her father's death, and was still living with the mother at the time of these proceedings. She was not before the court. The only question before the court was whether the mother had the right to stay on under the words of the section.

In *Gammans* v. *Ekins* [1] a man and a woman had been living together for some years in a house. They were not married and the man had taken the woman's name. They were regarded in the neighbourhood as man and wife. The woman, who was the tenant, died, and the man claimed the protection of the above section. It was decided that he could not be held to be a member of the deceased tenant's family, but the question was referred to, and left open, whether the result would or might have been different if there had been children. We are here concerned with a case where there are children and where the claim is put forward by the woman, the mother of the children. As was pointed out by Asquith L.J. in *Gammans'* case,[1] a husband has been held on the authorities to be a member of his wife's family, an adopted child a member of the adoptor parents' family, and he referred to cases.

The basic principle, which has been referred to a number of times, as the test on which these matters should be approached was laid down by Cohen L.J. in *Brock* v. *Wollams* [2]: "The "question the county court judge should have asked himself "was this: Would an ordinary man, addressing his mind to the "question whether Mrs. Wollams was a member of the family

* [1949] 2 K.B. 388, 395; [1949] 1 All E.R. 715.
† [1950] 2 K.B. 328, 331; 66 T.L.R. (Pt. 1) 1139; [1950] 2 All E.R. 140.
‡ [1951] 2 K.B. 420; [1951] 1 T.L.R. 1166; [1951] 2 All E.R. 50.
§ [1947] L.J.N.C.C.R. 291; Megarry, 7th ed., p. 210.
¶ [1951] 1 K.B. 666; [1951] 1 T.L.R. 238; [1951] 1 All E.R. 60.
[1] [1950] 2 K.B. 328.
[2] [1949] 2 K.B. 388, 395.

" or not, have answered 'Yes' or 'No'?". The county court judge in the present case, after summarizing the facts and the evidence, said this: "They all lived together as a family. He "treated and acknowledged the children as his own and they used "his surname. She did not take his name. She said that it "would have made no difference as all the neighbours knew that "they were not married. Parents and children continued to live "together in this way up to Randall's death."

Miss Evenden, in her evidence, said that the original suggestion was that she should go there as a housekeeper, and in one part of her evidence she referred to wages. It seems to me plain from her evidence as a whole, however, that she came as his mistress, and that that was the arrangement, and that she received from him small sums from time to time for the general housekeeping expenses. There is nothing in the evidence which would justify a challenge against the county court judge's finding that they all lived together as a family. Later in his judgment, following the language which Jenkins L.J. had used in another case, he said: "There was here in fact 'the equiva-"'lent of a marriage with the natural consequences of a "'marriage.'" He held that on the facts of the case not only the children but also their mother were members of the tenant's family.

From that decision the plaintiff appeals, and this question, left open in *Gammans* v. *Ekins*,[3] falls to be decided. I think that the county court judge put the right question to himself and that his decision was right. The mere fact that someone living in a house, possibly as one of a number of domestic servants, has had a child by the tenant and the tenant makes provision for the child, and so on, would not in itself, I think, constitute the father and the mother of the child a family within the meaning of the section. But in a case where the evidence justifies a finding that they all lived together as a family, then, applying the approach indicated by Cohen L.J., I think that the mother is a member of the family within section 12 (1) (*g*) as was held by the county court judge. In those circumstances I would dismiss the appeal.

JENKINS L.J. I agree and find nothing that I can usefully add to what my Lord has said.

HODSON L.J. I also agree.

*Appeal dismissed.*

Solicitors: *Clarke, Lewthwaite & Co.; Peter Kingshill.*

A. W. G.

[3] [1950] 2 K.B. 328.

[QUEEN'S BENCH DIVISION.]

1953
*July* 28.

# * BROWNING *v.* J. W. H. WATSON (ROCHESTER) LD.

Lord Goddard C.J., Parker and Donovan JJ.

*Road Traffic — Public service vehicle — Express carriage — "Special "occasion"—Members of a club taken to a league football match on six occasions—"Private party"—Presence of two non-members on one occasion—Road Traffic Act,* 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *s.* 61 (1) (2).

On each of six occasions during the months of August, September, October and November, 1952, members of a club were taken by motor-coach to watch the first team of a football club play in a league match. On the last occasion two persons in the service of the licensing authority, who were not members of the club, boarded the omnibus and were conveyed to the ground. The coach proprietors having been charged in respect of each occasion with unlawfully permitting their coach to be used as an express carriage without a road service licence as required by section 72 of the Road Traffic Act, 1930, claimed that the vehicle was being used "on a special occasion for the conveyance of a private party" within the proviso to section 61 (2), and, therefore, was not to be deemed an express carriage:—

*Held* (1) that each occasion was "a special occasion" within the meaning of the proviso to section 61 (2), the words "special "occasion" being construed ejusdem generis with "race meetings, "public gatherings and other like special occasions" referred to in the proviso to section 61 (1).

*Miller* v. *Pill* [1933] 2 K.B. 308; 49 T.L.R. 437 applied.

*Nelson* v. *Blackford* [1936] 2 All E.R. 109 distinguished.

(2) that the presence of two non-members on the sixth occasion prevented the party from being a private party within the meaning of the proviso to section 61 (2) and the fact that neither the coach proprietors nor their servant in charge of the vehicle were aware of their presence was not a defence to the charge in respect of that occasion.

*Reynolds* v. *G. H. Austin & Sons Ld.* [1951] 2 K.B. 135; [1951] 1 T.L.R. 614; [1951] 1 All E.R. 606 distinguished.

CASE STATED by Rochester justices.

The prosecutor, Ernest Clifford Browning, preferred six informations on behalf of the licensing authority for public service vehicles for the South Eastern Traffic Area against J. W. H. Watson (Rochester) Ld., alleging that in contravention of section 72 of the Road Traffic Act, 1930, they unlawfully permitted their motor-coach to be used as an "express "carriage" within the meaning of the Road Traffic Acts, 1930–1937, on the road between Rainham and Gillingham without the appropriate licence required by section 72.

The following facts were proved or admitted before the justices: On August 30, September 13 and 27, October 18, November 1 and 15, 1952, respectively, the defendants' motor-coach was hired by the secretary of the United Services Club,

[Reported by MISS C. J. ELLIS, Barrister-at-Law.]

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Rainham, to take members of the club to Gillingham football ground. On each of those days the first team of Gillingham football club was playing in a Third Division (Southern) League match. On Saturday, November 15, 1952, the prosecutor and one Lander, a traffic examiner, boarded the motor-coach when it was standing outside the club premises at Rainham and travelled to Gillingham football ground as passengers, returning by the motor-coach after the match. Fares were collected from them and from a few other passengers by a committee member of the club. Neither the defendants' servants nor any other person, save the prosecutor and Lander, were aware that the motor-coach was carrying passengers who were not members of the club. On all the other occasions all the persons who travelled in the coach were members of the United Services Club. On each occasion all the conditions prescribed by section 25 (1) of the Road Traffic Act, 1934, were complied with by the defendants except in so far as the presence of the prosecutor and Lander on the sixth occasion constituted a non-compliance with condition (*a*). The defendants had no road service licence to use the motor-coach as an express carriage on any of the material dates.

The justices were of opinion that each of the occasions was a "special occasion" within the meaning of section 61 (2) [1] of the Road Traffic Act, 1930, and that the defendants could not be said to have permitted the use of the motor-coach on November 15, otherwise than for the conveyance of a private party as they were not aware of the presence of the prosecutor and Lander or that fares were collected from them, and they accordingly dismissed the informations.

The prosecutor appealed.

*Norman Skelhorn* for the prosecutor.

*M. Dunbar Van Oss* for the defendants.

The following cases were cited in argument: *Wurzal* v. *Dowker* [2]; *Nelson* v. *Blackford* [3]; *Macmillan* v. *Western S. M. T.*

[1] Road Traffic Act, 1930, s. 61: "(1) . . . Provided that a motor vehicle adapted to carry less than eight passengers shall not be deemed to be a stage carriage or an express carriage by reason only that on occasions of race meetings, public gatherings and other like special occasions it is used to carry passengers at separate fares . . . (2) It is hereby declared that where persons are carried in a motor vehicle for any journey in consideration of separate payments made by them, whether to the owner of the vehicle or to any other person, the vehicle in which they are carried shall be deemed to be a vehicle carrying passengers for hire or reward at separate fares, whether the payments are solely in respect of the journey or not: Provided that a vehicle used on a special occasion for the conveyance of a private party shall not be deemed to be a vehicle carrying passengers for hire or reward at separate fares by reason only that the members of the party have made separate payments which cover their conveyance by that vehicle on that occasion."

[2] [1953] 2 W.L.R. 1196; [1953] 2 All E.R. 88.

[3] [1936] 2 All E.R. 109.

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*Co., Ld.**; *Miller* v. *Pill* †; *Sidery* v. *Evans & Peters* ‡; *Reynolds* v. *G. H. Austin & Sons Ld.*§; *Brannan* v. *Peek.*¶

LORD GODDARD C.J. stated the facts and continued:—This case raises the sometimes difficult question which comes before this court, as to the meaning of "special occasion" and "private party." The appeal is brought to test whether the justices were right in holding that football matches were special occasions, and it is sought to say that because there were six football matches they could not be special occasions.

[His Lordship read the proviso to section 61 (1) of the Road Traffic Act, 1930, and section 61 (2), and continued:] Obviously the proviso to subsection (1) does not in terms apply to this case because the vehicle in question was adapted to carry more than eight passengers, but the cases which have dealt with this matter start with *Nelson* v. *Blackford*,[1] where this court, in giving judgment, said: "A special occasion must be a particular and "individual occasion analogous to a race meeting"; that is because "special occasion" is used in the proviso to subsection (1) as referring to the occasion of a race meeting, public gatherings and other like special occasions. Of course, if one finds the expression "special occasions" used twice in the same section one gives the same meaning to it. Therefore, the court has said, practically in so many words, that in construing the proviso to subsection (2) one has to apply the ejusdem generis rule and consider whether the occasion is something in the nature of a race meeting, a public meeting or other like occasion, an occasion for which it is contemplated that extra transport will be required to satisfy the public who want to go to these places.

In the present case the justices found that these football matches were special occasions, and the question is whether they were right in view of the fact that there were six matches all taking place within a comparatively short space of time, namely, on August 30, September 13 and 27, October 18 and November 1 and 15. It should be observed that there were no more than two in one month.

We are not, therefore, considering a case like *Nelson* v. *Blackford*,[1] where illuminations at Blackpool were continuing for a month and this court said that one could not have a special occasion where the occasion in question went on for a month. Here one is considering football matches of a special nature in the sense that they are not just ordinary club matches, but league matches, and take place not more than two in a month. Could the justices, therefore, on those facts, find that they were special occasions? In my opinion, clearly they could.

* 1933 S.C.(J.) 51.

† [1933] 2 K.B. 308; 49 T.L.R. 437.

‡ (1938) 55 T.L.R. 54; [1938] 4 All E.R. 137.

§ [1951] 2 K.B. 135; [1951] 1 T.L.R. 614; [1951] 1 All E.R. 606.

¶ [1948] 1 K.B. 68; 63 T.L.R. 592; [1947] 2 All E.R. 572.

[1] [1936] 2 All E.R. 109; 110.

Reliance is placed on *Miller* v. *Pill*,[2] which had to be considered by this court in *Wurzal* v. *Dowker*[3] because of a dictum of my own in *Victoria Motors (Scarborough) Ld.* v. *Wurzal*,[4] for which I hope, in *Wurzal* v. *Dowker*,[3] I stood sufficiently in a white sheet and with a candle in my hand because the attention of the court had not been called, in the *Victoria Motors* case,[4] to *Miller* v. *Pill*.[2] I still think that the view that we held in the former case was preferable to that held in *Miller* v. *Pill*,[2] but we are bound by *Miller* v. *Pill*, in which Humphreys J. said,[5] rather summarizing what the other members of the court had said: "... I should come to the conclusion that the expression "'special occasion' refers to something more than the views "and intentions of the members of the party and points to some-"thing which can be described as a special occasion in the "locality and was the object of the journey being undertaken."

It is common sense and common knowledge to say that a football match is very frequently a special occasion in the locality. People very often come from all over England to see a cup-tie, especially if it is getting somewhere near the final. The justices know what a league match is, and the sort of things which the people of Gillingham and Rainham treat as special occasions, and I cannot, for this purpose, see the difference between a football match and a race meeting. The Act has not provided that race meetings in order to be special occasions must only take place two or three times a year or at certain specified intervals. One can have a race meeting, as I said in the argument, at a place like Epsom, where the spring and summer meetings take place within quite a short time of one another; the City and Suburban takes place at one and the Derby takes place at the other, and each meeting lasts for so many days, and each of those days is a special occasion. Racing at Newmarket occurs a great number of times in the year; every one of them is a special occasion.

Therefore, when one finds that there are football matches where one club plays a different club each time—and there is no suggestion that these occasions are being used simply to provide an unauthorized omnibus service, but are trips provided for the members of a particular club on a particular occasion which the justices were, in my opinion, justified in holding was special to the locality—then I think the decision of *Miller* v. *Pill*[6] and all the doubts which may have existed since then are amply satisfied by the facts of the present case. Accordingly, with regard to five of these informations, there was evidence on which the justices could find and were justified in finding that the occasions of the journeys were special.

[2] [1933] 2 K.B. 308; 49 T.L.R. 437.

[3] [1953] 2 W.L.R. 1196; [1953] 2 All E.R. 88.

[4] [1951] 2 K.B. 520; [1951] 1 T.L.R. 837; [1951] 1 All E.R. 1016.

[5] [1933] 2 K.B. 308, 318.

[6] [1933] 2 K.B. 308.

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With regard to the sixth information, two persons in the employ of the Minister of Transport insinuated themselves among the members of the club and got into the bus; therefore, as they were not members of the club for whom the bus had been hired, but were outsiders or "snoopers," they prevented the party from being a private party. The justices, however, thought that the defendants could not be convicted because they did not know of the presence of these two people among the people who got into the omnibus.

Great reliance has been placed on *Reynolds* v. *G. H. Austin & Sons Ld.*[7], in which this court, in a reserved judgment, went very fully into the question of vicarious liability in these cases, but it should be observed that the facts in *Reynolds* v. *G. H. Austin & Sons Ld.*[7] were of a somewhat special nature. A women's institute at one town in Staffordshire had engaged a coach to take them on an outing, and as they had not sold quite enough tickets in the particular township where the women's institute was, they put up an advertisement in a window of a tradesman some miles away. Therefore, there had been a previous advertisement to the public of the arrangements for this private party. We pointed out in that case that the advertisement there was by the promoter and it was advertised a long distance away. There were no practical means by which the proprietors of the coach could know of this advertisement and they had no reason to suppose that the trip had been advertised. Accordingly, reviewing the cases over a long period, we came to the conclusion that they were not vicariously liable by reason of the fact that the persons who engaged them had committed a breach of the Act. But I think it is implicit throughout the judgments in that case that we were excluding the cases where a man or a company might incur vicarious liability because of his or their servants. In the present case the coach was in charge of the company's servant and although he did not know, because he did not inquire, and took no precaution to see, that only the members of the club got on board, we cannot absolve the defendants on that ground.

These are absolute prohibitions, and while it is true that in *Reynolds* v. *G. H. Austin & Sons Ld.*[7] we refused to impose vicarious liability, and a good deal of discussion took place about the doctrine of mens rea, mens rea in cases of absolute prohibition can be supplied by the simple doing of the forbidden act. We cannot say here that, if a coach proprietor lets a coach to a club for the conveyance of the members of the club and allows people who are not members of the club to get into the coach, he is not liable. Although there was no wilful violation in this case, it is clear that the proprietors should take some precaution, either by issuing tickets to the members so that the proprietors could see that the people who got on the bus were members, or

[7] [1951] 2 K.B. 135; [1951] 1 T.L.R. 614; [1951] 1 All E.R. 606.

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by insisting that a servant of the club, or the secretary, ensured that only members of the party got on to the bus. But it would be going too far to say that if the members of the public, other than members of the party, get on to the bus and are conveyed, it is an answer to say: "We did not know that that had happened."

No court in England has ever liked action by what are generally called agents provocateurs, resulting in the imposition of criminal liability. We are often told that unless such action is allowed breaches of the law cannot be detected. But Parliament can, if it sees fit, make provisions to meet that state of affairs. We must hold that, in the case of the sixth information relating to November 15, 1952, an offence was committed. We need only remind the justices that it is possible for them to grant an absolute discharge, and it is not even necessary for them when doing so to order payment of costs. That case must go back to the justices with a direction that the offence is proved.

PARKER J. I agree. On the facts found by the justices it is impossible to say that they were wrong in holding that the six occasions in question were not special occasions. Speaking for myself I should like to reserve the question whether, if in any particular case the facts showed that the occasions in question were more frequent, the time might come when those occasions cease to be special occasions by reason of their frequency.

DONOVAN J. I agree. I also agree with Lord Goddard C.J. that in determining what is a special occasion one must get back in the end to the words in the proviso of section 61 (1) of the Act of 1930, namely: "race meetings, public gatherings and other "like special occasions." These last words are to be construed to include "occasion" ejusdem generis with race meetings and public gatherings. I find it difficult to conceive of a genus which will include race meetings and public gatherings and yet exclude a football match, such as the present, an English league match probably attracting thousands of spectators. On the other aspect of the case I have no further observations to make.

*Appeal allowed in part.*

Solicitors: *Treasury Solicitor; Gregory, Rowcliffe & Co. for Wood, McLellan and Williams, Chatham.*

[COURT OF APPEAL.]

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Evershed M.R., Birkett and Morris L.JJ.

## * PERRINS *v.* DRAPER.

[LVC. 290. 1951]

*Rating—Dairy—Cooling, bottling and pasteurizing milk—Milk mostly produced elsewhere—Building occupied with agricultural land—Whether agricultural building—Whether used solely in connexion with agricultural operations on the land—Rating and Valuation (Apportionment) Act,* 1928 (18 & 19 *Geo.* 5, *c.* 44), *s.* 2.

A dairy on a farm was used solely for cooling, bottling and pasteurizing milk of which about 50 gallons each day were produced on the farm and the rest, about 200 gallons per day, was purchased elsewhere:—

*Held,* that the dairy was used in connexion with the agricultural operation of milk production, but as that operation was not confined to the land occupied with the dairy, the dairy was not "used "solely in connexion with agricultural operations thereon" within the meaning of section 2 of the Rating and Valuation (Apportionment) Act, 1928; accordingly, it was not an "agricultural "building" and, therefore, was assessable to rates.

*Thompson* v. *Milk Marketing Board* [1952] 2 Q.B. 817; [1952] 2 T.L.R. 231; [1952] 2 All E.R. 344 distinguished.

CASE stated by Lands Tribunal.

A farm of about 364 acres at Stourpaine, Dorset, known as Havelins Farm was, prior to 1937, occupied by the father of the appellant, H. Draper, who produced milk thereon which he retailed locally. In 1937, Havelins Farm was divided between the appellant and his brother. The appellant took over that part known as Coach Road Farm which comprised 64 acres of agricultural land, an agricultural dwelling-house, and a detached outbuilding, together with his father's milk business, and his brother occupied the other part which continued to be known as Havelins Farm. In 1950, the appellant built a dairy at Coach Road Farm in which he cooled and bottled all the milk sold through his retail business, and pasteurized some of it. About 50 gallons of milk were produced on Coach Road Farm, but the appellant also bought about 200 gallons of milk each day produced on Havelins Farm and, occasionally, in times of shortage he purchased milk in bulk from the United Dairies Ld. to make up his daily deliveries. The dairy building was occupied together with the agricultural land comprising Coach Road Farm and was used solely for the cooling, pasteurizing and bottling of milk.

The local valuation court for Dorset determined that the assessment relating to Coach Road Farm should be altered from gross value £50 and rateable value £40 to gross value £20 and rateable value £12 on the ground that the dairy was an "agricul- "tural building" within the meaning of the definition in

section 2 of the Rating and Valuation (Apportionment) Act, 1928,[1] and that it was not rateable. An appeal by the valuation officer was allowed by the Lands Tribunal who directed that the assessment be restored to the original valuation. The Lands Tribunal expressed its conclusions in the Case stated as follows: "We "came to the conclusion that the building is used solely for an "agricultural purpose, but that that use is in connexion not only "with the associated hereditament, but also and to a greater "extent with another hereditament altogether namely Havelins "Farm. In our opinion the decision in this case rested on the "construction of the words 'used solely in connexion with "'agricultural operations thereon' appearing in the definition "of 'agricultural buildings' in section 2 of the Rating and "Valuation (Apportionment) Act, 1928. We came to the con-"clusion that, subject to the de minimis rule, these words must "be interpreted as meaning on the agricultural land occupied "with the building in question and on that land alone. We "further concluded that the de minimis rule could not apply "seeing that some 75 per cent. of the milk treated in the "building was produced elsewhere than on the agricultural land "occupied with the [appellant's] premises." The tribunal, therefore, ordered that the appeal be allowed.

*W. M. Huntley* for the appellant.
*M. L. Lyell* for the valuation officer.

The following cases were referred to in argument: *Thompson* v. *Milk Marketing Board*[2]; *Smith* v. *Richmond*.[3]

EVERSHED M.R. stated the facts and continued: The sole question in the appeal is whether the dairy building is an "agricul-"tural building" within the meaning of section 2 (2) of the Rating and Valuation (Apportionment) Act, 1928. [His Lordship read subsection (2) and continued:] As a matter of English it seems to me that the relevant part of the definition is quite plain in its terms and meaning. The word "thereon" at the end of the definition must mean the agricultural land together with which the building is occupied, and the question, therefore, is whether this dairy is being used solely in connexion with some agricultural operations on the land with which the building is occupied.

There is no doubt that maintaining a herd of dairy cattle is an agricultural operation and, therefore, if this dairy were used

[1] Rating and Valuation (Apportionment) Act, 1928, s. 2: "(1) In this "Act the expression 'agricultural here-"'ditament' means any hereditament "being agricultural land or agricul-"tural buildings. (2) . . . 'Agricul-"'tural buildings' means buildings "(other than dwelling-houses) occu-"pied together with agricultural land ". . . and . . . used solely in con-"nexion with agricultural operations "thereon."

[2] [1952] 2 Q.B. 817; [1952] 2 T.L.R. 231; [1952] 2 All E.R. 344.

[3] [1899] A.C. 448; 15 T.L.R. 523.

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exclusively for cooling, bottling and pasteurization of milk which the appellant produced on his 64 acres of land the dairy would be properly described as being used solely in connexion with the agricultural operations on that land. But although this building is used in connexion with the agricultural operation of the production of milk, that operation is not confined to the land occupied with the building. The milk produced is produced only as to about one-fifth on that land and as to the rest on the appellant's brother's land. If, therefore, I am right in saying that the production of milk is the " agricultural operation " in question, then, the milk produced not being exclusively produced on the appellant's land, it seems to me plainly to follow that the building is not an " agricultural building " within the definition.

It was, however, said by Mr. Huntley, for the appellant, that the true " agricultural operation " which is here in question is not that of milk production, but the more limited operation of cooling, pasteurizing and bottling milk. But if that is the " agricultural operation," then it seems to me that it is exclusively carried on in the building and not on the adjoining land; alternatively it is an operation connected with milk which is certainly not produced exclusively on the land occupied by the appellant. In my judgment, however, the true agricultural operation here in question is that of the production of milk, not that merely of cooling, bottling and pasteurization. The case seems to me to be, therefore, distinct from *Thompson* v. *Milk Marketing Board* [1] and, save for the language of Somervell L.J., which supports the view I have taken of the meaning of the word " thereon " in the definition, the case does not, I think, assist in the solution of the present case. The question there related to a building which was part of a cattle-breeding centre established by the Milk Marketing Board used for the extraction of semen from bulls for the artificial insemination of cows. The agricultural land together with which the building in question was occupied was limited to some 29 acres, on which the bulls were grazed and otherwise maintained. The semen, having been extracted from the bulls, was used for the purpose of the insemination of cows not brought on or kept on the 29 acres, but maintained on other farm lands which were in no sense occupied with the building in question but occupied by farmers all round the neighbourhood. The argument for the valuation officer in that case was that the operation which consisted of and ended with the extraction of the semen could not be treated as being a complete agricultural operation: the total operation was the insemination of the cows and that operation was not carried out on the land in question. This court, however, held that the keeping of the bulls and the extraction of the semen from them was an agricultural operation which was distinct in itself and that it was irrelevant that the product of that operation was not

[1] [1952] 2 Q.B. 817.

something sold in the market but was something which was thereafter used by way of service elsewhere. Nothing in that case assists in the problem here, and for the reason which I have given it seems to me that the conclusion stated by the lands tribunal was correct. [His Lordship read the conclusions of the Lands Tribunal set out above, and concluded:] I agree with that conclusion and think, therefore, that this appeal fails and must be dismissed.

BIRKETT L.J. I agree. In the Case stated the two contentions are set out very clearly: "The [valuation officer] contends "that on the facts as found the dairy building is rateable in that "it is not an agricultural building within the meaning of section "2 since it is not used solely in connexion with agricultural operations on the land occupied therewith but also and to a greater "extent in connexion with agricultural operations on other "land." The appellant, on the other hand, contended "that the "dairy building is not rateable in that it is an agricultural "building within the said section 2 since it is occupied together "with agricultural land, and the kind of use to which it is solely "put consists of agricultural operations thereon and that such "use and operations are not connected with agricultural or any "operations on any other hereditaments."

That is a clear statement of the point at issue, and shows that *Thompson* v. *Milk Marketing Board*,[1] where the same section was under consideration but the facts were entirely different, does not lend any material assistance in the decision of the present case. I agree with the way in which the Master of the Rolls has framed the decision and there is nothing that I can usefully add to it.

MORRIS L.J. I also agree. The question may be posed as follows: Is the dairy building which is occupied together with 64 acres of agricultural land used solely in connexion with agricultural operations on the 64 acres of agricultural land? In my judgment, the answer to that question must be No, for the reason that the dairy building is partly used, and indeed very considerably used, in connexion with agricultural operations on other land—that is to say on the 364 acres.

*Appeal dismissed.*

Solicitors: *Church, Adams, Tatham & Co., for Burges, Salmon & Co., Bristol; The Solicitor of Inland Revenue.*

E. D.

[1] [1952] 2 Q.B. 817.

[COURT OF APPEAL.]

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Somervell, Jenkins and Hodson L.JJ.

## *JOSEPH *v.* JOSEPH.

*Husband and Wife—Divorce—Desertion—Jewish bill of divorcement—Consent to live separate and apart.*

A wife, whose husband had deserted her, obtained a *get* or Jewish bill of divorcement in the Beth Din, the court of the Chief Rabbi, in London:—

*Held*, that that amounted to an agreement by the wife to the husband's living separate and apart from her and that his desertion had thereby been terminated.

APPEAL from Mr. Commissioner Grazebrook Q.C.

The parties, both of whom were of the Jewish faith, were married on June 13, 1926, in the Synagogue in Shanghai. A son, the only child of the marriage, was born in April, 1927. The marriage became unhappy, and in 1936 the husband gave up his work in Shanghai, left his wife and went to India. In April, 1947, he settled in England and acquired an English domicile of choice.

In 1938 the wife came to England and consulted the Beth Din, the court of the Chief Rabbi in London, about the possibility of her obtaining a *get* or Jewish bill of divorcement from her husband. In 1940 she returned to Shanghai, where she and the son were interned by the Japanese from 1943 to 1945. After considerable correspondence between the parties concerning the obtaining of a Jewish bill of divorcement, the wife returned to England early in 1948, and on September 19, 1948, a *get* was given her in the Beth Din.

The wife had, at that time, the idea of returning to Shanghai, but, in view of the development of hostilities in China, she did not do so. Instead, she visited the son, who was at college in the United States, returning to England in 1951, when she brought the present petition for divorce on the ground of her husband's desertion.

The commissioner, on March 25, 1953, dismissed the petition on the ground that, although until September 19, 1948, the husband was in desertion, from that date, by consenting to the *get*, the wife had agreed to the husband's living separate and apart from her, thereby terminating the husband's desertion.

The wife appealed.

*Phineas Quass Q.C.* and *Ralph Millner* for the wife.

*B. St. Q. Power* for the husband.

[Reported by NIUL HOGG, Esq., Barrister-at-Law.]

The following cases were cited in argument: *Watson* v. *Watson* [1]; *Cohen* v. *Cohen* [2]; *Papadopoulos* v. *Papadopoulos* [3]; *Preger* v. *Preger*.[4]

SOMERVELL L.J. stated the facts, and said that the question was whether the circumstances attending the obtaining of the *get* and its effect prevented, as from that date, desertion running. His Lordship reviewed the evidence and continued: The commissioner referred to *Preger* v. *Preger* [1] and *Papadopoulos* v. *Papadopoulos*,[2] neither of which, I think, are conclusive, but he summarized the matter in this way: "The conclusion to which "I am driven is that the wife, by obtaining this *get* and insisting "upon it in the way in which she did, had consented to her "husband living apart from her and that, from that moment, "there was no desertion of the wife by the husband. That "remains the position, unless it can be said that there has been "any conduct of the wife or the husband to take the matter out "of the category of a consensual living apart." I think that that conclusion is inescapable. She did ask for this document and for a divorce valid according to Jewish law. There is no suggestion that both parties did not realize that it had no legal effect in English law and, indeed, the wife's evidence emphasizes that, in that she wanted it because, in her opinion at any rate, it would be effective in Shanghai. One has some sympathy with her if the step which she took in 1948 to obtain the *get* which she believed would effect what she wanted in Shanghai, has resulted in an obstacle in her way in relying on the desertion which started in 1937 and getting a divorce in this country, owing to the provisions of our law. However, she clearly asked the authorities to produce the document with her husband's consent, indicating that these two parties should, in future, by consent, live separate and no longer be man and wife according to the Jewish law. In those circumstances, I do not see how one can avoid the conclusion that she was terminating her husband's desertion by bringing about the state of affairs as between them, that they were to live apart. He was not thereafter in a position to come back to her, and if he had sought to do so she was entitled to say that she must abide by the decision of the *get*.

It is unnecessary to decide whether steps might be taken, now that both parties are apparently living in this country, which would enable her to put her husband again in desertion. I am only referring to that to indicate that I have not addressed my mind to that problem, and I am not indicating one way or the other what might or might not be possible.

[1] [1938] P. 258; 54 T.L.R. 1117; [1938] 3 All E.R. 770.
[2] [1940] A.C. 631; 56 T.L.R. 597; [1940] 2 All E.R. 331.
[3] [1936] P. 108; 52 T.L.R. 190.
[4] (1926) 42 T.L.R. 281.
[1] (1926) 42 T.L.R. 281.
[2] [1936] P. 108; 52 T.L.R. 190.

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For the reasons which I have given I think that the commissioner came to a right conclusion and that the appeal should be dismissed.

JENKINS L.J. I agree. Mr. Quass invited us to ignore the *get* given to the wife as a mere nullity having no effect in English law, either as a decree of divorce or as an agreement to separate. I agree with him that the *get* has neither operation. It clearly does not effect a divorce, and it does not in itself constitute an agreement to separate under English law. Nevertheless, it must, in my judgment, have some efficacy within its own field, that is to say, the field of Jewish religious law. I cannot accept the position that where a *get*, which purports to effect a divorce according to Jewish law, has been given by a husband to a wife with the approval of the Beth Din, both spouses being of the Jewish faith, it would be consistent with the religious obligations of those two persons to ignore the *get* and live together again as man and wife.

The result seems to me to be inescapable, that in the present case the wife cannot consistently with the *get* given at her own request, maintain that the husband is in desertion. I think that her successful request for the *get* indicated her unwillingness to receive the husband back and amounted to a consent on her part to his continuing to live separate and apart from her. Like my Lord, I find it unnecessary to decide in what circumstances it may be possible for the wife hereafter to take fresh proceedings on the ground of the husband's desertion, but in the present proceedings it seems to me that the *get* is an insurmountable obstacle. Accordingly, I agree that the commissioner came to a right conclusion and that this appeal should be dismissed.

HODSON L.J. The parties were married in 1926 and the husband deserted the wife in 1937. Since then they have lived apart. The petition which was presented by the wife on January 8, 1952, was based on the ground of desertion for three years and upwards immediately preceding the petition. The husband, by an amended answer, set out the defence that he was not in desertion because on September 19, 1948, the wife had been the instigator in proceedings before the Beth Din. She had requested him to give her a bill of divorcement under the guidance of and under the control of the court of the Beth Din in London. The Beth Din gave a certificate that she had received her *get*, or bill of divorcement, at the Beth Din, London, on a date in the Jewish calendar corresponding to September 19, 1948, and she was free to marry again in accordance with Jewish religious law after 90 clear days from that date.

Mr. Quass has argued that that document is of no effect, and he supported his argument by referring to *Papadopoulos* v. *Papadopoulos*.[3] That was a case of an invalid and illegal agreement,

[3] [1936] P. 108; 52 T.L.R. 190.

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Hodson L.J.

but what happened in this case has nothing invalid or illegal about it. The certificate is a perfectly valid document for what it purports to be, namely a certificate of a Jewish bill of divorcement given according to Jewish religious law; it does not purport to be a decree of divorce dissolving the marriage according to the law of this country. The action of the husband and the wife before the Beth Din seems to me to involve that there was a consensus between the parties that thereafter they should live apart. Up to that time there had been desertion by the husband of the wife. As the commissioner found, the wife had from an early date, many years before, persisted in requesting her husband, if he would not rejoin her, to give her this bill of divorcement. He did so, acting upon her request, and I think that it is impossible for her to maintain thereafter, so long as that agreement exists, that they are not living apart by consent. In those circumstances the appeal fails. I agree with the conclusion at which the commissioner arrived and with the judgments which have been delivered by my Lords.

*Appeal dismissed; no order as to costs.*

Solicitors: *Harold Miller & Co.; G. Houghton & Son.*

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[QUEEN'S BENCH DIVISION.]

## * CAVE *v.* CAPEL.

1953
*July* 22, 31.
Ormerod J.

*Execution—Sheriff's summons for protection—Seizure of caravan—Trespass to person—Claim to caravan by third party admitted by sheriff—Action in trespass—R.S.C., Ord.* 57, *r.* 16*a*.

A bailiff, acting as sheriff's officer, in pursuance of execution warrants, took possession of a caravan which he mistakenly believed to be the property of a judgment debtor, removed it from the judgment debtor's premises and locked it in a barn belonging to the judgment creditor. The plaintiff, the mother of the judgment debtor, who was residing in the caravan, refused to leave it and was taken in the caravan to the judgment creditor's barn, where she remained for some time, eventually vacating the caravan and leaving the barn by a small door which had been left unlocked. The owner of the caravan having given notice pursuant to Ord. 57, r. 16A,[1] claiming the caravan, the sheriff withdrew from possession.

[Reported by MRS. E. M. WELLWOOD, Barrister-at-Law.]

[1] R.S.C., Ord. 57, r. 16A: "When the execution creditor has given notice to the sheriff or his officer that he admits the claim of the claimant, the sheriff may thereupon withdraw from possession of the goods claimed, and may apply for an order protecting him from any action in respect of the said seizure and possession of the said goods, and the judge or master may make any such order as may be just and reasonable in respect of the same: Provided always that the claimant

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The plaintiff then brought an action against the sheriff for damages for trespass to the person and wrongful imprisonment, and the sheriff issued a summons pursuant to Ord. 57, r. 16A, claiming an order protecting him from the plaintiff's action. The master refused the order and the defendant appealed to a judge in chambers:—

*Held*, reversing the order of the master, that since the trespass to the person of the plaintiff occurred while the bailiff was taking possession of goods which he had grounds for believing were the property of the judgment debtor, the trespass to the person and the taking of the goods must be regarded as one and the same action, and the plaintiff's action was one to which Ord. 57, r. 16A, applied.

Dictum of Brett M.R. in *Smith* v. *Critchfield* (1885) 14 Q.B.D. 873, 878; 1 T.L.R. 421 applied.

*Held*, also, that the words of the rule provide that a sheriff is entitled to apply for an order protecting him from "any action in "respect of the said seizure and possession of the said goods," and not merely from any action in respect of the said seizure brought by the claimant only. The defendant was therefore entitled to an order under the rule notwithstanding the words of the proviso.

SUMMONS adjourned into court.

The following facts are taken substantially from the judgment.

The defendant, Air Vice-Marshal Arthur John Capel was at the material time High Sheriff of the County of Somerset. On October 29, 1952, a bailiff, one William Hext, acting as sheriff's officer in pursuance of two warrants, was instructed to levy execution upon the goods of one A. H. Cave in respect of two judgments, one for the sum of £158 17s. and the other for £205 13s. 3d. The bailiff proceeded to the address of the judgment debtor at Rode Common, Somerset, and found there no property upon which to levy execution other than a caravan. In that caravan was residing the plaintiff, Mrs. May Finella Cave, the mother of the judgment debtor, who asserted that the caravan was not her son's property, but she refused to say whose property it was, and refused to leave the caravan. The bailiff made inquiries both from the solicitors to the judgment creditor and from other persons, and eventually satisfied himself that it was his duty to levy execution upon the caravan. As a result, on the following day, October 30, 1952, a trailer was supplied by the judgment creditor and the caravan was taken from the judgment debtor's premises at Rode Common to the judgment creditor's farm, where it was put in a barn. The main double doors of the barn were then locked, but a smaller door was left open and unlocked.

The plaintiff, Mrs. Cave, having refused to leave the caravan, locked herself in and was taken in the caravan from the judgment debtor's premises to the judgment creditor's barn, where she was left. She eventually vacated the caravan and left the barn by way of the small door.

"shall receive notice of such intended "application, and, if he desires it, "may attend the hearing of the same, "and if he attend, the judge or "master may, in and for the purposes "of such application, make all such "orders as to costs as may be just "and reasonable."

On October 31, 1952, a Mrs. M. F. Carr gave to the bailiff a notice pursuant to Ord. 57, r. 16A, stating that she was the owner of the caravan in question and claiming it. After inquiries had been made, the sheriff was instructed to withdraw from possession of the caravan and did in fact do so.

On April 24, 1953, the plaintiff issued a writ against the defendant claiming damages for wrongful execution, wrongful imprisonment and trespass against the person. The defendant took out a summons under Ord. 57, r. 16A, claiming protection in the action pursuant to that Order, but on June 30 Master Harwood refused to make the required order.

The defendant appealed to a judge in chambers.

ORMEROD J. delivered his judgment in open court on July 31, 1953.

*James Stirling* and *N. Lermon* for the plaintiff.
*E. S. Fay* and *A. M. Wallace* for the defendant.

ORMEROD J. stated the facts and continued: The question is whether this action is one in which protection should be given to the sheriff by reason of Ord. 57, r. 16A. [His Lordship read the rule and continued:] The first question is whether this action is one coming within the words of the rule, that the sheriff "may "apply for an order protecting him from any action in respect "of the said seizure and possession of the said goods." It was contended for the plaintiff that this was not an action either in respect of the seizure or possession of the said goods, but was something entirely separate and distinct, and therefore was something which did not come within the words of the rule.

I find it extremely hard to accept that contention. The trespass which is claimed against the defendant occurred when the bailiff was acting in accordance with the warrant, that is to say, taking possession of the caravan which he believed (and had, I think, in the circumstances, ground for believing) was the property of the judgment debtor, and therefore property upon which execution could be levied. In that state of affairs it appears to me that, having regard to the way in which the plaintiff's claim is put, and bearing in mind the plaintiff's actions at the time of the execution, it is impossible to separate the act of the sheriff's officer in levying execution from the act (whether it was a wrongful act or not) of the sheriff's officer in taking the plaintiff in this caravan from the judgment debtor's premises to those of the judgment creditor.

In *Smith* v. *Critchfield*,[1] which was cited to me, there is a statement of opinion by Brett M.R. which was certainly obiter, but which appears to me to carry some considerable weight. That was a case where execution had been levied upon the goods

[1] (1885) 14 Q.B.D. 873; 1 T.L.R. 421.

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of a judgment debtor, but the man who appeared to be the rightful owner of the goods brought an action against the sheriff not only for wrongfully distraining on the goods, but also for trespass on his property in order to levy execution; and, although the point did not fall to be decided in that case, there was an expression of view by the master of the rolls that it was impossible to separate the entry on the premises from the levying of execution, and therefore that the two matters must be considered as one.

Brett M.R. said [2]: "It is not, of course, in every case that "the judge will protect the sheriff. He will be protected when "he has only made an honest mistake in executing the process "of the court, and but for such mistake everything that he has "done would have been justified by the writ. Then against "what is he to be protected? It is contended that he may be "protected in respect of one part and not in respect of another "part of what is really one simultaneous action done by him "under the writ of execution; that he may be protected from "an action for wrongfully seizing the goods but not from an "action for wrongfully walking into the house to seize them. "I do not think this contention can be sustained. The trespass "to the house and the trespass to the goods are, as it seems to "me, parts of one action which is intended to be done under the "writ, and which would have been rightful if the goods had "belonged to the execution debtor, but which is in fact wrongful "because of the sheriff's mistake as to the property in the "goods."

In that case, of course, the claim was one by the claimant to the goods, and his action was in form a claim not only for damages for wrongful seizure, but for trespass on his property. The present claim, of course, is one by someone other than the actual owner of the goods distrained upon; but it appears to me that the reasoning applies just as strongly in this case as it applied in that case. In my view the words "the trespass to the "house and the trespass to the goods are, as it seems to me, "parts of one action" apply here in that the trespass to the goods, if in fact there was such a trespass—that is to say, the taking of the goods in execution—and the trespass to the person of the plaintiff who insisted on remaining in the caravan when the goods were taken away, must be regarded as one and the same action; and therefore it would appear on the face of it that this action is one to which these words apply.

The rule provides that the sheriff "may apply for an order "protecting him from any action in respect of the said seizure "and possession of the said goods." It was further contended, however, that even if that were so, the rule would still not apply because if the rule be read as a whole, and the meaning of the rule as a whole be taken, then it could be interpreted in the sense

[2] 14 Q.B.D. 873, 878.

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that it applied only to actions in respect of the seizure and possession of the goods which were taken by the claimant; and in support of that it was urged that the proviso to the rule made it clear, because the proviso is to the effect that a claimant "shall "receive notice of such intended application"; and it was argued that if the application was one to protect the sheriff against an action by someone other than the claimant, no useful purpose would be served by inserting that proviso.

After some consideration, I have come to the conclusion, however, that the words of the rule must be taken to mean what on the face of them they do mean, and that the sheriff is entitled to apply for an order protecting him from any action in respect of the seizure, and not merely from any action in respect of the seizure which may be brought by the claimant. I see no sufficient reason in the wording of the rule for importing into it those additional words, and in particular for importing those additional words into a rule which was obviously brought into being for the specific purpose of protecting a sheriff against actions which might be brought against him after he had taken possession of the goods.

In those circumstances, I have come to the conclusion that this appeal should be allowed, and that there should be an order giving the defendant protection under Ord. 57, r. 16A.

*Appeal allowed.*
*Order accordingly.*

Solicitors: *Kingsford Dorman & Co.; Church, Adams, Tatham & Co.*

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[CHANCERY DIVISION.]

[BANKRUPTCY COURT.]

## * PRACTICE DIRECTION (COUNSEL'S FEES).

1953
*July 27.*

*Costs — Counsel's fees — Bankruptcy — High Court — Judgment summons.*

Harman, Danckwerts and Upjohn JJ. have directed that in future at the hearing of a judgment summons in bankruptcy the sum of £2 4s. 6d. may be allowed for counsel.

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[QUEEN'S BENCH DIVISION.]

1953
July 17.

Hallett J.

# * RIVOLI HATS LD. *v.* GOOCH.

[1953 R. No. 1037.]

*Principal and Agent—Commission agent—Monthly payments made to selling agent "on account of commission which will accrue due"—Excess of payments over commission earned on termination of agency—Whether excess recoverable—Law reports—Authenticity.*

The defendant acted as selling agent for the plaintiffs, hat manufacturers, under an agreement whereby he was to receive 10 per cent. commission on all goods sold by him and "a sum of "£125 per month shall be paid on account of the commission which "will accrue due to him." The monthly payments were duly made to the defendant until he terminated his agency by which time £389 19s. 8d. in excess of the commission actually earned had been paid to him by the plaintiffs. In an action by the plaintiffs to recover the overpayment on the ground that there was an implied term in the agreement that the defendant would repay any overpayment on termination of his agency, or, alternatively, that the money paid in excess of commission was money lent to the defendant:—

*Held* that, where an anticipatory payment was made in respect of something which it was expected would occur whereby money would be earned and that which was anticipated did not occur so that the money was not earned, the money paid, in the absence of a provision entitling the recipient to retain it, could not be retained. The defendant was being paid purely on results and the monthly payments were not made on account of services rendered in presenti, but were payments in advance of commission to accrue due in the future; the overpayment, therefore, had not been earned by the defendant and the plaintiffs, accordingly, were entitled to recover.

Decision of McNair J. in *Clayton Newbury Ld.* v. *Findlay* (1951) 1 C.L.C. 65; Note, *post*, not followed.

ACTION.

On May 20, 1952, the plaintiffs, hat manufacturers, entered into an agreement with the defendant whereby the defendant was to act as their selling agent. The agreement was evidenced in writing by a letter dated June 20, 1952, written to the plaintiffs by the defendant's solicitors on his behalf as follows: "We "understand from Mr. Gooch that he is acting as your agent on "the following terms: Mr. Gooch is to be your agent and "conform to all the accepted principles of agents during his "employment as such. He is to receive 10 per cent. commission "on all goods sold by him and delivered and paid for, after deduc-"tion of any discount allowed." By paragraph 4 of the letter "A "sum of £125 per month shall be paid on account of the commis-"sion which will accrue due to him." The defendant duly worked as the plaintiff's agent and received the monthly payments, reduced by agreement on October 19, 1952, to £95, until February 22, 1953, when he wrote to the plaintiffs terminating his agency.

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By that time he had received from the plaintiffs £389 19s. 8d. in excess of the total commission which he had earned during his agency.

The plaintiffs sued the defendant for £389 19s. 8d. alleging that there was an implied term in the agreement that the defendant would repay any overpayment at the termination of his agency and that, in breach of that implied term the defendant had failed to repay the excess, thereby causing the plaintiffs damage; alternatively, they claimed that the amount of the excess was money lent, alleging that all sums of money paid to the defendant in excess of commission earned by him were lent to him by them at his request.

The defendant claimed to be entitled to retain the overpayment. He contended that on the true construction of the agreement the money was paid to him as remuneration for the agency and that no part of it was to become repayable either expressly or by implication at the termination of the agency or at any other time and he denied that any part of that sum was lent to him.

*Owen Stable* for the plaintiff referred to *Dies* v. *British and International Mining and Finance Corporation*.[1]

*A. J. L. Lincoln* for the defendant referred to the following note in Current Law, December, 1951 ([1951] 12 C.L. 107). "—— implied term. In *Clayton Newbury* v. *Findlay* [2] (December "3, 1951) the plaintiffs, dress manufacturers, employed the defendant as their agent on the terms that he should receive 7½ per "cent. commission on all orders and repeat orders in his area, "this commission to be his sole remuneration. The plaintiffs also "agreed to pay the defendant £25 per week whilst travelling "'against commission which will accrue' to the defendant; no "term as to any repayment if the commission did not amount to "£25 per week was agreed. The defendant resigned and the plaintiffs sued him to recover the sum of £152 which was excess paid "to him over the commission he had earned and for which the "plaintiffs had given him credit. McNair J., held that he was "unable to imply any term into the contract regarding the repayment of any sum paid by the plaintiffs in excess of commission "earned. He also held that the words of the agreement, '£25 per "'week drawing against commission which will accrue,' were "inconsistent with a term implying that this drawing would be "repaid if the commission did not accrue. [*Ex rel. Aron "Owen, Esq., Barrister-at-Law.*]"

HALLETT J. I should have thought that the only point to be decided in this case was clear, and indeed, despite Mr. Lincoln's careful argument, beyond argument, but I am told that the

[1] [1939] 1 K.B. 724.

[2] (1951) 1 C.L.C. 65, and *post*, Note.

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resistance to what appears on the face of it to be an unquestionably good claim, has been encouraged by the fact that, in Current Law, a publication which appears monthly, there is a note of a case decided by McNair J. which, at any rate upon a cursory glance, does appear to bear a strong resemblance to the present case.

In the days when I was at the Bar the only reports which could be cited to courts were a certain recognised series of reports written by barristers, and I confess that I think that this case is an instance of the awkwardness of relying on publications which have not the status of any recognised series of reports. I say that because I know nothing of this case beyond what the note says. It may very well be that there is some distinction between that case and the one with which I am dealing; I hope that there is, because I do not agree with the view which, according to that note, it would seem at first sight that McNair J. took.

[His Lordship referred to the facts in the present case and continued:] There is no provision in the letter of June 20 that the defendant is to have a salary; nor is there any provision that he is to have his expenses paid by the plaintiffs. He is to get "10 per "cent. commission on all goods sold by him and delivered and "paid for," and out of that 10 per cent. he is to pay his own expenses. If as a result of his efforts, however good, he does not effect a sale, or if incidentally a bad debt is contracted in respect of those goods, he does not earn his commission and he is not entitled to be paid either commission or expenses.

The only ground upon which an argument for him can be founded, if it is to be founded anywhere, is in paragraph 4. It is obvious that whenever a man is being remunerated only by commission and is not even being paid something extra for expenses, there may be a practical difficulty as to how he is to carry on in between the payments which he may earn. There is also the further difficulty that the earnings of a commission agent fluctuate widely from time to time, particularly in the clothing and textile trades which are very seasonal.

It is because this case does not differ from a great many others that this point has some slight importance. It is a common thing for what is called a drawing account to be arranged, whereby one party is allowed to draw from the other up to a certain amount on account of future earnings.

Paragraph 4 reads as follows: "A sum of £125 per month "shall be paid on account of the commission which will accrue "due to him." That sum was altered by agreement to £95; if anything, the subsequent alteration tends to support the view which I am going to express, though it is by no means conclusive of it. There is no ground for Mr. Lincoln's argument that the monthly payments were made to the defendant in respect of services that he was rendering by being the plaintiffs' agent. It is plain that he was being paid those amounts "on account of the "commission which will accrue due to him." The payments are

referred to in a later letter as an advance of commission, and to my mind that is a correct description of them.

In my judgment it is clear on principle, that if a payment is made in respect of something which it is expected will occur in the future, whereby money will be earned—and if that which is anticipated does not occur, and accordingly that in respect of which the money would have been earned never takes place, the money which has been paid cannot be retained by the recipient. I agree with Mr. Lincoln that analogies dealing with different subject-matter may be very misleading, but whatever type of transaction one looks at—unless the payment on account can be regarded as a deposit with the special incidents of forfeiture in the event of a breach of obligation attaching to a deposit—where a payment is made in anticipation of something being supplied therefor in the absence of some provision entitling the recipient to retain the payment, it becomes recoverable if that something is not supplied.

That seems to be the law and to be in accordance with common sense. Here Mr. Lincoln's argument depends on the assumption that the payments which were to be made on account of the commission which would accrue due in the future were not payments on account of commission, as the words of the letter say, but were payments on account of something which the defendant was doing in presenti. The defendant was not, however, being paid for what he was doing in presenti, but was to be paid purely on results. The whole question is whether the defendant, having done nothing to earn the excess payment, is entitled to retain it. As he has not earned it I cannot see any grounds on which the defendant could be entitled to retain the overpayment.

It was said that a difficulty arises as to the form of action. The sum in dispute is claimed as being due under an implied term that the defendant should repay any overpayment on the termination of his agency; alternatively, it is sought to recover the sum in question as money loaned to the defendant at his request by the plaintiffs. It is not claimed as money had and received.

Mr. Lincoln submitted that no such term ought to be implied, and that McNair J. in the case referred to refused to imply such a term. He also argued that the money was not, on the true view of the situation, money lent, that a claim for money had and received was not made in the statement of claim; and that, if it had been made, having regard to what has been said in *Sinclair* v. *Brougham* [1] and later cases as to the limits of an action for money had and received, such a claim could not succeed.

On the other hand, in *Dies* v. *British and International Mining and Finance Corporation, Ltd.*,[2] Stable J. refused to be deterred by difficulties as to the form of the claim, saying that once the court is satisfied that a claim is right in principle, it ought not to be unduly deterred by difficulties as regards the form of the claim.

[1] [1914] A.C. 398; 30 T.L.R. 315. [2] [1939] 1 K.B. 724.

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In the present case I would be prepared to hold, if necessary, that the term is to be implied, and also that this money was, in truth, money lent. If it is anticipated that a man is going to earn something in the future, and if in order to help him to carry on in the meantime his employers pay him that which is not yet due, in the expectation that it will become due, I think that that money may be treated as a loan, and I should be prepared to so hold in this case. For these reasons, in my judgment the sum overpaid ought to be repaid, and the claim succeeds. There will be judgment accordingly.

*Judgment for the plaintiffs.*

Solicitors: *S. A. Redfern, Barron & Morton; Hamlins, Grammer & Hamlin.*

J. F. L.

## NOTE

1951
December 3.

McNair J.

### CLAYTON NEWBURY LD. *v.* FINDLAY

[1950 C. No. 1415.]

ACTION.

The plaintiff company, manufacturers of fashion gowns which they sold as wholesalers to retail shops, were desirous of appointing a new representative to cover their territory north of London and up to the Scottish border, and accordingly, inserted advertisements to that effect in a trade journal. On October 8, 1949, as a result of the advertisements, the defendant visited the plaintiffs and saw a director of the company, Miss Newbury. After a discussion as to terms it was agreed that the defendant should be paid a commission of 7½ per cent. on all orders executed and paid for by customers in his territory whether new, old or repeat orders. The question having arisen as to travelling expenses, it was arranged that the defendant should be paid £25 a week to be placed against his commission. On the same day, October 8, 1949, the defendant wrote to the plaintiffs: "Will you "please confirm my terms agreed upon, . . . the drawing of the allow- "ance of £25 per week when travelling to be placed against my "commission account." On October 10, 1949, the plaintiffs wrote to the defendant "We wish to confirm our conversation of Friday's date, "appointing you our agent. . . . We are arranging for you to draw "£25 per week whilst travelling against the commission which will "accrue to you from all accounts . . . and including repeat orders. . . . "Under those conditions we will expect you to devote your entire time "to our firm. . . ." The defendant started work on October 17, 1949, and from then until December 16, the sum of £25 was paid to him except for one week when only £10 was paid, so that by December 16, £237 9s. had been paid. On January 4, 1950, the defendant resigned his appointment and the total commission by then payable to him on sales in his territory amounted to only £85 6s. 6d.

The plaintiffs claimed £152 2s. 6d., the return of the balance of monies entrusted to the defendant by them as drawings against commission to be earned under the verbal contract of October 7, 1949, confirmed by the letters dated October 8 and October 10, 1949.

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CLAYTON NEWBURY LD. v. FINDLAY.

The defendant denied that, upon the true construction of any agreement between the parties the money was to be or ever became repayable by him to the plaintiffs.

*Aron Owen* for the plaintiffs.
*Lord Hailsham* for the defendant.

MCNAIR J. stated the facts and continued: The question I have to determine is whether the plaintiffs have made out their case that they are entitled to recover the difference of £152 2s. 6d. between the moneys paid to the defendant and the commission earned by him. It is not suggested that there was any express oral bargain to that effect. Indeed neither of the witnesses who spoke as to the conversation said a word about repayment should the money paid exceed the commission earned. The overpayment can only be recoverable if one can properly find in the arrangement made, whether orally or whether reduced into writing, some implied term under which the repayment can be enforced. It is very well settled law that the function of the court is not to make bargains for the parties, but to ascertain what bargains the parties have made. It sometimes happens in commerce that the parties do not mention every term of their bargain, because some terms are so obvious that they go without saying, but the court will only imply a term which has not been expressly mentioned, if it is satisfied that the term was necessary to give business efficacy to the contract, and is such that both parties must have intended it, or, to use the words of Scrutton L.J. in *Reigate* v. *Union Manufacturing Company (Ramsbottom) Limited*,[1] quoted with approval by Lord Wright in *Luxor (Eastbourne) Ld.* v. *Cooper*[2]: "The first thing is to "see what the parties have expressed in the contract; and then an "implied term is not to be added because the court thinks it would "have been reasonable to have inserted it in the contract. A term "can only be implied if it is necessary in the business sense to give "efficacy to the contract; that is, if it is such a term that it can "confidently be said that if at the time the contract was being "negotiated someone had said to the parties, 'What will happen in "'such a case,' they would both have replied, 'Of course, so-and-so "'will happen; we did not trouble to say that; it is too clear.' Unless "the court comes to some such conclusion as that, it ought not to "imply a term which the parties themselves have not expressed."

Here the parties have not expressed in words what is to happen if the expenses exceeded the commission or not. I find it quite impossible to say confidently what they would have said if, as Lord Hailsham has aptly phrased, the officious by-stander had asked what was to happen in that event. It may be, if such enquiry had been made, it would have been apparent at once that the parties were not in agreement. It may be that the defendant would have said: "Well, if this ground "is so poor that you cannot promise that it will produce £25 a week "commission, I am not taking on the post." On the other hand, Miss Newbury might well have said: "Remember, this £25 is only an "advance, and if you do not earn your commission I will look to you "for the repayment." I am left in complete doubt as to what the answer would be. It is sufficient to say I am not satisfied that the answer would be the answer suggested by the plaintiffs. Nor do the plaintiffs say what the exact term is which they wish to be implied. At what period, for instance, is the calculation to be made? At what rests are you to calculate whether the expenses have exceeded or are

[1] [1918] 1 K.B. 592, 605.

[2] [1941] A.C. 108, 144; 57 T.L.R. 213; [1941] 1 All E.R. 33.

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CLAYTON NEWBURY LD. v. FINDLAY.

McNair J.

short of the commission? In my judgment, those considerations alone are sufficient to defeat the plaintiff's claim.

Lord Hailsham also said with substantial force, that to write into these two letters of confirmation the terms as to repayment which the plaintiffs suggest, would really be inconsistent with the express terms of the letters, or at any rate, that it would be inconsistent to attempt to read into the express terms of the second letter of October 10, which says that the defendant is to draw £25 a week against commission "which will accrue to you from all accounts on this ground," the words "and this drawing will be repaid if the commission does not "accrue."

In those circumstances, the plaintiffs have failed to satisfy me that the bargain which was made with the defendant contained any agreement which covers the facts of this case in such a way as to entitle them to recover the amount of the payments which they made to the defendant week by week, and there will be judgment for the defendant, with costs.

*Judgment for the defendant.*

Solicitors: *H. Fishman & Co.; Hamlins, Grammer & Hamlin.*

J. F. L.

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[COURT OF APPEAL.]

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1953 *July*, 30.

Singleton, Denning and Morris L.JJ.

## *MARTINALI *v.* RAMUZ AND OTHERS

[1951 W. No. 4169.]

*Landlord and Tenant—New lease—Lessee holding over in occupation of shop premises after expiry of lease—Writ for possession issued against occupier as tenant at will—Application by occupier for new lease on ground that tenancy was terminated by writ—Writ not notice to quit—Leasehold Property (Temporary Provisions) Act*, 1951 (14 & 15 *Geo.* 6, *c.* 38), *s.* 10.

The Leasehold Property (Temporary Provisions) Act, 1951, by section 10, enables an occupier of shop premises under an expiring tenancy to apply to the court for, and in certain circumstances to obtain, the grant of a new tenancy, where the expiring tenancy would come to an end immediately before the Act came into force (June 24, 1951) or within two years beginning with that date and "would so come to an end by effluxion of time or by the expira-"tion of a notice to quit given by the landlord. . . ."

The applicant was the occupier of shop premises, having held over after leases had expired at various dates before June 24, 1951. The landlord having died, his personal representatives, on December 5, 1951, issued in the High Court writs for possession of the premises, which were served on the occupier on December 8. The occupier then applied to the county court for new leases under section 10 of the Act of 1951, claiming that in each case the date and mode of termination of the tenancies was December 8, by service of the writs for possession on him.

The county court judge heard a preliminary objection by the personal representatives, made on the basis that the occupier was a tenant at will, that as the applicant had not had his tenancy determined by a notice to quit, and it was not a tenancy which expired by effluxion of time, it was not covered by section 10 of the

Act. In his judgment, while he expressed, obiter, the view that a tenancy at will did not fall within the protection afforded by the Act of 1951, he held that the tenancies in question had not come to an end in any manner covered by section 10 of that Act, and he allowed the preliminary objection. On appeal by the occupier:—

*Held*, that since a writ for possession, an appropriate method of determining a tenancy at will, could not be a notice to quit within the definition of that term in the Act of 1951 or in any legal context, the tenancies had not come to an end either by effluxion of time or by notices to quit, and did not therefore fall within the provisions of section 10 of the Act of 1951.

Decision of the county court judge affirmed.

APPEAL from Judge Geoffrey Howard, Southend County Court.

The applicant, Guilelmo Martinali, was the occupier of a block of shop property which had been the subject of six leases, all of which expired at various dates between March 25, 1946, and March 25, 1951, either by effluxion of time or by notices to quit. The applicant made unsuccessful applications under the Landlord and Tenant Act, 1927, and then, after the leases had expired, he held over and continued in occupation, it was said, as a tenant at will.

On June 24, 1951, the Leasehold Property (Temporary Provisions) Act, 1951, came into force. On December 5, 1951, the landlord having died, his personal representatives issued writs in the High Court claiming possession of the premises. The applicant then applied to the county court for new leases of the premises under the Leasehold Property (Temporary Provisions) Act, 1951, s. 10,[1] alleging in each case that the date and mode

[1] Leasehold Property (Temporary Provisions) Act, 1951, s. 10: "(1) The "provisions of this part of this Act "shall have effect for enabling the "occupier of a shop under a tenancy "to which this section applies (here- "inafter referred to as 'the expiring "tenancy') to apply to the court for, "and subject to the provisions of "this Act to obtain, the grant of a "new tenancy where apart from the "next following section the expiring "tenancy would come to an end "immediately before the date of the "commencement of this Act or with- "in the period of two years begin- "ning with that date, and would so "come to an end by effluxion of time "or by the expiration of a notice to "quit given by the landlord, whether "before or after the commencement "of this Act."

S. 11: "(1) An application under "this Part of this Act for the grant "of a new tenancy shall—(*a*) if "apart from this section the expir- "ing tenancy would expire by "effluxion of time, not be made "later than one month before the "date on which that tenancy would "so expire; (*b*) if apart from this "section the expiring tenancy would "come to an end by notice to quit "given by the landlord, be made after "the giving of the notice to quit and "not later than one month there- "after: Provided that where the latest "time limited by the foregoing pro- "visions of this subsection would fall "before the end of one month begin- "ning with the commencement of this "Act, an application may be made "not later than the end of that "month."

S. 20: "(1) In this Act the follow- "ing expressions have the meanings "hereby assigned to them respectively, "that is to say: . . . 'notice to quit' "includes a notice to determine a "term of years certain, but does not "include a notice requiring possession "where s. 121 of the Lands Clauses "Consolidation Act, 1845, applies."

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of termination of the tenancy was December 8, 1951, by service of the writ for possession.

For the personal representatives a preliminary objection was taken before the county court judge, that as the applicant, being for the purposes of the objection a tenant at will, had not had his tenancy determined by a notice to quit, and it was not a tenancy which expired by effluxion of time, it was not covered by section 10 of the Act of 1951.

The county court judge on May 13, 1953, upheld that submission, and held that the tenancy expired neither by a notice to quit (since a writ for possession was not a notice to quit within the meaning of the Act of 1951) nor by effluxion of time; and that the preliminary objection succeeded.

The applicant appealed.

*Neil McKinnon* for the applicant.

*D. P. Croom-Johnson* for the personal representatives of the landlord.

The following cases were cited in the argument: *Denn d. Brune* v. *Rawlins* [2]; *Preston and Area Rent Tribunal* v. *Pickavance*.[3]

SINGLETON L.J. stated the facts and continued: The county court judge had these applications for new leases before him and the whole question, as I see it, depended on the view which he took of section 10 of the Act of 1951, which is in these terms: [His Lordship read the section.] It is said by Mr. McKinnon that after the terms granted by the leases had expired there arose in each case a tenancy at will, and for the purposes of this case, and for no other purpose, it is assumed there was a tenancy at will. Mr. McKinnon submitted that the tenancy at will was brought to an end by the service of the writ in December, 1951, which service of the writ, he claimed, was (within the definition in the Act) a notice to quit. So far as I know, a writ has never been held to be a notice to quit. A notice to quit is a well-recognized term. To bring the cases within section 10 it has to be shown that the tenancy within the stipulated time came to an end either by effluxion of time (which does not arise) or by the expiration of a notice to quit given by the landlord. There was no notice to quit given by the landlord.

There was at the most in this case a tenancy at will. The county court judge did not think that section 10 of the Act of 1951 covered a tenancy at will. Mr. Croom-Johnson desires to keep that point open and no good purpose would be served by my considering it, but for what it is worth I would say that I share the view of the county court judge having regard to the wording

[2] (1808) 10 East 261.

[3] [1953] 3 W.L.R. 242; [1953] 2 All E.R. 438.

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of the section. But assuming that it could be said that a tenancy at will was covered by, or within the contemplation of, section 10 of the Act, still there was in this case no notice to quit, so that it cannot be said that the tenancy was brought to an end by the expiration of a notice to quit.

That is sufficient to dispose of this appeal. I agree with the judgment of the county court judge, and I am satisfied that the appeal ought to be dismissed.

DENNING L.J. I agree. It is elementary that a tenancy at will is determined by a demand for possession, not by a notice to quit. This tenancy at will was determined by the issue of a writ claiming possession, which is itself a demand for possession. The tenancy at will was not determined by a notice to quit at all, and the case therefore does not come within the extension provisions of the Act of 1951.

I agree that the appeal should be dismissed.

MORRIS L.J. I agree.

*Appeal dismissed.*

Solicitors: *Emanuel, Round & Nathan; Carpenter, Wilson & Smith.*

M. M. H.

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[QUEEN'S BENCH DIVISION.]

## * EDWARDS *v.* GRIFFITHS.

1953
*July* 30.

Lord Goddard C.J., Parker and Donovan JJ.

*Road Traffic—Insurance—Motor tractor—Policy—Whether driver disqualified from holding licence—Meaning of "disqualified"—Mental incapacity—Road Traffic Act*, 1930 (20 & 21 *Geo.* 5, *c.* 43), *ss.* 4 (2) (6), 5 (1) (2) (4), 35 (1).

A policy of insurance in respect of a motor tractor provided, according to the insurance certificate (which alone was before the court), that the vehicle could be driven by "any . . . person with "the permission of the policy holder provided that the person "driving holds a licence . . . or has held and is not disqualified "for holding or obtaining . . . a licence":—

*Held*, that as between the assured and the insurers those words, on construction, meant disqualified from holding or obtaining a licence by an order of a court, under section 4 (6) of the Road Traffic Act, 1930, and did not mean prohibited from holding or obtaining a licence by reason of mental or physical disability. Accordingly, an employee of the policy holder when driving the vehicle on the public highway with the latter's permission was covered by the policy where he (the employee) had previously held a licence, although at the time when he was driving the vehicle he had no licence because he had been unable to renew it owing to mental disability. Such disability was not a "disqualification" within the meaning of the policy.

It is desirable that in such cases the policy itself, and not merely the certificate, should be before the court.

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CASE STATED by Wiltshire justices sitting at Chippenham.

An information was preferred under section 35 [1] of the Road Traffic Act, 1930, against the defendant, Henry Edwards, alleging that on February 22, 1953, he used a motor tractor when there was not in force in relation to such user of the vehicle by him such a policy of insurance or such a security in respect of third party risks as complied with the requirements of the Act.

The following facts were proved or admitted before the justices. —On February 22, 1953, the defendant drove an agricultural tractor, the property of his employer, a farmer, on a public highway. The defendant was driving with his employer's permission but was not then the holder of a current driving licence. Before October, 1951, the defendant had held a provisional driving licence, and during that month he had passed a driving test and had been granted a driving licence for 12 months enabling him to drive motor cycles and tractors. Some time during 1952 the defendant was informed verbally by an official of the county council that as he, the defendant, was then under the statutory supervision of the local health authority under the provisions of the Mental Deficiency Acts, 1913–1938, he must not drive his motor cycle, but no formal notice revoking the licence had been received by the defendant in pursuance of section 5 (4) of the Road Traffic Act, 1930.[2] Since the expiration of the licence the defendant had applied to the licensing authority for a licence, but his application was refused, the authority informing him that it had received notice that he was under the statutory supervision of the local health authority under the provisions of the Mental Deficiency Acts.

[1] Road Traffic Act, 1930, s. 35: "(1) . . . it shall not be lawful for "any person to use . . . a motor "vehicle on a road unless there is in "force in relation to the user of the "vehicle by that person . . . such "a policy of insurance or such a "security in respect of third party "risks as complies with the require-"ments . . . of this Act."

[2] Road Traffic Act, 1930, s. 4: "(2) Subject to the provisions of "this part of this Act as to the "physical fitness of applicants for "licences, the licensing authority, "except in the case of an appli-"cant who is disqualified as herein-"after mentioned, shall . . . grant "a licence to any person who "applies for it . . . and makes a "declaration . . . that he is not, "under the provisions of this part of "this Act, disqualified by reason of "age or otherwise for obtaining the "licence. . . . (6) A person shall be "disqualified for obtaining a licence "... (*b*) if he is by a conviction . . . "or by an order of a court . . . dis-"qualified for holding or obtaining "a licence."

S. 5: "(1) On an application for "the grant of a licence the applicant "shall make a declaration . . . as "to whether or not he is suffering "from . . . any . . . disease or "physical disability . . . , which "would be likely to cause the driving "by him of a motor vehicle . . . to "be a source of danger to the public. "(2) If from the declaration it "appears that the applicant is suffer-"ing from any such disease or dis-"ability . . . the licensing authority "shall refuse to grant the licence: "... (4) If it appears . . . that any "person who holds a licence . . . is "suffering from a disease or physical "disability likely to cause the driving "by him of a motor vehicle . . . to "be a source of danger to the public, "and on inquiry . . . the authority are "satisfied that the licence holder is "suffering from such a disease or dis-"ability . . . the licensing authority "may, after giving . . . notice . . . "revoke the licence, . . ."

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The conditions of user of the motor tractor contained in the employer's certificate of insurance provided that it could be driven by, (a) the policy holder, and (b) any other person with the permission of the policy holder provided that the person driving held a licence to drive the vehicle or had held and was not disqualified for holding or obtaining such a licence.

On behalf of the defendant it was contended that, as he had previously held a driving licence and had not been disqualified for holding or obtaining a licence, he was insured in respect of third party risks in pursuance of the proviso recited in the conditions of user in the certificate of insurance.

On behalf of the prosecutor it was contended that as the defendant was prohibited from holding or obtaining a licence by virtue of his being under statutory supervision he was automatically disqualified for holding or obtaining a licence within the meaning of the Act.

The justices were of the opinion that "disqualified" in the insurance certificate meant disqualified by an order of the court in accordance with section 4 (6) (*b*) of the Act and did not mean "prohibited from obtaining a licence by reason of "mental or physical disability" and they dismissed the information.

The prosecutor appealed.

The employer's policy of insurance was not before the court, nor had the prosecution obtained advice from the Motor Insurers' Committee whether the insurance company insuring the employer would have considered themselves under risk while the defendant was driving the tractor.

*M. McGougan* for the prosecutor.

The defendant was not represented.

The following case was cited in argument: *Digby* v. *General Accident Fire and Life Assurance Corporation Ltd.*[3]

LORD GODDARD C.J. This case affords a good example of the inconvenience of having to decide, in the absence of the insurance company, the question whether or not a policy covers a particular person at a particular time, but there is no provision in the Road Traffic Act, 1930, by which the insurance company can be brought in to take part in the argument and discussion on these matters. If the insurance company is on risk, or would regard itself as being on risk, the mischief which the compulsory insurance sections are intended to guard against does not arise; it was for that reason that two years ago an arrangement was arrived at, with the sanction of the Home Office, by which police authorities who were in doubt whether a particular policy covered a particular driver at a particular time might consult the

[3] [1943] A.C. 121, 138; 58 T.L.R. 375; [1942] 2 All E.R. 319.

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Committee of Underwriters at Lloyd's to ascertain whether or not in the particular circumstances they would regard themselves at risk. That does not, of course, entitle the Committee of Underwriters to decide questions of law.

In this case, it may be for good reasons, the police wanted a ruling on the matter, but they did not consult the Committee of Underwriters. We have, therefore, to decide, in the absence of the insurance company, in one respect the party most interested, a question of the construction of the policy, namely, would the insurers have been on risk if there had been an accident?

It would be very much better in all these cases, and I desire police authorities to take notice of this, to take the precaution of having not merely the insurance certificate, but the policy itself, before the court; that can be done by a subpoena on the assured to produce the policy to the court. The farmer in this case held an insurance policy and, according to the certificate, the persons covered were the policy holder and any other person driving with the permission of the policy holder. Therefore, the defendant, prima facie, was covered. The certificate, however, continues: "Provided the person driving holds a licence to drive "the vehicle or has held and is not disqualified for holding or "obtaining such a licence." The defendant had held a licence, but at the time of the alleged offence did not hold one, and, being under the care of the local authority in the sense that he is mentally defective would not be able to obtain a licence. He could therefore have been prosecuted for driving without a licence, but the police prosecuted him for driving uninsured, because they said: "Although the policy covers a "driver who is driving with the permission of the holder of the "policy, you were disqualified because at the time when you "were driving you were mentally deficient."

The justices held that the words in the policy "is not dis-"qualified for obtaining such a licence" mean a disqualification by order of the court under section 4 (6) of the Road Traffic Act, 1930. In my opinion, they were right. It is true that under the provisions of sections 4 and 5 relating to physical fitness and age a person may be said to be disqualified for obtaining a licence, but that is not what we have to decide. What we have to determine is whether, as between the assured and the insurers, these words "not disqualified for holding or obtaining such a licence" do or do not refer merely to the provision of disqualification by order of the court on conviction. One reason which influences me very much is that under this policy prima facie a person driving with the permission of the policy holder is covered, provided, and this applies to the policy holder as well as a person driving with the policy holder's permission, he holds a licence to drive or has held a licence to drive. Therefore a person who, though he does not hold a licence, has held a licence is covered, but, with regard to him, the proviso is saying: "We are not going to insure him

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"if he has been disqualified for holding or obtaining a licence." To my mind, the words "and is not disqualified for holding or "obtaining such a licence" following immediately after the words "has held" seem to indicate clearly that they are contemplating the case of a man who has held a licence but has been disqualified from holding it, that means, disqualified from getting a new one or from holding his current licence by reason of an order of a court.

I do not say that it is an easy point, but, as it seems to me, as between the assured and the insurers we have to construe the policy against the insurers. If there is an ambiguity or a doubt as to the extent of the policy, we should have to construe it in favour of the assured, that is to say, if the question arose as to the liability of the insurers, we should have to put on the policy the construction most favourable to the assured and the less favourable construction to the insurers.

For these reasons, I have come to the conclusion that the justices were right in the interpretation which they put on this policy, and that this appeal therefore fails.

PARKER J. I agree.

DONOVAN J. I, too, have not found this an easy case, but when I read in section 9 (5) of the Act of 1930 that a person prohibited by reason of his age from driving a motor vehicle shall be deemed to be disqualified for obtaining a licence, I think that it is clear that disqualification in the Act has the restricted meaning given to it in section 4 (6), which is not the same as prohibited. Then, when I find a policy taken out using the language of the Act, I think "disqualified" should receive the same restricted meaning. Therefore I agree with the judgment given.

*Appeal dismissed.*

Solicitors: *Drury, Hopgood & Co. for B. T. Ford, Marlborough.*

J. F. L.

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[COURT OF APPEAL.]

## * BARNARD *v.* TOWERS.

C. A.

1953 *July* 29, 30.

Somervell, Jenkins and Hodson L.JJ.

*Landlord and Tenant — Rent restriction — Possession — Alternative accommodation—Dwelling-house required by landlord—Tenant in exclusive occupation—Offer of other premises, sharing with another occupant—Whether offer of "suitable alternative accommodation" —Rent and Mortgage Interest Restrictions (Amendment) Act*, 1933 (23 & 24 *Geo.* 5, *c.* 32), *s.* 3 (1) (*b*).

Where the tenant of a rent-controlled dwelling-house has exclusive occupation, another house, which would have to be shared with another occupant, is not "suitable alternative accommodation"

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within the meaning of section 3 (1) (*b*) of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933.[1]

APPEAL from Judge Wrangham, sitting at Market Harborough County Court.

The plaintiff, Barnard, as landlord sought possession of the dwelling-house, 52 Lubenham Hill, Market Harborough, which was let to his sister-in-law, Miss Towers, the defendant. He offered as suitable alternative accommodation No. 21 Charles St., which was owned by Miss Towers jointly with her widowed sister Mrs. Sutherland, who occupied those premises and would continue to do so. The defendant opposed the plaintiff's claim for possession and the county court judge gave judgment in her favour. Applying subsection (3) (*b*) of section 3 of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933,[1] he held that the security of tenure of joint ownership was not reasonably equivalent to the security which a protected tenant had, and therefore the alternative accommodation was not suitable. The plaintiff appealed.

*C. P. Harvey Q.C.* and *Owen Stable* for the plaintiff.
*J. T. Plume* for the defendant.

The following cases were cited in argument: *Minns* v. *Moore*[2]; *Sheehan* v. *Cutler*[3]; and *Standingford* v. *Probert*.[4]

SOMERVELL L.J. The case proceeded on the basis that the plaintiff landlord, in order to succeed, had to show suitable alternative accommodation under section 3 of the Act of 1933. [His Lordship read subsections (1) and (3) of section 3 and continued:] There was some argument, and there have been some observations in the cases to which we were referred, as to how far subsection (3) is exhaustive, and I think it is right to say a word about that. If the tenant sought to be evicted had a house of his own which was empty and to which it was reasonable he should go but, owing to its rateable value, was outside the

[1] Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 3 (1): "No order or judgment for "the recovery of possession of any "dwelling-house to which the principal Acts apply or for the ejectment "of a tenant therefrom shall be made "or given unless the court considers "it reasonable to make such an order "or give such a judgment, and . . . "(*b*) the court is satisfied that suitable alternative accommodation is "available for the tenant or will be "available for him when the order or "judgment takes effect."

Subs. (3): ". . . accommodation "shall be deemed to be suitable if it "consists either—(*a*) of a dwelling-house to which the principal Acts "apply; or (*b*) of premises to be let "as a separate dwelling on terms "which will, in the opinion of the "court, afford to the tenant security "of tenure reasonably equivalent to "the security afforded by the principal Acts in the case of a dwelling-house to which those Acts apply, "and is, in the opinion of the court, "reasonably suitable to the needs of "the tenant and his family. . . ."

[2] [1950] 1 K.B. 241, 245, 248; 65 T.L.R. 739; [1949] 2 All E.R. 800.

[3] [1946] K.B. 339; 62 T.L.R. 261.

[4] [1950] 1 K.B. 377; 65 T.L.R. 704; [1949] 2 All E.R. 861.

Rent Acts, it would clearly not be within subsection (3). It is difficult, however, to believe that the court would be precluded from considering it as alternative accommodation. However, in my opinion those points do not arise in the present case.

The defendant had formerly lived with her father and two other sisters at 21 Charles Street. The father had died, and one of the sisters remained in those premises, and for some time before the defendant took a lease of the house of which possession is sought, she was living at 21 Charles Street with her sister. The alternative accommodation on which the plaintiff seeks to rely is 21 Charles Street, which is at present occupied and lived in by the sister, but of which the defendant is the joint owner.

It is clear that if this was a question of fact the judge would have found on the facts in the plaintiff's favour, namely, that it was reasonable that the defendant should go and live there with her sister. I think that he would have found as a fact, though the sisters gave contrary evidence, that the sisters were on such terms that if they had nowhere else to go they would live together, and he thought that if he had made an order the defendant would have gone and lived with her sister. He took the view that the defendant was being unreasonable because of family disputes. But that is not a matter with which we are in the least concerned. He decided that the plaintiff could not recover possession because, applying subsection (3) (*b*), the facts did not enable him to say that the security of tenure, if she went into this house with her sister, was that required by the subsection. He said: "Security of tenure of joint owners is nothing "like equivalent to the security which a protected tenant has. "Either joint owner can take the security away and force a sale "at any moment."

I think there is great force in that. We were told that that was the subsection under which this case was argued below, but having had the advantage of a second argument, it seems to me first that section 3 (3) (*b*) cannot apply, because these premises were not premises to be let as a separate dwelling. The reference to security of tenure there might give guidance to the meaning of suitable alternative accommodation. This case does not fall under that subsection. I think that the plaintiff's case fails in limine. The offer of the sharing of a house is not an offer of suitable alternative accommodation to a tenant who under the lease has a house of his own. It seems to me that accommodation in a house of one's own differs in kind from sharing a house with someone else. When this section speaks of suitable alternative accommodation it means suitable alternative accommodation of the kind, though it may not be in all respects so good, as that which the tenant is enjoying, namely, in this case a house of which she has exclusive occupation. For these reasons I think that the judge came to the right conclusion, though my reasons are different, and I would dismiss the appeal.

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JENKINS L.J. I agree and find nothing I can usefully add.

HODSON L.J. I agree.

*Appeal dismissed.*

Solicitors: *Alfred Hurner; Vizard, Oldham, Crowder & Cash for Wartnaby & Co., Market Harborough.*

A. W. G.

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[COURT OF APPEAL]

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*July* 17, 20.
Singleton, Denning and Morris L.JJ.

* LEVESLEY *v.* THOMAS FIRTH & JOHN BROWN LD.

[1952 L. No. 649.]

*Factory—Safe means of access—Maintenance of—Duty of employer—"Transient and exceptional" obstruction—Not a breach of employers' obligation to maintain—Factories Act,* 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 67), *s.* 26 (1).

When a safe means of access for workmen to their place of work has been provided by an employer as required by section 26 (1) of the Factories Act, 1937, the obligation under the section to maintain such means of access "so far as is reasonably practicable" is not broken, in the absence of negligence on the part of the employer, by the presence of a transient and exceptional obstruction on the means of access provided.

*Latimer* v. *A.E.C.* [1953] 3 W.L.R. 259; [1953] 2 All E.R. 449 applied.

Decision of Cassels J. reversed.

APPEAL from Cassels J. sitting at Leeds Assizes.

The plaintiff, Charles Albert Levesley, was an engineer's turner employed by the defendants, Thomas Firth and John Brown Ld., at their premises situated at Brightside, Sheffield, such premises being a factory within the meaning of the Factories Act, 1937. On May 29, 1951, the plaintiff and another man decided that they would work overtime and, accordingly, at about 4.50 p.m. they left their work to go to the canteen for tea. They were returning at about 5 p.m. when a buzzer sounded, which was the signal to cease work. The plaintiff worked in a shop known as O.5 shop, and to reach the canteen he had to pass through O.1 shop. Through that shop there was a space 15ft. 3 ins. in width which was the normal way used by workmen when going to or from their work. The space was marked out on each side by a white line, and inside the space there was a set of railway lines on which at times stood a truck or lorry. When the plaintiff and his fellow-workman passed through the shop on the way to the canteen there was no lorry on the space, but when they were returning there was a lorry on it occupying about half of the available space and standing more to

one side of it than the other. The workmen who had heard the buzzer were hurrying from work in the opposite direction to that in which the plaintiff was going.

When heavy material had to be loaded on to a lorry, it was the practice to make use of a packing, consisting of a piece of steel approximately 11 ins. long by 7½ ins. wide and 2 ins. thick, to keep the object to be lifted off the floor while lifting chains were placed beneath it. When the plaintiff was returning through shop O.1 he saw the lorry and noticed that there was more room to pass on the right hand side of it than on the left, but chose the latter, possibly for the reason that there were more people coming towards him on the right hand side. As the plaintiff was passing the lorry, he stumbled and fell over a piece of packing which was not far from the lorry and extended for some three or four inches over the white line. The plaintiff's leg was broken, and he claimed damages from the defendants on the ground of negligence and/or breach of statutory duty. The breach of statutory duty alleged was that the defendants had, contrary to section 26 (1) of the Factories Act, 1937,[1] failed, so far as was reasonably practicable, to provide and maintain safe means of access to every place at which the plaintiff had at any time to work.

By their defence the defendants denied negligence or breach of statutory duty and pleaded contributory negligence.

Cassels J. held that there had been no negligence on the part of the defendants, but that they had been guilty of a breach of section 26 (1) of the Factories Act, 1937, and gave judgment for the plaintiff, assessing the damages at £1,095 10s. 7d.

The defendants appealed.

*H. I. Nelson Q.C.* and *D. H. Robson* for the defendants.
*Elwyn Jones Q.C.* and *R. Castle-Miller* for the plaintiff.

The following cases were cited in argument: *Donovan* v. *Cammell Laird & Co.*[2]; *Callaghan* v. *Kidd (F.) and Son (Engineers) Ld.*[3]; *Hopwood* v. *Rolls Royce Ld.*[4]; *Street* v. *British Electricity Authority*[5]; *McCarthy* v. *Coldair Ld.*[6]; *Sheppey* v. *Matthew T. Shaw & Co. Ld.*[7]

SINGLETON L.J. This appeal must be allowed. The plaintiff's claim was put in two ways. It was said that the defendants had been negligent in that there was along the route which the plaintiff was taking at the time of the accident an obstruction which had been left there negligently; and further, that there

[1] Factories Act, 1937, s. 26: "(1) "There shall, so far as is reasonably "practicable, be provided and main-"tained safe means of access to every "place at which any person has at "any time to work."

[2] [1949] 2 All E.R. 82.

[3] [1944] K.B. 560; 60 T.L.R. 409; [1944] 1 All E.R. 525.

[4] [1947] 176 L.T. 514.

[5] [1952] 2 Q.B. 399; [1952] 1 T.L.R. 799; [1952] 1 All E.R. 679.

[6] [1951] 2 T.L.R. 1226; [1951] W.N. 590.

[7] [1952] 1 T.L.R. 1272.

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was a breach of section 26 (1) of the Factories Act, 1937, which provides that "There shall, so far as is reasonably practicable, "be provided and maintained safe means of access to every "place at which any person has at any time to work."

Cassels J. held that there was no negligence on the part of the defendants, but he decided in favour of the plaintiff on the ground that the defendants were in breach of their duty under section 26 (1) of the Factories Act, 1937.

[His Lordship stated the facts and continued:] Cassels J. said in the course of his judgment: "It is accepted that this "was a means of access for the plaintiff to his work, although "he had selected a slightly earlier time in minutes to go and get "a cup of tea and to be returning to his work." A little later the judge said: "An obstruction like this upon the gangway "or upon the means of access—a thing that does not yield; it "is not as if anybody could so easily kick it off—is a considerable "obstruction, although it may be only two inches in height, "when it is stretched over this white line. It is clear that the "object of the white lines is to see that the space between them "shall be kept clear. If the means of access for workmen "getting to and from their work is to be shared with lorries "which are being loaded, then it is clear that it is up to the "defendants to see that the place is clear, so that, if the work-"men have to share the gangway with the lorries, they shall "have a clear space in which to pass on their way to work or "on their way from it."

I am not sure that that is not putting the duty a little too high. Cassels J. continued: "I think that this was a breach of "the statute. I think that it was reasonably practicable for them "to have provided that, if these packing pieces were used in the "loading of a lorry, when they are finished with them, they "should not be left in the gangway. It was unfortunate that "an accident like this did happen; and it may be that, if it "had not been for the crowd going one way and the plaintiff "going in the opposite direction, he would have seen what was "on the gangway; but there it was."

To determine this appeal it is necessary to have regard to the actual words of section 26 (1). In this case the defendants had provided safe means of access. The two white lines marked the place down which people went in the ordinary way. The object of the white lines was to ensure, as far as possible, that materials were not put over them to obstruct the way. The section contains the words "so far as is reasonably practicable." The means of access was also a means of access for lorries which had to be loaded. If lorries had to be loaded, from time to time it would occur that some object would be over the white line. So far as is reasonably practicable the defendants must maintain safe means of access. They had provided safe means of access; but it is said they had not "maintained" safe means of access. On the other side of the lorry there was some 5 ft. of space down

which the plaintiff could have passed. The lorry was only there temporarily; in a short time it would have gone. It may be that when the lorry had gone, the piece of packing would have been moved back to the proper place, but there was safe means of access, and I find it difficult to see that there was any breach of the statutory duty laid upon the defendants.

I recognize that a matter of this kind is very largely a question of fact, and for many reasons I should have liked to have agreed with the judgment of Cassels J., but I have looked again and again at section 26 (1). I have had my attention called to that which was said in *Street* v. *British Electricity Authority*,[1] and, upon full consideration, I find it impossible to say that in the circumstances of this case there was a breach of the terms of section 26 (1) of the Factories Act, 1937.

I asked counsel how an information under this section could be framed, and whether, if one was drawn in the terms of the section, there could be any possible chance on the present facts of getting a conviction under the section which, after all, is a penal section. I do not think that there could be.

Those are my reasons for saying that, in my opinion, this appeal should be allowed and judgment should be entered for the defendants, having regard to the finding of Cassels J. that there was no negligence upon their part.

DENNING L.J. Cassels J. said that "it is up to the defendants "to see that the place is clear," and because it was not kept absolutely clear, he has held the defendants liable. I can well understand the judge holding as he did, having regard to the state of the authorities at that time. Since his decision, however, we have had the advantage of the decision of the House of Lords in *Latimer* v. *A. E. C.*[2] That was, it is true, a decision on section 25 of the Factories Act, 1937, but it gives an authoritative interpretation of the word "maintained," which is used in sections 25 and 26. All previous decisions, not only on section 25, but also on section 26, need to be reconsidered in the light of that decision.

The difference between sections 25 and 26 is this: section 25 deals with specified things, some of which are themselves means of access, such as stairs, passages and gangways; whereas section 26 deals with unspecified things like scaffolding, staging and so forth, which are erected for the purpose of getting to or at a place of work. Section 25, in regard to its specific means of access, imposes a higher obligation than section 26. It enacts that they *shall be* properly maintained; whereas section 26 only requires that the means provided under it shall be maintained *so far as is reasonably practicable.*

Section 26 has given rise to some difficulty because of the close collocation of the words "maintain" and "safe." It has

[1] [1952] 2 Q.B. 399; [1952] 1 T.L.R. 799; [1952] 1 All E.R. 679.

[2] [1953] 3 W.L.R. 259; [1953] 2 All E.R. 449.

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often been read as meaning that the occupier must maintain the safety of the access, or, in other words, must keep it safe. It seems to me that since *Latimer's* case [2] that is no longer a correct reading of the section. The proper interpretation is to read "safe" with "provided" so that the section reads in this way: There shall be provided a safe means of access (such as a scaffolding, staging, or so forth); and such a means having been provided, it must thereafter be "maintained," that is, maintained in the way defined in section 152 (1), namely, maintained in an efficient state, in efficient working order, and in good repair. *Latimer's* case [2] shows that this obligation to "maintain" should not be used so as to put an excessive obligation on the employer. (See *per* Lord Porter and *per* Lord Reid.[3]) The obligation is not an absolute obligation to maintain safety, but a relative obligation to maintain efficiently. Once a safe means of access is provided, such as a passage or gangway, the occupier is not responsible for every temporary obstruction (such as a patch of oil or slipperiness) which may, through some accident or mischance, occur in it. If he has an efficient system, then to keep it clean and free from obstruction is all that can be reasonably demanded of him. It is, indeed, all that is reasonably practicable. So regarded, section 26 adds very little to the common law obligation between employers and workmen, and it has been so said on several occasions in this court.

In the present case the occupier "has provided" a safe means of access. He has provided a roadway 15 ft. 3 ins. wide, of sound construction and marked out by white lines. The only question is whether he has "maintained" it in an efficient state so far as is reasonably practicable. I think that he has. It so happened that in the course of some loading operation a block of iron was left temporarily protruding three inches out into the gangway. It is not known whether it was done by the servants of the occupier or not. In my opinion a transient and exceptional obstruction of that kind is not a breach of the obligation to maintain the means of access. I agree, therefore, that this appeal should be allowed.

MORRIS L.J. I also agree. On the facts in this case it does not seem to me that it could be said that there was a failure to provide safe means of access. For the plaintiff to succeed, in my judgment, he had to show that there was a failure, so far as reasonably practicable, to maintain a safe means of access. The word "maintain" is defined in the Act to mean "maintained in an efficient state, in efficient working order, and in good repair."

In his speech in *Latimer's* case [2] in a passage in which he was dealing with section 25, but which is applicable in a wider context, Lord Porter said [4]: "To be efficient, the appellant

[2] [1953] 3 W.L.R. 259; [1953] 2 All E.R. 449.
[3] [1953] 3 W.L.R. 259, 263, 266.
[4] Ibid. 263.

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" contended, the floor must be fit for any of the purposes for " which it is intended, for example, for support and for passing " over in safety. The difficulty of such a view is that it puts an " excessive obligation upon the employer. Indeed, it was con- " ceded that it could not be carried to the length of saying that a " temporary obstruction, such as a piece of orange peel or the like, " would make it inefficient. Once this concession is made it " becomes a question of the degree of temporary inefficiency which " constitutes a breach of the employer's obligation."

In the present case the lorry was only temporarily in position, and in all probability the packing piece was also only temporarily in the place where it was. The time involved was very short, and a consideration of the facts in this case leads me to the view that it was not shown that, so far as reasonably practicable, there was a failure to maintain or to provide safe means of access.

*Appeal allowed.*

Solicitors: *Bell, Brodrick and Gray for Harold Jackson & Co., Sheffield; W. H. Thompson.*

P. B. D.

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[CHANCERY DIVISION.]

1953
*May* 21, 22.
Harman J.

## * *In re* WOLFFE. SHAPLEY *v.* WOLFFE.

[1951 W. 584.]

*Will—Construction—Limitation—Condition precedent—Legacy to be transferred to the beneficiary on marriage "to a person of the Jewish faith and the child of Jewish parents"—Proviso directing trustee not to transfer legacy to legatee, if she shall marry "a "person not of the Jewish faith and not the son of parents of the "Jewish faith"—Validity.*

A testatrix, by her will, dated in 1923, directed her trustee to pay the income of £600 to her daughter for life and, on her death, to pay the income to her granddaughter during spinsterhood and, on the marriage of the granddaughter "to a person of the Jewish "faith and the child of Jewish parents," to transfer to her the investments and securities representing the £600, "subject however "to the proviso hereinafter set forth."

After devising and bequeathing her residue between her three children, the testatrix directed as follows: "Provided always that "if my granddaughter . . . shall marry a person not of the Jewish "faith and not the son of parents of the Jewish faith" her trustee should not transfer the fund to the granddaughter, but should transfer to her one-sixth thereof and divide the remainder between two named persons equally. In October, 1927, the granddaughter married a person who was neither of the Jewish faith nor the son of Jewish parents:—

*Held*, (1) that if the qualification that the corpus of the gift

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was to pass to the granddaughter on her marriage to a person of the Jewish faith constituted a limitation, she had not fulfilled its requirements; (2) alternatively, that if the qualification was to be regarded as a condition precedent, that condition was, unknown to the testatrix, impossible of fulfilment in view of the decision in *Clayton* v. *Ramsden* [1943] A.C. 320, so that the condition failed and the gift failed with it; with the consequence that in either event the gifts over in the proviso took effect.

*Clayton* v. *Ramsden* [1943] A.C. 320; 59 T.L.R. 75; [1943] 1 All E.R. 16; *In re Wilkinson* [1926] Ch. 842; *In re Piper* [1946] W.N. 187; 62 T.L.R. 618; [1946] 2 All E.R. 503; *In re Elliott* [1952] Ch. 217; [1952] 1 T.L.R. 298; [1952] 1 All E.R. 145, considered.

ADJOURNED SUMMONS.

By her will, dated October 12, 1923, Augusta Wolffe directed her trustee to hold £600 in trust, after a life interest in the income to her daughter, Annie Cohen, to pay the income to her granddaughter, Rosa Cohen (daughter of Annie Cohen), during her spinsterhood, and "upon the marriage of the said Rosa Cohen to "a person of the Jewish faith and the child of Jewish parents" to transfer to her the investments and securities representing the said sum of £600, "subject however to the proviso hereinafter set "forth." After devising and bequeathing her residue equally among her three children, Annie Cohen, Ruth Merritt and Jacob Wolffe, she directed as follows: "Provided always that if my "granddaughter the said Rosa Cohen shall marry a person not "of the Jewish faith and not the son of parents of the Jewish "faith then in that event my trustees or trustee shall not transfer "to her the investments or securities representing the said sum "of £600 but shall transfer to her one-sixth of such investments "or securities only and no more and shall sell the residue of the "said investments or securities and divide the proceeds thereof "between my said son Jacob Wolffe and my said daughter Ruth "Merritt equally."

On October 1, 1927, Rosa Cohen married Cecil Harold Hill, who was neither of the Jewish faith nor the child of Jewish parents.

By a deed dated April 6, 1937, Jacob Wolffe assigned to Walter Thomas Shapley his interest under the will. In 1948 the trustee of the will paid over the legacy of £600 to the legatee, Rosa Hill, with the approval of Annie Cohen, the parties having been advised that all the conditions as to the legacy were void.

Annie Cohen died in September, 1949, and in October, 1949, the solicitors representing Walter Thomas Shapley wrote to the trustee of the will reminding him of the assignment of April 6, 1937, and, as a result of this correspondence, Walter Thomas Shapley took out a summons to ascertain whether the legacy of £600, on the death of Annie Cohen, became payable (a) to Rosa Hill absolutely, or (b) as to one-sixth thereof to Rosa Hill, and as to the remainder became divisible between the plaintiff as assignee of Jacob Wolffe and the testatrix's daughter Ruth

Merritt, or (c) fell into residue, or (d) in what other manner it became distributable.

*Michael Browne* for the plaintiff.
*B. H. Dillon* for the defendant Rosa Hill.

Cases referred to in argument: *In re Blaiberg* [1]; *In re Donn* [2]; *In re Gape* [3]; *In re Piper* [4]; *In re Elliott* [5]; *In re Wilkinson* [6]; *In re Allen.* [7]

HARMAN J. This summons raises a point on the will of one Augusta Wolffe, who died in 1924, leaving a will made in October, 1923, which was proved by her sole executor, her nephew, Moss Wolffe. He died in 1950, just before this summons was taken out. It was in fact taken out making him a defendant under the impression that he was alive; but it has been amended by joining his widow and personal representative as the first defendant.

The second defendant, added by reamendment, is one Rosa Hill, a beneficiary under the will and a person to whom a certain trust fund has been paid. The question is whether that payment was rightly made or no. She has come here to argue that it was rightly paid. The personal representative of the last surviving trustee has not intervened in this suit, though I understand an appearance was entered for her; and I do not know whether, if I decide in a certain way, there may have to be an action against her entitled in the matter of Moss Wolffe's Estate for administration on the footing of a devastavit or breach of trust. That does not arise today. All I am going to decide today is a question of construction under the will, and I shall leave any subsequent results to the future.

[His Lordship read the provisions of the will and continued:] For reasons which I do not know or understand, Moss Wolffe was apparently advised that Rosa Hill was absolutely entitled to that legacy, subject to her mother's interest, and it has been, with her mother's consent, as I understand it, paid over to her. The question is whether that was rightly done.

The present claim is made by one Walter Thomas Shapley who is the assign of all the interest of the son Jacob Wolffe under the will. It will be remembered that Jacob Wolffe's interest is either under the proviso under which he would get half of five-sixths of the fund, or as a residuary legatee, in which capacity he would get one-third of anything that went into residue. The claim, of course, could not be made until the death of Annie

[1] [1940] 1 Ch. 385; 56 T.L.R. 487; [1940] 1 All E.R. 632.
[2] [1944] Ch. 8; 60 T.L.R. 30; [1943] 2 All E.R. 564.
[3] [1952] Ch. 418.
[4] [1946] W.N. 187; 62 T.L.R. 618; [1946] 2 All E.R. 503.
[5] [1952] Ch. 217; [1952] 1 T.L.R. 298; [1952] 1 All E.R. 145.
[6] [1926] Ch. 842.
[7] [1953] 1 Ch. 116; [1953] 1 All E.R. 308.

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Cohen, although the assignment was made in 1937. Moss Wolffe when he handed the fund over had notice that the assignment had been made.

Now, it will be observed that there is a gift to Rosa during spinsterhood. There is no further gift to her of income at all, and there is then a gift to her of the capital of the fund on her marriage to a person of the Jewish faith and a child of Jewish parents. That is the only event in which she is to have the capital. Of course, if she remains a spinster, she will continue the enjoyment of income during the rest of her life, and the residuary bequest will then operate on her death.

The testatrix, therefore, has dealt with the fund if Rosa lives and dies a spinster, and has dealt with the case if Rosa marries and marries a person of Jewish faith and parentage, but not further; by the proviso, she proceeds to fill what she conceives to be the gap. The gap she conceives can only arise if Rosa marries a person not of the Jewish faith and not the son of parents of the Jewish faith. In that case Rosa is to have only £100 and the other £500 is to go to her aunt and uncle.

This case seems to be the first of its kind. There is no question here, as I see it, of a vested life interest in Rosa, cut down by a proviso in the form of a condition subsequent. This is a condition precedent, if it be a condition at all; and it seems to me that entirely different considerations apply to it from those which apply in the case of conditions subsequent. It is now well enough known, since the decision of the House of Lords in *Clayton* v. *Ramsden*,[1] that a condition of defeasance of an estate or interest by way of condition subsequent on marriage to a person not of the Jewish faith and not of Jewish parents is bad, because it is too uncertain and, being too uncertain, the condition subsequent fails and the gift remains; so that the legatee can take the benefit without complying with the condition. But that does not at all apply to conditions precedent, for there the legatee must qualify for the gift, and she can only qualify by marrying a person of Jewish faith and parentage. It may be that that is not a thing which, in the eye of the law, she can do. It is said, therefore, that this is a condition precedent which is impossible and should therefore be rejected; but I do not follow that argument at all. If one rejects the condition, one rejects the gift. There is no gift to her on her marriage. There is only a gift to her on her marriage to a person of Jewish faith and parentage; and it seems to me that, on the true view of it, this is not a condition at all but a limitation, and the limitation fails.

I see, therefore, no limitation to the second defendant in the events which have happened. Moreover, I regard the proviso which follows the residuary gift as really an alternative limitation in these words: "If the condition I have imposed "be not fulfilled, then, in the alternative, I give it over in

[1] [1943] A.C. 320; 59 T.L.R. 75; [1943] 1 All E.R. 16.

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" another way." I will deal with what conclusion I come to regarding that other way in a moment; but I think that I have authority for construing the will in that way in *In re Wilkinson*.[2] There the bequest was of a fund to be paid to a niece so long as she resided in a certain house, and then, if she ceased to reside in the house, the fund was to go over. Tomlin J. held that there was nothing bad about those limitations on their face. In the event, having regard to the word " voluntarily " there, he concluded that the niece might not be bound by it, if obliged by the duties of her husband to live elsewhere. That does not affect the way he construed the will. He said: " When I " come to examine the language of this will, I am satisfied that " I am not dealing with a case of a gift cut down by a condition " subsequent, but that I am dealing with a case of limitation. " The language of the gift is ' pay the income . . . to my niece " ' . . . (in order to enable her to reside . . .) for and during the " ' term of her natural life or until she shall voluntarily cease to " ' make the . . . dwelling-house her permanent home.' If the " clause had paused there, I feel great difficulty in appreciating " what argument could have been addressed to me to suggest " that that was other than a limitation similar to the ordinary " limitation to a woman for life, or until she shall marry again. " But it is said, and said truly, that in construing these words, " I must read the clause as a whole. And it is contended that " when I go on to find the direction that after her death the " trustees shall hold the sum of £7,000 in trust as she shall " appoint, and that in default of appointment this sum shall fall " into residue followed by the proviso ' Provided however that in " ' the event of my said niece voluntarily ceasing to make the said " ' dwelling-house her permanent home as aforesaid I direct that " ' the said sum of £7,000 and the investments representing the " ' same shall fall into ' residue, I must in some way modify my " view of the earlier language, and read it as though it were a gift " to her for life, with a condition subsequent that her interest " shall cease if at any time she voluntarily ceases to make the " dwelling-house her permanent home. I am unable to follow " that argument. The scheme of the clause seems to me to be " reasonably plain. There is, first of all, a limitation of the " income to her for life, or until the happening of the named " event. The next branch of the clause, as I read it, deals with " the alternative, of her death without having ceased to occupy " the house, and then the proviso deals with the other alternative " of her ceasing to reside in the house. The words ' provided " ' however ' seem to me to mean nothing more than ' but in the " ' other alternative.' "

Those words seem to me to fit very well the form of the will here; but supposing I am wrong about that, I must deal with the matter on the supposition that there is a true condition

[2] [1926] Ch. 842, 848.

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precedent. (It is not even suggested here that this can be read as a condition subsequent, and rightly, because there is no suggestion of a gift to the second defendant of the income for anything more than her spinsterhood.) Suppose, then, that this be a condition precedent. It is a condition which, having regard to the state of the law, is impossible. It is not said to be contrary to the policy of the law; nor is it said to be wrong in any way. It is argued that an impossible condition will not be insisted on having regard to the ecclesiastical law on the subject inherited by the Court of Chancery.

Now, both Romer L.J. and myself appear to have given judgments independently on this subject recently, and I am glad to say that, though his case was not cited to me, our judgments seem to be congruous. His case was *In re Piper*.[3] Mine is *In re Elliott*.[4] Both of us cited a passage out of Cotton L.J.'s decision in *In re Moore*[5] which he took from an early edition of Jarman by the author. I will read that passage from where I cited it[6]: "The rule is thus stated by Mr. Jarman: 'But with respect "'to legacies out of personal estate, the civil law, which in this "'respect has been adopted by courts of equity, differs in some "'respects from the common law in its treatment of conditions "'precedent; the rule of the civil law being that where a con-"'dition precedent is originally impossible, or is made so by the "'act or default of the testator, or is illegal as involving malum "'prohibitum, the bequest is absolute, just as if the condition "'had been subsequent.'"

It is argued before me that this bequest was originally impossible; but the quotation goes on: "'But where the "'performance of the condition is the sole motive of the bequest, "'or its impossibility was unknown to the testator, or the con-"'dition which was possible in its creation has since become "'impossible by the act of God, or where it is illegal as involving "'malum in se, in these cases the civil agrees with the common "'law in holding both gift and condition void.'"

Now, if I apply that passage, as both the Lord Justice and I did in those two decisions, I feel that the condition here exactly complies with the second sentence; the performance of the condition seems to me to have been the sole motive of the bequest. Furthermore, its impossibility must have been, as I see it, unknown to the testatrix; no testator would ever guess that in the eye of the law one could not marry a Jew, and it is only by a reasoning from the peculiar doctrine which covers conditions subsequent, that a position is reached where it is impossible to say whether a man is a Jew or of Jewish parentage. Those who select scholars for Jewish charitable scholarships have no difficulty at all. It is not to be supposed that the testatrix knew that the condition was impossible: and, therefore, as she

[3] [1946] W.N. 187; 62 T.L.R. 618; [1946] 2 All E.R. 503.
[4] [1952] Ch. 217.
[5] (1888) 39 Ch.D. 116, 128.
[6] [1952] Ch. 217, 221.

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only posed one which, having regard to the highest authority, I must hold to be impossible, as the condition is bad, the gift fails with it.

It is then argued in the interest of residue that "if in law you "cannot say that a man is a Jew, so you cannot say that a man "is not." I find it very difficult to believe that, if a man marries a woman of pure Zulu parents, on both sides, anyone can say that she was a Jewess of Jewish parents; at some point there comes a limit to this uncertainty, and that is reached here.

Therefore, when I come to the proviso, and I find this: "If "my granddaughter shall marry a person not of the Jewish faith "and not the son of parents of the Jewish faith," I cannot see any difficulty. She has married, and nobody suggests that the person she married satisfied those conditions; in that event she was not to receive more than one-sixth of the investments.

The result is that on the marriage the fund became payable as to one-sixth to Rosa Hill and, as to the remainder, became divisible between Jacob Wolffe and Ruth Merritt in equal shares. I think I can say: between the plaintiff as assignee of the interest of Jacob Wolffe and the testatrix's daughter Ruth Merritt in equal shares, and there will be liberty to apply. I do not propose to make any further order.

*Declaration accordingly.*

Solicitors: *Gibson & Weldon for Shapley, Barret & Co.*, Nairobi, Kenya Colony; *Sampson & Co.*

J. L. D.

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[PROBATE, ETC., DIVISION.]

## * BUTTLE *v.* BUTTLE.

1953
*June* 26.

Lord Merriman P.
Pearce J.

*Husband and Wife — Justices — Maintenance — Home Office circular — Guidance as to amount of maintenance — Court's discretion not superseded.*

Any attempt by a government department to dictate to a court how it should decide the question of the amount of a maintenance order is to be deprecated; and it is particularly desirable in government circulars which give information relevant to the determination of the amount of an order that it be made clear beyond doubt that the document is not intended to supersede the discretion of the court, or its duty to form its own opinion in each particular case as to what is just.

APPEAL of husband from an order of the Domestic Proceedings Court for the borough of Chelsea against the amount of maintenance ordered on February 24, 1953.

The husband, who admitted that he had deserted the wife, was a corporal in the Royal Horse Guards, and for purposes of

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pay and allowances ranked as a sergeant in a line regiment. For the wife to qualify to receive the marriage allowance of 49s. a week the husband was obliged to pay 28s. a week. The husband was ordered to pay £3 17s. a week, but there was evidence admitted by the wife that she was earning £6 10s. a week herself. The domestic proceedings court gave consideration in reaching its decision to a Home Office circular, the relevant passages in which, and the interpretation of such passages by the court, are considered in the judgment of Lord Merriman P.

*Colin Coode* for the husband appellant.
*S. H. Noakes* for the wife respondent.

LORD MERRIMAN P. This is an appeal solely on the question of the amount of £3 17s. a week which on February 24, 1953, a husband was ordered to pay by the Domestic Proceedings Court for the borough of Chelsea on the ground of his admitted desertion. The suggestion is that the amount is too much, because no account has been taken of the fact, admitted by the wife, that she was earning £6 10s. a week.

The husband is a corporal in the Royal Horse Guards, but for the purpose of pay and allowances he ranks as a sergeant in a line regiment. The result is that he is obliged, in effect, to make an allotment of 28s. to his wife to qualify her to receive the married allowance of 49s. a week. Those two sums together make up the sum of £3 17s., which is the same sum as that which has been ordered. But it is said that that is no mere coincidence, but is the result of the magistrates paying attention, but, as it happens, insufficient attention, to a Home Office circular issued under the authority of the Secretary of State in February, 1953, which replaced other similar circulars issued with the same purpose.

It seems from the heading of the circular and, indeed, from many of its terms, that the object of issuing it is to give to magistrates' courts useful information about the way in which maintenance orders can be enforced as against members of Her Majesty's Forces by stoppage of pay, the implication being that it is no use making orders for fantastic amounts which could not possibly be enforced, and I venture to think that nobody can object in principle to information of that sort being circularized to magistrates' courts.

In about 1943, when the scheme of the regulations about stoppage of pay and enforcement of orders and the like was changed, this Division experienced extreme difficulty in finding out what exactly was the precise effect of any given order for maintenance, and it was frequently necessary to refer to the Stationery Office for whatever was the latest White Paper on the subject. Although no possible exception can be taken to the issue of the circular of February, 1953, it is said that it is worded in an objectionable way. It must be acknowledged that there

are passages in it which could, with advantage, have been worded otherwise, and in certain respects the advice contained in the circular is not strictly in accordance with the law.

About the effect consideration of this circular had on the magistrates' decision there is no doubt, for in their reasons the magistrates, the chairman of whom was a metropolitan magistrate, said that the desertion was not only proved, but actually admitted by counsel for the husband, and continued: "The "amount of the order is the amount the wife normally received "or would normally receive . . . by way of qualifying allotment "and married allowance if the parties were not estranged from "each other, and is, in fact, the amount she had been receiving." So it was not a coincidence that the amount of the order equalled the combined amount of the compulsory allotment and the married allowance. The chairman continued: "This is in "accordance with the advice given to clerks to justices by the "Home Office, in their circular letter . . . of December 1, 1952, "as to the arrangements made by the Service Departments with "regard to separated wives of members of the Forces." I pause there to observe that even if the amount had been fixed strictly in accordance with the circular, but on a wrong basis, the compliance with the circular would of itself be no justification. The magistrates would not be entitled to shelter themselves behind advice or directions given by a government department if that advice was demonstrably wrong, for then they would plainly have misdirected themselves. If the advice has been misunderstood, and, while purporting to follow the advice, the court has in fact not followed it, but has thought that it was following it, there is plainly a misdirection of itself by the court, and the matter is open to the appellate tribunal.

The relevant paragraphs of the circular, are, for present purposes, Nos. 9 and 10, bearing in mind that they refer to the subject of estrangement introduced in the preceding paragraph 8. Paragraph 9 states that in assessing a soldier's income in order to fix the amount of a maintenance order it would be proper to take into account certain items. The first item is the soldier's pay, which is stated at the lowest rate, the next is the amount of the married allowance which would be payable if normal domestic relations existed between the parties, which is obviously a matter properly to be taken into account, and next the fact that in addition to receiving pay a soldier is normally clothed, fed and lodged at the public expense, or else receives a cash allowance in lieu in special cases. There is a note to that paragraph: "It is impossible, however, to ascribe an accurate "cash value to the food, clothing and lodging provided, and it "would therefore be for the court to decide the value to be "placed on issue in kind in each particular case." It is quite impossible to take exception to that as a statement of the

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general principles. It happens to coincide, in effect, with something I am reported as having said in connexion with a maintenance order in this court made against an officer in the Forces in *Collins* v. *Collins*,[1] which my brother tells me as a matter of practice is constantly followed by the registrars in similar cases.

The circular then goes on, in paragraph 10, in a sentence which has been criticized: "From the particulars given in "Appendix (A) the court should be able to ascertain in relation "to any particular member of the Forces the minimum amount "which would normally be received by the wife by way of allot-"ments and allowance if the parties were not estranged from "each other." That is perfectly clear and accurate, and, in the present case, the qualifying allotment is the sum of 28s., which attracts the marriage allowance of 49s. The word "minimum "amount" is used because there is nothing in these schedules to prevent a man from making a voluntary allotment in addition to the compulsory qualifying allotment. But the sentence then continues in these words: "In the absence of private income of "either the husband or the wife the court *should* take the figure "so arrived at as a general guide to a minimum amount for the "maintenance order." I think that that sentence is subject to the criticism that it appears to be an attempt by a government department to dictate to a court how it should decide the question of the amount of a maintenance order, and I deprecate any such attempt.

A very slight modification of the words would meet that difficulty which is one confronting judges every day in addressing juries on matters which are peculiarly within the province of the jury and not of the judge, and I do not think that it is necessary for us to substitute any particular formula for that which has here been adopted. But as it is to this particular paragraph that the chairman is referring in the statement of the reasons, the decision is not in accordance with the advice, because the advice that the court should take the figure so arrived at as a general guide to the minimum amount for the maintenance order is qualified by the statement that this should be done "in the "absence of private income of either the husband or the wife," whereas here it is clear that the wife has a gross income of £6 10s. a week. Although that sum has never been analysed so as to show what spending money she really has out of it, it is common ground that she has a private income by her own exertions of £6 10s. a week.

There is another qualification upon these directions which I should like to make: Paragraph 11 provides "Where either the "husband or the wife has other sources of income these should "be taken into account in fixing the amount to be paid under a "maintenance order." That is quite unexceptionable. It goes

[1] [1943] P. 106; 59 T.L.R. 388; [1943] 2 All E.R. 474.

on "There will no doubt be cases in which a wife is in employ- "ment and may be earning a considerable wage." That is the present case. "In any case of this kind, however, allowance "should be made for the value of the issues in kind received by "the soldier in order to maintain the proper balance between "the respective incomes of the parties. Regard should also be "had to any allowance received by the wife under the provisions "of the Family Allowance Act, 1945." As a direction that all sources of income should be taken into account in making the assessment, I have nothing to say by way of criticism, but if it is intended to convey, as might be thought from a literal reading of this paragraph, that it is only in cases where the wife has a separate income, either by her own earnings or otherwise, that the advantages to the husband of what are called the "issues in kind" should be taken into account, I should differ, because in any event, in my opinion, the fact that in addition to his pay the husband receives his food, some of his clothing, and his quarters free, is a matter to be taken into account, if for no other reason because, putting it generally, it leaves his pay more or less free for his own spending purposes. I am not intending that phrase to be taken literally, because one knows that there are certain necessary expenses, for extra messing, games, and the like, which no doubt also ought to be taken into account in seeing what is really the effect of the combination of his receipt of pay in cash and other benefits in kind. The point is that these calculations should always be made in assessing the husband's means, and not only be made in cases of which it can be said that it is necessary to counterbalance some private income of the wife's.

There is, therefore, only one conclusion, namely, that the magistrates have gone wrong by purporting to follow the advice given in a circular which is not in itself wholly accurate, whereas they have, in fact, misunderstood or misapplied that advice. That involves the result that they are seen to have misdirected themselves, and, therefore, although this court does not interfere with mere questions of amount unless there is some error in principle, it seems to me that this is clearly a case in which there is some error in principle, and the matter must be sent back for further consideration.

PEARCE J. I agree with all that has been said. I should like to emphasise what my Lord has said with regard to this circular letter. It is particularly desirable, in documents such as this, that it should be made clear beyond doubt that the document is not intended to supersede the discretion of the court or its duty to form its own opinion in each particular case as to what is the just order to make on all the evidence in that case. I agree that the case should be sent back for rehearing.

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THE PRESIDENT. Our order will be that the appeal is allowed, the order set aside, and the wife's summons remitted to a fresh panel of the justices for determination of the amount of the order.

*Appeal allowed.*
*Case sent back for rehearing.*

Solicitors: *Frank Taylor, Nightingale & Baker; Watson, Sons & Room.*

J. B. G.

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[PROBATE, ETC., DIVISION.]

1953
*June 25.*

## * WAKEFORD *v.* WAKEFORD

Lord Merriman P. and Pearce J.

*Husband and Wife—Justices—Maintenance—Attempt to force husband to grant wife tenancy by excessive order.*

A husband, who had admittedly deserted his wife, allowed her to live rent free in a flat in certain premises in which he had a business interest; but he refused to grant her a tenancy of the flat. A court of summary jurisdiction ordered him to pay her maintenance at a higher figure than appropriate, but intimated that it would consider a variation of the amount if he offered her the security of a tenancy:—

*Held,* that there was no justification for the court making an excessive order for maintenance for the purpose of forcing the husband to grant the tenancy against his wish.

APPEAL by husband against the amount of maintenance ordered on December 2, 1952, by the justices for the Mortlake petty sessional division of Surrey. The husband admitted that he had deserted the wife.

The following statement of facts is summarized from the judgment of Lord Merriman P.: The husband, in partnership with another man, owned two shops, one in Tooting, and the other in Barnes. As a matter of partnership arrangement the husband drew the profits of the Tooting shop, and the other man the profits of the Barnes shop. The husband had a lease of the premises the ground floor of which was the Barnes shop, and he sublet that floor to the partnership. The wife lived rent free in a flat on the first floor of the Barnes premises. The husband paid the rates on the whole building, and paid the light of the flat. The value of the flat, in those circumstances, was accepted by both parties as £1 a week, and the wife offered to pay that sum as rent if she could get a tenancy.

The justices adjourned the case after the figures had been considered, expressing the hope that an agreement might be reached on the question of a tenancy, so that the wife might have some security of tenure. The husband had stated in cross-examination that he did not want to allow his wife £3 and take

£1 back for rent (the sum offered by the wife) because she had said that she would "see him in the gutter." At the adjourned hearing the husband again refused to grant a tenancy, and after a further adjournment the justices made an order of £4 a week.

In their reasons the justices said: ". . . As to the security "of the wife's living accommodation, they felt that the wife's "position would be safer if protected by an agreement for sub-"letting of the premises than by a licence, but intimated that "should any offer as to an agreement of tenancy be made by "the husband they would consider a variation of the financial "part of the order on application by [the husband]."

*D. J. Stinson* for the husband, appellant.
*Miss Colwill* for the wife, respondent.

LORD MERRIMAN P. This is a husband's appeal against the amount of an order made in favour of the wife by the justices for the Mortlake petty sessional division of Surrey, on December 2, 1952, in a case in which the charge of desertion was admitted. They awarded the sum of £4 a week. It is said that in the circumstances of this case the amount was excessive, and that on the figures, which in substance are uncontroversial so far as the particular point in question is concerned, the amount should be £3.

Let me say at once that where a particular figure appears to be sustainable on the respective means of the parties, even though this court may think that it is a shade high or a shade low, we are very reluctant to interfere unless it appears that some question of principle is involved. This is a case in which it may very well be (though I express no concluded opinion about it), that the sum of £4 might be a difficult figure to attack when looked at merely in the light of the test of the husband's earnings and the fact that the wife was earning no substantial money. But in my opinion it is clear that a serious question of principle arises in this case. [His Lordship stated the facts and continued:] There can be no doubt that the justices thought that they were entitled to put some pressure upon the husband to give his wife the tenancy which she sought, and which he refused. In passing, I may say that, apart from any question whether the wife would take undue advantage of becoming the husband's tenant, there are obvious circumstances in which, from a business point of view, it might be inconvenient to tie this flat up with a tenancy of any substantial duration. Although the partnership business is only conducted in the ground floor of the premises, the situation might easily arise in which, for some business reason, it might be desired to get rid of the ground floor premises, which would be facilitated if the whole of the premises were free.

There was a further argument after the week's adjournment. At the end of it the justices decided to make an order of £4 a

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week. It was clear, as the result of the adjournment, that the wife was not going to obtain the security of tenure which they thought she ought to have.

In due course, for the purposes of this appeal, the justices' clerk was asked to set out the reasons, and he stated that as the husband admitted desertion it was assumed that what was meant was the reasons for the amount of the court order. This, he said, was based on the respective earnings of the parties. I have already said that if the matter stood there it might be difficult, if not impossible, for this court to intervene, but the statement of the reasons goes on: "As to the security of the wife's living "accommodation, they felt that the wife's position would be "safer if protected by an agreement for subletting of the "premises than by a licence, but intimated that should any offer "as to an agreement of tenancy be made by the husband they "would consider a variation of the financial part of the order on "application by [the husband]." It is not difficult, I think, to penetrate the extremely thin veneer by which the real decision of the justices is covered. On the basis that at present subsists week by week, the wife is in occupation of a flat provided by the husband which is worth £1 a week to her. On that basis in actual cash her maintenance should be £3. If, for any reason, her occupation of the flat is terminated by the husband, the loss of the accommodation has to be made up to her, as could, and, I think, should be done, by an order increasing the amount of the cash benefit by whatever sum is necessary to produce alternative accommodation on a comparable basis.

Instead of that the justices have ordered a payment of £4 in order to force the husband to give a tenancy of unknown duration, with the suggestion that if he does give such a tenancy the financial part of the order will be reduced. In my opinion they had no right whatever to make an order on that basis, and in doing so have clearly gone wrong as a matter of principle. In plain English they have increased the cash amount of the order by £1 more than it ought to be, having regard to the fact that the husband has supplied the wife with this residence rent free, rate free, light free, in order to force him to change that permissive occupation into a formal tenancy, the hypothesis being that the wife would have to pay £1 a week for the tenancy.

The facts have only to be stated, in my opinion, to make it apparent that the justices have done something which they had no right whatever to do. In my opinion this appeal should be allowed, and, as there is really no dispute about the figures, I think that we can safely take it upon ourselves to reduce the amount of the order from £4 to £3.

PEARCE J. I agree. On the face of the note and of the reasons it becomes apparent that the justices have done what my Lord has said. From the cross-examination it would appear that it seemed to the wife's counsel (and I do not think that she now

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Pearce J.

repudiates it) that the right figure for maintenance was £3 plus the use of the flat, but the wife was trying to get the husband to give her the security of the tenancy instead of merely allowing her to be there at his will. As he was obdurate the justices adjourned the matter. On the adjourned hearing the husband's counsel declined to give a tenancy, but offered a licence. Again the justices adjourned the matter in order that the husband might become willing to grant a tenancy. The case was finally heard on December 2, 1952. The husband being still obdurate, the justices made an order for £4. Miss Colwill, in trying to justify it, suggests that the justices had in mind the fact that the wife might be turned out of the flat and that her living expenses would then be greater. The justices had no reason to believe that the husband was about to turn her out. If they were providing for that contingency (which has not yet occurred) the order is in the present circumstances too high.

In my view the justices were attempting to force the husband to grant a tenancy which he did not wish to give by fixing the maintenance at £1 higher than it ought to be, with the allurement of a possible reduction if he would grant a tenancy. However worthy may be the motives which led them to seek that the wife in this particular case should have security of tenure, that is no justification for using an excessive order as a means to bring the husband to take the course which they thought was the right one.

For these and the reasons my Lord has given, I agree that the appeal should be allowed, and that the amount of £4 should be reduced to £3.

Solicitors: *Sutton-Mattocks & Co.; Musson & Co.*

J. B. G.

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[PROBATE, ETC., DIVISION.]

## * KEMP *v.* KEMP.

*June* 11, 1953

Lord Merriman P. and Collingwood J.

*Husband and Wife—Justices—Majority decision—Whether duty on dissenting member to give reasons for dissent.*

On the hearing before three justices of a complaint by a wife that her husband had deserted her, two members of the bench were in favour of dismissing the complaint, while the third, the chairman, was of the contrary opinion. The wife's complaint had accordingly been dismissed. The wife appealed and, pending the hearing of the appeal, her solicitors had sought from the clerk to the justices a statement not only of the reasons of the majority of the court (to which they were entitled) but also a statement of the reasons of the dissenting member for the view taken by him. Reluctantly, and only after repeated requests, the clerk furnished a statement of the dissenting member's reasons.

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*Held*, that while, in matrimonial proceedings before justices, there was no reason why it should not be indicated that the decision was not unanimous, the parties were not entitled to demand that the dissentient magistrate or magistrates should furnish a written statement of the reasons for the dissent.

APPEAL from Leeds City Justices.

The justices on January 9, 1953, dismissed, by a majority of two to one, the wife's complaint that her husband had deserted her on December 24, 1952. Another summons by her against him on the ground of wilful neglect to provide her with reasonable maintenance was allowed to stand over pending this appeal by the wife against the dismissal of the first summons.

By rule 71 (3) of the Matrimonial Causes Rules, 1950 (which deals with appeals to the Divisional Court of the Probate, Divorce and Admiralty Division from courts of summary jurisdiction) it is provided: "The appeal shall be entered by lodging at the Divorce "Registry two copies of the notice of motion. There shall be "lodged at the same time two certified copies of the summons and "of the order appealed against, two copies of the justices' clerk's "notes of the evidence and two copies of the reasons of the "justices for their decision."

The case is reported only on the question whether, when the decision of the justices is not unanimous, the parties are entitled to have a statement of the reasons of the dissenting magistrate for the view taken by him.

*H. D. Baskerville* for the wife appellant.

The husband respondent was not present and was not represented.

LORD MERRIMAN P. Mr. Baskerville, who has argued the case for the wife, made it clear that in substance the two summonses stand or fall together. It is not a case in which there is any difference in the principles involved, because, unless the wife can justify the fact that she left home, as she did on the date from which she charges desertion, and has not since resumed cohabitation, she has no basis for making a claim for maintenance.

I should like to say at once that it is apparent that the magistrates gave very careful consideration to the case. We have an excellent note, and we have something else, about which I have been invited to say a word for the guidance of their clerk. It appears that of the three magistrates sitting, two were in favour of dismissing the summons, and one was of the contrary opinion. In other words, the decision was by majority, and it is evident that when the question arose of stating the reasons for the decision, the wife's solicitors were anxious to obtain the statement of the reasons for the dissenting justice's view. The clerk was reluctant to call upon the dissenting magistrate, who happened to be the chairman, to give, as it were, a separate judgment, and attention has been called to an observation which

I am reported as having made in *England* v. *England*[1]: "The "justices found by a majority (a fact which is irrelevant, in my "opinion, if it ought to have been disclosed at all) . . ." My recollection is that my attention had been called to some observations by the Lord Chief Justice, when, on a case stated in some criminal matter, it was recorded that the decision was that of a majority, and he had said that he thought that that ought not to be mentioned. We have asked counsel to be good enough to find, if possible, where that was reported, but evidently it does not appear in any of the regular reports, and probably it was a remark which was quoted in some newspaper at or about the time that we gave our judgment in *England* v. *England*.[1] However that may be regarding a case stated about some criminal matter, I am not sure that there is any reason why, in some way or another, it should not be indicated in connexion with matrimonial disputes that the decision was not unanimous. But that is one thing. I do not think that even if that is made clear in some way or another at the hearing, or is expressly stated at the time when the finding is made, it entitles parties to demand that the dissentient magistrate or magistrates shall furnish a written statement of the reasons for the dissent, and I certainly deprecate encouraging the establishment of any such practice. In this case, of course, there could not possibly be any criticism of the clerk having done so in response to repeated requests, because he did it as a matter of courtesy. I merely say that I do not think that it should go forth that this court wishes to establish a practice that reasons for a dissent should be formulated and published.

Having said that, I want to make it quite clear that I think that we must approach this case on the basis of the reasons given by the majority as the reasons for the decision, albeit we know that they did not command the assent of one member of the court. I do not think that it would be right for us to weigh up the two rival judgments, so to speak, and say that we prefer the one to the other. What we have to decide is whether the reasons for the decision commend themselves to us.

[His Lordship then considered the facts of the case and expressed the view that the appeal should be allowed on the merits.]

COLLINGWOOD J. concurred.

*Appeal allowed.*

Solicitors: *Biddle, Thorne, Welsford & Barnes* for *D. Lyth*, Leeds.

J. B. G.

[1] [1953] P. 16, 19; [1952] 2 T.L.R. 705; [1952] 2 All E.R. 784.

[COURT OF APPEAL.]

C. A.

1953
*July* 28.

Somervell, Jenkins and Hodson L.JJ.

* ACTON BOROUGH COUNCIL *v.* MORRIS AND ANOTHER.

[Plaint No. J. 141.]

*Emergency Legislation—Requisitioned premises—Part of house requisitioned for homeless from enemy bombing—Duration of requisitioning—Failure to obtain extension from Minister—Defence (General) Regulations*, 1939 (*S.R. & O.* 1939, *No.* 927), *reg.* 51—*Ministry of Health Circular* 2080 *of* 1940.

In 1945 the plaintiffs, a local authority, gave notice to requisition, under the powers delegated to them by the Minister of Health pursuant to regulation 51 of the Defence (General) Regulations, 1939, certain premises for the accommodation of persons rendered homeless by enemy action. The requisition was upon the terms of the Ministry of Health circular No. 2082 of 1940, which limited the duration of the requisition to one month where the previous consent of the Minister or his Senior Regional Officer had not been obtained, but provided for a possible extension of that period on an application for such extension being made to the Ministry. The local authority duly notified the Ministry of the requisition, and their action was in due course confirmed by the Minister through his Senior Regional Officer, but no application was specifically made or granted for an extension beyond the period of one month. In an action against the owner of the premises and his tenant for possession of the premises and for damages for trespass the plaintiff local authority succeeded in the county court, but on appeal by the defendants:—

*Held*, reversing the decision of the county court judge, that the confirmation, on behalf of the Minister, of the requisition was no more than a confirmation of that which the plaintiffs had already done and could not be construed as recording an extension granted by or on behalf of the Minister, and the requisition was therefore now invalid.

*Per* Somervell L.J. The principle to be applied is that those who are exercising special powers to take private property must see that they carry out accurately and in detail the Act of Parliament or, in this case, the conditions of the delegation under the Defence (General) Regulations.

APPEAL from Judge Tudor Rees, sitting at Brentford County Court.

The plaintiffs, the Mayor, Aldermen and Burgesses of the borough of Acton, on June 22, 1945, served notice "that in exercise of the powers delegated . . . by the Minister of Health "under and by virtue of regulation 51 of the Defence Regulations, "1939," they had that day "taken possession of the premises "known as 35 and 37 Kent Road, Acton Green, W.4, for accommodating persons rendered homeless by enemy action." That notice covered 35 Kent Road, the premises in question in the action. Some three weeks later, on July 13, 1945, the town clerk sent the following document to the Ministry of Health: "I, Hugo Charles Lockyer, . . . in the exercise of the powers

"delegated to me under the terms of Ministry of Health circular "2082 by the Minister of Health and by virtue of regulation 51 of "the Defence Regulations, 1939, took possession of the premises "set out upon the accompanying schedule for the purpose of "accommodating persons rendered homeless by enemy action." At the bottom of the document were the words: "The Minister "of Health hereby confirms the taking possession of the premises "named in the accompanying schedule," followed by a space in which the confirmation of the Minister could be signified through the Senior Regional Officer of the Ministry.

The premises in question had been bombed by the enemy, but, before the requisitioning, had been put into repair. The first defendant, Archibald Thomas Morris, had previously lived as tenant in the ground floor of No. 35, and after the premises had been repaired he, with the approval of the plaintiffs, entered and occupied the ground floor, possession of which was surrendered by the local authority. In 1952 the occupier of the first floor flat left and the defendant Morris, who had by that time purchased the whole of the house, wished to put in his brother-in-law, the second defendant Smith, as tenant of the first floor, while the local authority wished to put in their own nominee, to whom the defendant Morris objected. Entrance to the house could only be obtained by the one front door, and Morris having put a mortice lock on that door the representatives of the local authority were unable to obtain access to the first floor. The plaintiffs therefore brought the present action, claiming possession of the first floor and damages against both defendants for trespass.

The county court judge found in favour of the plaintiffs and the defendants appealed, contending that under the powers delegated by the Minister of Health to local authorities the requisitioning, unless an extension was granted by the Minister, was only effective for one month, and no application for an extension having been made or granted the requisition was no longer valid.

*J. Raymond Phillips* for the defendants.
*B. S. Wingate-Saul* for the plaintiffs.

The following cases were cited in argument: *Blackpool Corporation* v. *Locker* [1]; *Erith Corporation* v. *Holder* [2]; *Metropolitan Borough of Lewisham* v. *Roberts*.[3]

SOMERVELL L.J. This is an appeal from a decision of Judge Tudor Rees, in which he decided in favour of the plaintiffs in a claim for possession and damages for trespass. The plaintiffs are a local authority, and on June 22, 1945, they served notice "that "in exercise of the powers delegated to me by the Minister of

[1] [1948] 1 K.B. 349; [1948] 1 All E.R. 85.
[2] [1949] 2 K.B. 46; 65 T.L.R. 243; [1949] 1 All E.R. 389.
[3] [1949] 2 K.B. 608; 65 T.L.R. 423; [1949] 1 All E.R. 815.

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Somervell L.J.

"Health under and by virtue of regulation 51 of the Defence "Regulations, 1939, I have this day taken possession of the "premises known as 35 and 37 Kent Road, Acton Green, W.4, for "accommodating persons rendered homeless by enemy action." That notice covered the premises in question in this case, 35 Kent Road. On July 13, 1945, the town clerk sent the following document to the Ministry of Health: "I, Hugo Charles Lockyer, "Town Clerk of Acton, in the exercise of the powers delegated "to me under the terms of Ministry of Health circular 2082 by "the Minister of Health and by virtue of regulation 51 of the "Defence Regulations, 1939, took possession of the premises set "out upon the accompanying schedule for the purpose of accom- "modating persons rendered homeless by enemy action." Then certain matters are certified which, no doubt, it was proper to certify but which do not concern us here. At the bottom of the document there are these words: "The Minister of Health "hereby confirms the taking possession of the premises named "in the accompanying schedule," and then there is a blank and underneath the words "for Senior Regional Officer, Ministry of "Health," and then a note: "The Minister of Health may at "any time direct that the possession of the premises named in "the accompanying schedule shall cease." There was some question as to the construction of that document, but in my opinion, having regard to the words which I have read at the bottom, and the blank, it was a request by the town clerk to the Minister of Health, through his Senior Regional Officer, to confirm the taking possession of the premises named in the schedule.

The Defence Regulation which dealt with the taking of possession or, as it is normally called, the requisitioning of premises for varying purposes of the war, is regulation 51, which I need not trouble to read. It is common ground that there was power to delegate the powers which the Minister of Health had, as a competent authority within the meaning of the regulation, and that he did delegate his powers for certain purposes and subject to certain restrictions to local authorities, including the plaintiffs in this action. [His Lordship stated the facts and continued:]

The first point taken for the defendant is that the delegated powers were not properly exercised, or rather were not valid beyond a month and, therefore, the whole requisition was invalid. The document from the town clerk to the Ministry of Health referred to circular No. 2082 as the circular under which possession was taken. It is a curious fact in this case that when the plaintiffs amended their pleadings they said that they had taken possession under circular 1857, to which I shall have to refer. It is conceded that if they are held to their pleadings they must fail, because circular 1857 does not authorize the taking of possession for the accommodation of persons rendered homeless by enemy action. We were told that that point was not taken below, and I think that it is probably true that if it had been taken the county court

judge would have allowed an amendment, and I daresay, if it became material, subject to discussion about costs, we would allow an amendment.

I will consider the matter on the basis that it is open to the plaintiffs to say that they requisitioned these premises under circular No. 2082. That was dated July 3, 1940, and covers the present subject-matter. In respect of the procedure with which we are concerned, it is provided by paragraph 9 (ii) that: "The "conditions laid down in the enclosure to circular 1949, except "paragraph 3 (ii) and except that the exceptional procedure set "out in paragraph 2 of that enclosure may be regarded as the "normal procedure for the purposes of this delegation." That is a little complicated, but when one turns to circular 1949 its purposes provide that normally approval should be sought in advance of requisition, but it provides for the exceptional procedure referred to under which requisition may be taken first, subject to conditions which I will refer to in a moment. Paragraph 3 (i) of circular 1949 provides: "The requisitioned power is "limited to the taking possession of (a) houses or other residential "buildings, in both cases if unoccupied; (b) other buildings "whether occupied or not, . . ." Clause (ii) is not applicable. Clause (iii) provides: "The period of occupation of the building "is not to extend beyond the period indicated to the Clerk by the "Senior Regional Officer when consent is given to the requisition; "or, in the case of premises requisitioned under the exceptional "procedure"—and that is the procedure applicable in the present case—"set out in paragraph 2, beyond one month." Then come the words on which this appeal turns: "In both cases any "necessary application for the extension of the period should be "made to the Senior Regional Officer."

It is said on behalf of the appellants, the defendants below, that in the document submitted to the Minister, which I have read, there is no application for the extension of the period of one month or for the extension for any period and, therefore, the condition necessary to extend the requisition beyond a month has not been complied with. Prima facie, that seems to me to be right. The local authority—and we are moving, I agree, in a technical field—sought to get over the difficulty which those words seem to create by referring to other circulars and to the general background of delegation under the regulation. I am bound to say for myself that the further one probes into matters other than the directly relevant document the more difficult does their case become. In circular 1857, which was the admittedly inapplicable circular relied on in the pleadings, there was also a provision that the period of occupation was not to extend beyond one month from the date of taking possession, and then there are these relevant words, "unless the requisition is confirmed by the Minister." In that circular, therefore, at that time, confirmation was regarded as the appropriate process for extending time beyond the month. But whether that was regarded as an inapt use of words or not,

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it is material to note that that particular matter was amended by paragraph 15 of circular 1949, and the procedure under this circular was assimilated to the procedure under the circular with which we are concerned, No. 2082, both of which, after the amendment, were, therefore, provided for by circular 1949. In that circular, as I have said, the words are those which I have already read as regards an application for extension.

If one investigates these other matters, there is attached to circular 1949 a form C.S.2. The form submitted to the Minister on July 13, 1945, was inaccurately headed "Form C.S.2." I say inaccurately, because it does not in fact set out everything which is set out in form C.S.2. Form C.S.2, I think, emphasizes the view which the defendants put before the court in this case, that confirmation is one thing, and extending time is another, because at the bottom of form C.S.2 are to be found these two sentences: "The Minister of Health hereby confirms the taking "possession of the land and/or premises named above," and, "The period of occupation must not extend beyond (blank) "months from the date of taking possession unless the consent of "the Minister is obtained." Then there are the words: "Note. "The Minister of Health may at any time direct that the posses- "sion of the land and/or premises named in this application shall "cease."

These delegated circulars were not normally available to members of the public whose property might be taken under them, but they were, of course, disclosed on discovery. I think that it is a case in which the principle to be applied is that those who are exercising special powers to take private property must see that they carry out accurately and in detail the Act of Parliament or, in this case, the form and conditions of the delegation under the Defence Regulations. Nor is it clear that this is a matter of no substance. Nobody can say, and I think that it would be inadmissible to call evidence on the subject. All that has happened here is confirmation of something which did not require confirmation, namely, taking possession of the premises. There are no words to suggest that the Minister has been asked to extend, and has extended, the time. For these reasons I think that this first point succeeds.

If that is right, it is unnecessary to consider the second point, which was whether, assuming that the local authority still had the right to use these premises, they could get an order for possession, or a declaration for possession or damages for trespass, in that it was said that all that the first defendant had done was to put a lock on his own door. I think that it may be that the form of relief was not claimed in precisely the right way. I do not want to say any more about it because it does not arise. I think that it may be that the right which the local authority had, which the first defendant infringed, was a right of access, but if that had been the point, probably even at this stage it could have been put right by an amendment asking for the appropriate declaration.

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On the letters which were read to us, it seems to me to be clear, and the first defendant is not attempting to suggest the opposite, that he was going to obstruct the local authority if they thought of putting in anybody else as occupier.

Under the counterclaim the first defendant was saying that if the requisition was still valid he had received nothing in respect of the use of the premises since the mid-quarter of 1952. He claimed for what was, presumably, the rate of compensation which had been paid. The county court judge found in favour of the plaintiffs on their claim and gave judgment on the counterclaim for the defendants for £22 odd. The plaintiffs did not cross-appeal in respect of the judgment on the counterclaim, and I cannot myself see how we can do anything but leave it where the county court judge left it. It is not, perhaps, as illogical as it looks. There is no doubt that the claim of the local authority to have the right to put in whom they wanted would have made it very difficult for the first defendant, over this period, to let these premises at a rent. However, we have not to do anything more than to decide whether, there being no cross-appeal, we can deal with the counterclaim. I do not think that we can, and in my opinion this appeal should be allowed.

JENKINS L.J. The plaintiffs' claim to possession of No. 35 Kent Road depends on their Town Clerk's requisition notice dated June 22, 1945, and the confirmation by the Senior Regional Officer of the Ministry of Health of the Town Clerk's taking possession of the premises, dated July 19, 1945. They claim that those two documents taken together constituted a valid requisition of the premises which at all times thereafter remained, and is still, in force. The defendants contend that the requisition of the premises carried out by means of those documents ceased to have effect at the expiration of one month from the date of the town clerk's notice of requisition, that is to say, one month from June 22, 1945. This question turns on the true construction of those documents and of the circular letters issued by the Minister from time to time, whereby he delegated, pursuant to the authority given him under regulation 51 of the Defence Regulations, various requisitioning powers to local authorities.

The first of those circulars to which we were referred was No. 1857, dated August 27, 1939. That contains, in clause 6, this provision, headed "Requisitioning powers": "Local authorities have in many cases already made arrangements for the temporary use of unoccupied buildings for evacuation purposes, and it is not thought that the use of compulsory requisitioning powers will often be necessary. In order, however, to meet cases in which accommodation in unoccupied dwelling-houses or other buildings is urgently required for purposes of the Government Evacuation Scheme and no arrangements with the owners have been found practicable, the Minister has decided to delegate to the Clerks of Local Authorities the requisitioning

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" powers conferred on him by regulation 51 of the Defence Regu-
" lations "; and a little further on the circular continues: " The
" delegation is subject to the following restrictions: (i) The
" requisitioning power is limited to the taking possession of (a)
" houses or other residential buildings, in both cases if unoccupied;
" (b) other buildings whether occupied or not. (ii) The power is
" limited to the taking of possession of buildings for some purpose
" directly connected with the Government's Evacuation Scheme
" under section 56 of the Civil Defence Act, 1939, as, for example,
" the accommodation of persons transferred under the scheme or
" the provision of the accommodation for communal meals, etc.,
" for these persons. (iii) The period of occupation of the building
" is not to extend beyond one month from the date of taking
" possession, unless the requisition is confirmed by the Minister."

It will be observed that the purposes to which those requisitioning powers relate are not relevant to the present case, for they were purposes of, or directly connected with, the Government Evacuation Scheme, and it is common ground that the requisitioning here in question had nothing to do with any such scheme. It is nevertheless important to note that under paragraph 6 (iii), to which I have referred, the period of occupation of the building is not to extend beyond one month from the date of taking possession unless the requisition is confirmed by the Minister.

The next circular to which reference should be made is circular 1949, dated January 18, 1940. That circular related primarily to the occupation of premises for first-aid, ambulance and mortuary purposes, and for purposes connected with the emergency hospital scheme. Those again are purposes not relevant to the present case. But Part 2 of circular 1949 contains the following: " 15. " The exercise by Clerks to County Borough and County District " Councils of the powers delegated to them by paragraphs 6 and 7 " of circular 1857 dated August 27, 1939, will in future be subject " to the conditions laid down in the enclosure to this circular." The enclosure to the circular says this: " In A.R.P. Department " Circular " No. so-and-so, " and issued by the Minister of Home " Security it was announced that the requisitioning powers pre-
" viously delegated to Clerks for various civil defence purposes
" were, with one exception (the provision of public shelters), made
" subject to the condition that the prior consent of the Regional
" Commissioner should be obtained before possession of land or
" premises is taken over. The Minister has decided to adopt a
" similar procedure in relation to the taking possession of premises
" for purposes connected with the first-aid post, ambulance and
" mortuary services, and with the Government Evacuation
" Scheme, and accordingly in future the consent of the Depart-
" ment must be obtained before possession is taken."

Then there is a provision about applications for the purpose of obtaining such consent, and paragraph 2 goes on: " The only " exception to this rule is the case where additional premises are " urgently required in extension of or in substitution for existing

" premises during or immediately following an air-raid. In these " circumstances possession may be taken without reference to the " Department, although the Senior Regional Officer should be " informed as soon as possible thereafter." Paragraph 3 contains certain limitations on the requisitioning power. The first relates to the character of the premises, and nothing turns on that here. The second also, I think, is not material. Paragraph 3 (iii) reads: " The period of occupation of the building is not to extend beyond " the period indicated to the Clerk by the Senior Regional Officer " when consent is given to the requisition; or, in the case of " premises requisitioned under the exceptional procedure set out " in paragraph 2, beyond the month. In both cases any necessary " application for the extension of the period should be made to the " Senior Regional Officer." Thus one finds that in the enclosure to circular 1949 a new provision is introduced, to the effect that where the requisition is limited to the period of one month, as having been made without prior consent, any necessary application for the extension of the period should be made to the Senior Regional Officer; whereas in circular No. 1857 the provision was to the effect that the period of occupation of the building was to be limited to one month unless the requisition was confirmed by the Minister.

Finally, there is circular No. 2082, which dealt with the subject-matter here in question, that is to say, to put it very broadly, the re-housing of persons rendered homeless by bombing. That contained this delegation of powers in paragraph 9: " The " Minister accordingly, in exercise of his power under paragraph 5 " of Defence (General) Regulation 51, hereby extends the powers " already delegated to you to cover the taking possession of build- " ings for some purpose directly connected with the accommoda- " tion of refugees from enemy attack or the imminence of enemy " action. The exercise of the powers now delegated will be subject " to the following conditions, namely, (i) The power shall not " be exercised in advance of the occasion on which the buildings " are required; (ii) the conditions laid down in the enclosure to " circular 1949, except paragraph 3 (ii) and except that the excep- " tional procedure set out in paragraph 2 of that enclosure may " be regarded as the normal procedure for the purpose of this " delegation." The result, therefore, was that in cases to which circular 2082 applied it was permissible, as normal procedure, for a local authority to requisition without obtaining the previous consent of the Minister or the Regional Officer representing the Minister, but in such cases the duration of the requisition was limited to one month, and any necessary application for the extension of the period was to be made to the Senior Regional Officer.

Those being the relevant circulars, I should turn again to the two actual documents in this case. The requisition notice of June 22, 1945, does not expressly refer to circular 2082, but a reference to that circular is implicit in the concluding words " for

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"accommodating persons rendered homeless by enemy action." It was, therefore, a requisition under the powers delegated by circular 2082, made without any prior consent from the Minister, and the position, accordingly, was, if I understand the circulars correctly, that the requisition effected by this notice could last only for the period of one month, subject to the possibility of its being extended for some further period upon an application for that purpose being made to the Senior Regional Officer.

The plaintiffs rely on the Senior Regional Officer's confirmation of July 19, 1945, as equivalent to an extension for an indefinite period. I cannot accept that view. The document to which such confirmation is appended on the face of it contains no more than a notification by the town clerk of what he has done, namely, the taking possession of the premises under circular 2082; and, appended as it is to such a document, the confirmation on behalf of the Minister is, on the face of it, no more than a confirmation of that which the town clerk has already done, namely, the effecting of a requisition to be valid for a period of one month. It is said that we should construe this document as recording an extension granted by or on behalf of the Minister. But I cannot construe it as anything more than a confirmation of the existing state of affairs.

My Lord has pointed out that additional force is given to the defendants' argument on this part of the case by the circumstance that in circular 1857 the word used is "confirmation," whereas circular 2082 refers to "extension." In a matter of construction, it is always legitimate to assume that a change of language is intended to produce some difference in the meaning. Under the relevant circular in the present case the procedure laid down to make a requisition such as this effective for more than one month was an application for an extension to be granted by or on behalf of the Minister. No such application was made, and my conclusion is that no such extension was granted. I appreciate that so far as the Minister himself was concerned it would have been within his powers to requisition premises for an indefinite period for any authorized purpose, and I also appreciate that it would have been possible for him to delegate ad hoc authority to effect such a requisition in any particular case. If that course had been adopted the result might well have been different, but that course was not adopted. The procedure followed was intended to comply with the provisions of the circulars, and for the reasons which I have given I think that it failed to do so.

Accordingly, I agree that this appeal should be allowed. My conclusion in regard to the validity and duration of the requisition makes it unnecessary to decide the interesting question whether, even if the requisition had still been in force, any relief could properly have been granted against Morris, the owner of the premises, for the acts on his part alleged to have amounted to the exclusion of the plaintiffs from possession. As to the judgment obtained by the first defendant on the counterclaim, for the

payment of compensation in respect of the requisition, I agree that we cannot interfere, inasmuch as the judgment obtained by that defendant in the court below has not been the subject of any appeal before us.

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HODSON L.J. I agree with both the judgments which have been delivered and cannot usefully add anything.

*Appeal allowed.*

Solicitors: *Oswald Hanson & Smith; H. C. Lockyer, Town Clerk, Acton.*

A. W. G.

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[PROBATE, ETC., DIVISION.]

## * PRACTICE DIRECTION: GRANTS OF REPRESENTATION.

1953 *May 5.*

*Administration—Foreign law—Deceased with foreign domicile—Grant of representation.*

THIS direction is a consolidation, with minor alterations and additions, of all current directions and circulars relating to applications for grants of representation of the estates of persons dying domiciled out of England.

*Orders for grants in foreign domicile cases.*—Where the deceased died domiciled out of England, unless the applicant is an executor entitled to probate as hereinafter set out or his attorney or in special circumstances an order to the contrary is made, the grant will be made by order to the person entrusted with administration by the court of the deceased's domicile or entitled to administer by the law of the deceased's domicile. A person entrusted who applies takes precedence over all others and it is not necessary for him to clear an executor. Unless the applicant is entrusted, an affidavit of law is required in every case. An exception to this general principle may be made if the whole of the estate in England consists of immovable property, when a grant limited thereto may issue in an ordinary English title, and no order need be obtained.

Orders for grants to persons entrusted or entitled will be made under section 73 of the Court of Probate Act, 1857, or section 162 of the Supreme Court of Judicature (Consolidation) Act, 1925, but it will not normally be necessary for a declaration to be filed or for sureties to justify in such cases. An affidavit of law stating that a person is entitled to administer the estate by the law of the place at which the deceased died domiciled will be accepted without further inquiry, and without the persons entitled being

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required to take a grant or complete any formalities in the foreign country. On the other hand, if it is specifically stated in the affidavit of law that the applicant would be entitled by the law of the domicile only if he were to obtain a grant or comply with some necessary formality, no order can be made for a grant to him in that capacity; but if the circumstances justify it, a discretionary order may still be made under section 162, and a declaration and justification will be required. Registrars of the Principal Registry have jurisdiction to make such orders whatever the amount of the estate. They will require to know why no representation has been established in the place of domicile and whether this will ultimately be done.

If the powers of a person entrusted are limited as to time, the order for the grant may be made subject to a similar limitation if the registrar is satisfied that the grant is required for the purpose only of collecting English assets, and that this can be done within the time limited by the foreign court, and that there are no debts in this country.

*Affidavit of law.*—The registrars will normally accept affidavits of law made by a barrister or advocate practising, or who has practised within the relevant period, in the foreign country and is conversant with its laws and constitution.

In cases which do not present serious difficulty the registrar may, in special circumstances, accept the affidavit of a person not so qualified if satisfied that by reason of his official position or otherwise he has knowledge of the law and constitution of the foreign country.

The office of consul of itself will not be regarded as a qualification enabling the holder to speak to the law of his country.

Variations will normally be allowed in the following special cases:—

1. A solicitor's affidavit will normally be accepted as to the law of Scotland, Northern Ireland, Republic of Ireland, Jersey or Guernsey.
2. An affidavit by a lawyer with adequate French qualifications, showing also that he is well conversant with the law of Belgium and is entitled to practise and has actually practised in Belgium, will normally be accepted as to the law of Belgium.
3. A lawyer adequately qualified in one State may speak to the law of any other State of the United States of America if he is able to swear that he is fully conversant with its laws.

An affidavit by the person claiming to be entitled or his attorney will be rejected whatever his qualifications.

*Attorney.*—Where a grant has been made by order to the attorney of a person entrusted by the court of the domicile or of the person entitled to administer by the law of the domicile "until further representation be granted," and the person giving

the power applies later for a direct grant, an affidavit will be called for showing:—

(a) that the order entrusting is still in force, or

(b) that the person concerned is still entitled to administer,

and a further order will be necessary.

*Community of property.*—Where, by the law of the place of domicile of the deceased, community of property exists between the spouses, the following concluding paragraph to the oath to lead the grant is appropriate and should be used:—

"the whole of the estate in England in respect of which
"a grant is required amounts in value to the sum of.....
"to the best of my knowledge, information and belief: and
"that.....(half).....of that sum has accrued to the sur-
"viving spouse by reason of the existence of community of
"property under the law of the place of domicile of the said
"deceased."

The grant will be in respect of the whole estate, but a court fee will be payable in respect of half of it only. The penalty in the bond, if any, will be in respect of half the estate.

*Danish wills.*—Since 1926 the surviving spouse of a domiciled Dane may take, in Denmark, what is equivalent to a grant of simple administration, notwithstanding any will left by the deceased. Though it is not proved, the will has some legal effect. In such cases a grant of administration with the will annexed will be made in this country, upon registrar's order, to the person entitled to administer by the law of the domicile, or to the person entrusted with the administration by the court of the domicile, upon the usual affidavit of law.

*Domicile.*—Whenever foreign law is relied upon, including cases under Lord Kingsdown's Act, the domicile at the date of death must be sworn to in the oath and recited in the grant. Where, as in the Provinces of the Union of South Africa or the States of the United States of America, there are separate jurisdictions, the Province or State must be specified and law of the Province or State spoken to. It is not necessary to specify the particular division of a country where the testamentary law is uniform, as in Switzerland.

*Executor.*—(a) *Appointment in English language.*—If a valid will of a testator, wherever domiciled, is in the English or Welsh language and appoints an executor, he will be accepted as having full rights of executorship. No expression in a foreign tongue purporting to mean "executor" will be accepted as constituting an executor; but if such a will sets out the duties of a person named therein in terms sufficient to constitute him executor according to the tenor thereof, he may obtain probate or appoint an attorney in that capacity. Failing this, administration with the will annexed will issue to the person entitled to administer the estate under the law of the domicile.

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(b) *Foreign company.*—A foreign corporation appointed executor in a will which would be regarded as giving a right to probate, were the executor an individual able to apply, may as executor appoint an attorney to take a grant for its use and benefit and until further representation be granted. It is immaterial whether the will has been proved in the court of the domicile or not, unless there is some other person entrusted by the foreign court who has applied here.

*Lord Kingsdown's Act.*—This Act can be used only for curing faults of execution, and appointing executors, but no further. It cannot make good, for example, the will of a minor the law of whose domicile does not permit him to make a will.

Unless the will is in English form the grant should be limited to personalty.

When it is necessary to decide whether the deceased was a British subject reference should be made to the British Nationality Act, 1948, and the Ireland Act, 1949.

*Inland Revenue affidavits.*—In all foreign domicile cases the Inland Revenue affidavit must be controlled by the Estate Duty Office prior to the issue of the grant.

*Minority or life interests.*—The statement in the oath as to minority or life interests should be based on the law of the domicile. If a minority or life interest arises, even if under the law of the domicile a single person can take the grant, section 160 of the Supreme Court of Judicature (Consolidation) Act, 1925, requires that the English grant shall go to not less than two individuals or to a trust corporation.

In straightforward cases, including cases under Lord Kingsdown's Act, the statement of the applicant in the oath that a minority or life interest does, or does not, exist may be accepted without further evidence. If, however, it appears on the face of the will and in the events which have happened that a minority or life interest does exist, and the oath states that it does not, the statement should be verified by an affidavit of law.

*New Zealand.*—Under the statutory procedure in New Zealand the Public Trustee of New Zealand can elect to administer an estate which does not exceed £1,000 in New Zealand, but is required subsequently to take a grant if such estate is increased to over £1,500. Where the Public Trustee applies as the person entrusted, and his capacity as such is established by an election to administer, it should be sworn in the oath that the property of the deceased in New Zealand does not exceed £1,500 and that since the election was filed in the New Zealand Supreme Court no grant has been issued by that court.

*Oath and bond.*—In cases where under section 73 or section 162 an order has been made for a grant to the person entrusted by the court of the domicile or entitled by the law of the domicile, an oath or bond describing the applicant as the person entitled

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or entrusted will normally be accepted whether it recites the order under the section or not.

In all other cases where an order has been made under one of these sections the oath and bond must describe the applicants as persons authorized under section 73 or section 162 as the case may be.

*Personal Application Department.*—An application for a grant to the person entrusted or entitled will not be accepted in the Personal Application Department.

*Translations of wills.*—In applications for a grant where the testator's will written in English has been lodged with a notary abroad, the notarially certified document lodged may contain a copy of the original will or it may merely contain a translation into a foreign language and a retranslation therefrom into English.

In this latter case a photographic copy or a duly verified copy of the original will be called for. In view of the decision in *In the Goods of Rule* (1878) 4 P.D. 76, however, if the applicant objects it will not be open to the Registry to insist on the production of such photographic or other copy of the original will. If, however, it appears on the face of the document that the retranslation is, or may be, inaccurate, the Registry will require that the retranslation be checked with the original.

*Treasury Solicitor.*—Particular regard must be paid to the provisions of Non-Contentious Probate Rule 75. It must be shown by the applicant that there are kin who under the foreign law will take estate in England passing under a partial or total intestacy, or that the Treasury Solicitor does not propose to take a grant on behalf of the Crown. The case of *In re Barnett's Trusts* [1902] 1 Ch. 847 is in point.

*Validity of wills in English form.*—A will in English and in English form will normally be accepted as valid without further inquiry if the domicile is Scotland, Northern Ireland, the Irish Republic, or any of the Dominions or Colonies except South Africa.

B. LONG,
Senior Registrar.

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[PROBATE, ETC., DIVISION.]

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*July* 16, 17, 31.

Willmer J.

## * OWNERS OF THE DUMB BARGE STONEDALE No. 1 *v.* MANCHESTER SHIP CANAL COMPANY. THE STONEDALE No. 1.

*Shipping—Limitation of liability—Expenses of raising barge—Whether "injury or damage"—Whether caused by improper navigation—Private Canal Company Act—Whether general Act applicable—Merchant Shipping (Liability of Shipowners and others) Act,* 1900 (63 & 64 *Vict. c.* 32), *ss.* 1, 3—*Manchester Ship Canal Act,* 1897 (60 & 61 *Vict. c. cviii*), *s.* 9—*Manchester Ship Canal Act,* 1936 (26 *Geo.* 5 & 1 *Edw.* 8, *c. cxxiv*), *s.* 32 (1), (2).

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THE STONEDALE No. 1.

By section 9 of the Manchester Ship Canal Act, 1897: "The "owners of any vessel . . . which without actual fault or privity "of the owners shall cause any injury or damage to the portion of "the canal" (as therein defined) "or to the banks locks or works "comprised in such portion shall not be liable in respect of such "injury or damage to an amount exceeding eight pounds for every "registered ton of such vessel."

By section 1 of the Merchant Shipping (Liability of Shipowners and others) Act, 1900: "The limitation of the liability of the "owners of any ship set by section 503 of the Merchant Shipping "Act, 1894, in respect of loss of or damage to vessels, goods, merchan-"dise, or other things, shall extend and apply to all cases where "(without their actual fault or privity) any loss or damage is "caused to property or rights of any kind, whether on land or on "water, or whether fixed or moveable, by reason of the improper "navigation or management of the ship." By section 3: "The "limitation of liability under this Act . . . shall apply whether the "liability arises at common law or under any general or private "Act of Parliament, and notwithstanding anything contained in "such Act."

By section 32 of the Manchester Ship Canal Act, 1936: "(1) "Whenever any vessel is sunk stranded or abandoned in any part of "(*a*) any river canal waterway navigable channel lock or dock "forming part of the harbour and port of Manchester or of the "undertaking . . . the company may . . . cause the vessel to be raised "or removed. . . . (2) The company may recover from the owner of "any such vessel all expenses incurred . . . in connexion with that "vessel. . . ."

The plaintiffs, the owners of the dumb barge *S.* and of the steam tug *W.*, claimed to be entitled to limit their liability in respect of the expenses incurred by the Manchester Ship Canal Company in raising the barge *S.* which sank, while proceeding up the canal in tow of the tug *W.*, after a collision with an outward-bound steamship. The collision and the consequent sinking of the *S.* was caused by the improper navigation of the *S.* herself and of the tug *W.*, and it occurred without their owners' actual fault or privity:—

*Held*, (1) that on the true construction of section 9 of the Manchester Ship Canal Act, 1897, the powers conferred on the owners of vessels liable to the company in respect of damage to limit their liability were apt to cover only physical "injury or damage" to the actual structure of the canal or the works connected with it (of which there was here no evidence) and did not provide for "loss."

(2) That the effect of section 32 of the Manchester Ship Canal Act, 1936, was not to exclude the provisions of the Merchant Shipping (Liability of Shipowners and others) Act, 1900, but that the expenses incurred by the canal company in raising the sunken barge were not caused by reason of the "improper navigation or "management" of the barge as provided for by section 1 of that Act. The plaintiffs were not, therefore, entitled to include those expenses charged against them by the canal company in limiting their liability.

*The Millie* [1940] P. 1; 55 T.L.R. 972 followed, but doubted.

*The Urka* [1953] 1 Ll.R. 478 considered.

*Workington Harbour and Dock Board* v. *Owners of the Towerfield* [1951] A.C. 112; 66 T.L.R. (Pt. 2) 387; [1950] 2 All E.R. 414 considered and applied.

ACTION for limitation of liability.

The plaintiffs, the owners of the dumb barge *Stonedale No. 1* and of the steam tug *Warrendale*, sought a decree of limitation of

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liability in respect of the damages arising out of a collision which occurred in the Manchester Ship Canal between the *Stonedale No. 1* and an outward-bound steamship while the *Stonedale No. 1* was proceeding up the canal in tow of the steam tug *Warrendale* and in consequence of which the *Stonedale No. 1* grounded and sank. It was common ground that the sinking of the *Stonedale No. 1* was caused by the improper navigation of the *Stonedale No. 1* herself and of the tug *Warrendale*, and also that it occurred without the actual fault or privity of the owners of the *Stonedale No. 1*. No claim was made against the plaintiffs except for the expenses incurred by the Manchester Ship Canal Company in raising the barge, the cost of which the plaintiffs sought to include in the limitation claim.

The facts are set out fully in the judgment.

*K. S. Carpmael Q.C.* and *P. T. Bucknill* for the plaintiffs.

*J. V. Naisby Q.C.* and *H. E. G. Browning* for the defendants.

The following cases were cited in argument: *The Millie* [1]; *Workington Harbour and Dock Board* v. *Owners of the Towerfield* [2]; *Great Western Railway Co.* v. *Mostyn (Owners)* [3]; *Great Northern, Piccadilly and Brompton Railway Co.* v. *Attorney-General* [4]; *The Urka (Clifton Steam Trawlers Ltd.* v. *Duncan MacIver Ltd.)* [5]; *The Cairnbahn* [6]; *Yorkshire Dale Steamship Co.* v. *Minister of War Transport* [7]; *Dee Conservancy Board* v. *McConnell* [8]; *The Crystal.* [9]

*Cur. adv. vult.*

July 31, 1953. WILLMER J. read the following judgment: The plaintiffs, as owners of the dumb barge *Stonedale No. 1* and the steam tug *Warrendale*, claim to have their liability limited in respect of a casualty which occurred in the Manchester Ship Canal on February 14, 1952. The *Stonedale No. 1*, while proceeding up the canal in tow of the *Warrendale*, collided with an outward-bound steamship, in consequence of which she grounded and sank in the canal in the vicinity of Hooton Wharf. As she was an obstruction in the canal, she was raised by the Manchester Ship Canal Company in pursuance of their statutory powers, and the canal company subsequently made a claim against the plaintiffs for the expenses incurred in raising the *Stonedale No. 1*, amounting to £7,609 1s. 4d.

The only defendants named in the writ, and the only defendants who have appeared, are the Manchester Ship Canal Company, who deny that the plaintiffs are entitled to limit their liability in respect of these wreck-raising expenses. It is common ground

[1] [1940] P. 1; 55 T.L.R. 972.
[2] [1951] A.C. 112; 66 T.L.R. (Pt. 2) 387; [1950] 2 All E.R. 414.
[3] [1928] A.C. 57; 44 T.L.R. 179.
[4] [1909] A.C. 1; 24 T.L.R. 506.
[5] [1953] 1 Ll.R. 478.
[6] [1914] P. 25; 30 T.L.R. 82.
[7] [1942] A.C. 691; 58 T.L.R. 263; [1942] 2 All E.R. 6.
[8] [1928] 2 K.B. 159.
[9] [1894] A.C. 508; 10 T.L.R. 551.

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that the sinking of the *Stonedale No. 1* was caused by the improper navigation of the *Stonedale No. 1* herself and of the tug *Warrendale*; it is also common ground that the sinking occurred without the actual fault or privity of the plaintiffs themselves. The registered tonnage of the *Stonedale No. 1*, ascertained in accordance with the provisions of the Merchant Shipping Acts, is agreed to be 105·77, and that of the *Warrendale* 104·37; and it is agreed that, if the plaintiffs are entitled to limit their liability, the amount for which they would be liable, based on the combined tonnage of the two vessels, is £1,681 2s. 6d.

The plaintiffs' claim to limit their liability is based on section 9 of the Manchester Ship Canal Act, 1897, or alternatively on sections 1 and 3 of the Merchant Shipping Act, 1900, the wording of which, it is contended, is apt to cover their liability in respect of the expenses of raising the *Stonedale No. 1*. The defendants deny that the plaintiffs' liability for the expenses of wreck-raising is affected by the provisions of these sections, and they rely on the provisions of section 32 of the Manchester Ship Canal Act, 1936, by which, it is contended, they are entitled to recover in full from the plaintiffs the expenses incurred in raising the *Stonedale No. 1*.

This is not the first occasion on which this court has had to consider whether the owners of a vessel sunk in the Manchester Ship Canal are entitled to limit their liability, as against the canal company, in respect of expenses incurred by the latter in raising a wreck. In *The Millie*,[1] on facts indistinguishable from those of the present case, except in one particular which, it will presently appear, seems to me to be immaterial, it was held by Langton J. that the owners of the vessel were not entitled to limit their liability, as against the canal company, in respect of such expenses. There was no appeal from that decision, and, so far as I am aware, the question raised has never so far engaged the attention of the Court of Appeal. It is contended by the plaintiffs, however, in the present case that *The Millie* [1] was wrongly decided, and I was given to understand that one of the objects of the present proceedings was to test the validity of that decision. Although I am, I suppose, at liberty to disagree with the decision of Langton J., I should naturally be most reluctant to do other than follow it, in the absence of any material distinction on the facts, unless satisfied either that the decision is inconsistent with other authority by which I am bound, or that some argument of compelling force was not brought to the attention of the court.

But first let me deal with the one matter in respect of which the facts of this case differ from those of *The Millie*.[1] In that case (contrary to what is stated in the report) the casualty occurred in a part of the canal to which the Manchester Ship Canal Act, 1897, does not apply, whereas in the present case the *Stonedale No. 1* sank in a part of the canal which is subject to that Act. One question which arises in this case, therefore, which did

[1] [1940] P. 1; 55 T.L.R. 972.

not arise in *The Millie*,[1] is whether the plaintiffs are entitled to limit under section 9 of the Act of 1897, apart altogether from whatever rights they may have under the Merchant Shipping Act, 1900. Section 9 of the Act of 1897 provides that "the "owners of any vessel . . . which without actual fault or privity "of the owners shall cause any injury or damage to the portion "of the canal" (as therein defined) "or to the banks locks or "works comprised in such portion shall not be liable in respect "of such injury or damage to an amount exceeding eight pounds "for every registered ton of such vessel." In my judgment, these words are apt to cover only physical injury or damage to the actual structure of the canal or the works connected therewith. Of that there is no evidence in the present case. The expenses claimed by the canal company were simply those of raising the wreck of the *Stonedale No. 1*, and do not include anything in respect of repairing damage to the canal. The wreck of the *Stonedale No. 1* obstructed the navigation of the canal, but it inflicted no damage. Section 9 of the Act of 1897 deals with "injury or damage," and not with liability for damages. Moreover, it is noteworthy that, unlike section 503 of the Merchant Shipping Act, 1894, and section 1 of the Merchant Shipping Act, 1900, it does not give any relief against "loss."

In holding that the effect of section 9 of the Act of 1897 is limited to physical injury or damage, I am guided by the decision of the House of Lords in *Workington Harbour and Dock Board* v. *Owners of the Towerfield*.[2] In that case the House of Lords were considering the effect of section 74 of the Harbours, Docks, and Piers Clauses Act, 1847, the material words of which are "damage done . . . to the harbour, dock, or pier, or the quays or "works connected therewith," and it was held that the damage recoverable was confined to that physically caused to the harbour works and did not include consequential loss of revenue through inability to use the harbour. As Lord Normand succinctly put it[3]: "Damage to the harbour, dock, or pier, or the quays or works "connected therewith means . . . physical damage to the opera "manufacta of the undertaking." See also *per* Lord Porter,[4] Lord Morton of Henryton[5] and Lord Radcliffe.[6] A similar view was expressed by Lord Blanesburgh in *Great Western Railway Co.* v. *Owners of the Mostyn*.[7] In my judgment, the similar wording of section 9 of the Manchester Ship Canal Act, 1897, should be construed in the same way, and I accordingly hold that under that section the plaintiffs have no right to limit their liability in respect of the expenses claimed by the canal company in the present case.

That leaves for consideration the plaintiffs' rights under sections 1 and 3 of the Merchant Shipping Act, 1900, which

[1] [1940] P. 1; 55 T.L.R. 972.
[2] [1951] A.C. 112.
[3] Ibid. 148.
[4] Ibid. 130.
[5] Ibid. 155.
[6] Ibid. 161.
[7] [1928] A.C. 57, 98, 99.

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formed the subject of Langton J.'s decision in *The Millie*.[8] The relevant provisions of the Act of 1900 are as follows: Section 1: "The limitation of the liability of the owners of any ship set by "section 503 of the Merchant Shipping Act, 1894, . . . shall "extend and apply to all cases where (without their actual fault "or privity) any loss or damage is caused to property or rights of "any kind, whether on land or on water, or whether fixed or "moveable, by reason of the improper navigation or management "of the ship."

Section 3: "The limitation of liability under this Act . . . "shall apply whether the liability arises at common law or under "any general or private Act of Parliament, and notwithstanding "anything contained in such Act."

Prior to 1936 the rights and powers of the Manchester Ship Canal Company in relation to the disposal of wrecks in the canal were derived from the Harbours, Docks, and Piers Clauses Act, 1847, the material provisions of which were incorporated by section 5 of the Manchester Ship Canal Act, 1885. The rights and powers of the canal company were enlarged by section 32 of the Act of 1936, the material provisions of which are as follows: "(1) Whenever any vessel is sunk stranded or abandoned in any "part of (*a*) any . . . canal . . . forming part . . . of the under-"taking . . . the company may if they think fit cause the vessel "to be raised or removed . . . in such manner as to clear such ". . . canal . . . therefrom. (2) The company may recover from "the owner of any such vessel all expenses incurred by the "company under this section in connexion with that vessel . . . "Provided always that the company may if they think fit and "shall if so required by the owner of the vessel cause such vessel ". . . to be sold . . . and out of the proceeds of the sale may . . . "reimburse themselves for any such expenses and shall hold "the surplus if any of those proceeds in trust for the persons "entitled thereto and in case such proceeds shall be insufficient "to reimburse the company such expenses the deficiency may be "recovered by the company in manner aforesaid." Subsection (3) provides that the company shall give the owner 24 hours' notice of their intention to raise the vessel, and that (subject to certain provisos), if the owner gives 12 hours' notice of his intention to raise the vessel himself, he shall be at liberty to do so. By subsection (6) the word "owner" is defined as meaning the owner at the time of the sinking, stranding or abandonment. Subsection (7) provides that "the powers conferred on the com-"pany by this section shall be in addition to and not in derogation "of any other powers exercisable by them for or with respect to "the removal of wrecks."

On the day of the casualty certain telephone conversations took place between representatives of the plaintiffs and of the canal company respectively, in the course of which the canal

[8] [1940] P. 1.

company gave notice of their intention to raise the *Stonedale No. 1* unless the plaintiffs did so themselves. The representative of the plaintiffs intimated that they did not propose to raise the barge themselves, but that they wished the canal company to do so. These telephone conversations were confirmed by an exchange of letters on the same day. By their letter the canal company gave notice that they would look to the plaintiffs for all costs to be incurred in connexion with the marking, raising or destruction of the wreck. The plaintiffs by their letter said: "We confirm having asked you to proceed with the lifting operations as soon as possible." The indications are that these letters crossed; neither appears to be an answer to the other, and, so far as I am aware, neither was ever specifically answered. Their importance, to my mind, lies in the fact that they show that at the time both parties recognized that the canal company were acting under the powers conferred by section 32 of the Act of 1936, and the plaintiffs' letter can, in my judgment, be construed only as a notice given with reference to subsection (3) of that section.

The answer of the canal company to the plaintiffs' claim for limitation was conveniently summarized by Mr. Naisby in a series of propositions, as follows: First, it was contended that in the absence from the Act of 1936 of any express saving for the provisions of the Merchant Shipping Acts, the application of sections 1 and 3 of the Act of 1900 must be taken to be excluded, and the only right of limitation as between shipowners and the canal company, qua canal company, is that contained in the canal company's own Acts, i.e., section 9 of the Act of 1897, which I have already held is not apt to cover the plaintiffs on the facts of the present case. Secondly, it was contended that, if, contrary to the submission of the canal company, the Act of 1900 does apply, the plaintiffs fail to prove either (a) that there was any loss or damage to property or rights of the canal company, or (b), if there was any such loss or damage, that it resulted as a matter of causation from the improper navigation of the plaintiffs' vessels. Thirdly, it was argued that the plaintiffs, by requesting the canal company to remove the wreck, impliedly undertook to pay the reasonable cost of such removal, and are accordingly liable to the canal company for the whole of such reasonable cost, in the same way as they would be liable if, as they might have done, they had employed an independent contractor to do it.

The third of these propositions was not apparently argued before Langton J. in *The Millie*,[8] and, indeed, it is not clear from the report whether the facts of that case were such as to raise the point. I will return to the consideration of this point hereafter. Mr. Naisby's other propositions—or substantially similar contentions—were undoubtedly argued in *The Millie* [8] and considered by Langton J. As I read the report of the judgment—and judging

[8] [1940] P. 1.

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by the wording of the headnote it appears that the reporter took the same view—Langton J. seems to have decided the case on the grounds that the words of section 1 of the Act of 1900, wide as they were, were not apt to cover the canal company's claim for wreck-raising expenses, and that such expenses were not shown to have been directly caused by the improper navigation or management of the plaintiffs' vessel. That this was the true ratio decidendi is, I think, shown by the words used by the judge in the following passage of his judgment [9]: "On the other hand, "I am very greatly impressed by the inadequacy of the language, "even in this widely drawn section, to cover an item of expense "not immediately connected with the actual occurrence of the "original loss. Without attempting to enter too deeply into the "baffling problem of causation, I doubt whether this expense can "be said to be directly caused by the improper navigation of the "*Millie*, and for both of these reasons, though principally upon "the ground of the inadequacy of the language, I am of opinion "that the statute does not cover the expenses incurred by the "canal company"

On the question whether the rights of limitation accorded by sections 1 and 3 of the Act of 1900 must be taken to be excluded, having regard to the express provisions of section 32 of the Manchester Ship Canal Act, 1936, it is not so easy to determine what the view of Langton J. was. At one point early in his judgment he appears to be expressing the view, in favour of the plaintiffs, that a private Act, such as the Manchester Ship Canal Act, 1936, cannot be construed as overriding the general provisions of a public Act like the Merchant Shipping Act, 1900. Langton J. is recorded as saying [10] that upon the wording of section 3 of the Act of 1900 counsel for the plaintiffs "founded a strong argument "that no subsequent private Act, such as the Manchester Ship "Canal Act, 1936, could be held to have taken away what this "general Act had intended to confer. The answer put forward "on behalf of the canal company was that . . . the right conferred "by section 32 of the Manchester Ship Canal Act, 1936, was "absolute in its terms and the Act contained no saving of any "section or portion of the Merchant Shipping Acts." The judge then proceeded [11]: "If I had to determine this matter upon the "latter of these arguments I should have had great hesitation in "holding that, where a private Act of Parliament and a public "Act were in conflict, the private Act, even though much subse-"quent in date, should be held to override the public one. On "this point one cannot but bear in mind the language of Lord "Loreburn L.C. in *Great Northern, Piccadilly and Brompton "Railway Co.* v. *Attorney-General.*" [12] The judge, after quoting the words used by the Lord Chancellor in that case, concluded as follows [13]: "I have, however, formed the view that this extremely

[9] Ibid. 10.
[10] Ibid. 6.
[11] Ibid. 7.
[12] [1909] A.C. 1, 6.
[13] [1940] P. 7.

"difficult and important matter falls to be determined rather "upon a close consideration of the wording of the statutes in "question than upon a mere broad estimation of the comparative "values of a public and a private Act." At the end of his judgment, however, Langton J. returned to this position, and, in summarizing the points in favour of the canal company, he said [14]: "Thirdly, there is the noticeable absence of any clause "saving the rights of limitation conferred by the Merchant "Shipping Act in a class of private statute where such savings "have often been made, and as to which the full force of Lord "Loreburn's observations in *Great Northern, Piccadilly and "Brompton Railway Co.* v. *Attorney-General* [15] hardly applies, "since it cannot be imagined that the Manchester Ship Canal "Company could get a private Act through Parliament without "the shipowning body being at least fully aware of the powers "against themselves which were being asked for and granted." I cannot think that in this subsequent passage of his judgment Langton J. intended to depart from the view which he had expressed in the earlier passage to which I have already referred. I take it to be his view, therefore, that, although in the case before him he did not think that the plaintiffs brought themselves within the terms of the Act of 1900, nevertheless the argument on behalf of the canal company that the provisions of that Act were excluded by the terms of section 32 of the Manchester Ship Canal Act, 1936, should not be accepted.

If that was indeed the view of Langton J., I can only say that I agree with it. Apart from the considerations referred to by Lord Loreburn in *Great Northern, Piccadilly and Brompton Railway Co.* v. *Attorney-General*,[15] it appears to me that there are other reasons for concluding that Parliament, when enacting this particular private statute, namely, the Manchester Ship Canal Act, 1936, cannot be taken to have intended that the rights of limitation conferred by the Merchant Shipping Act, 1900, should be excluded. As was pointed out by Mr. Carpmael, the Act of 1936 was described in its title as "an Act to empower the Man-"chester Ship Canal Company to construct certain railways to "extend the time limited for the construction by the company "of certain other railways to authorize the company to abandon "the Manchester and Salford Junction Canal, and for other "purposes." There is no reference in the preamble to any proposal to take away from shipowners the rights of limitation of liability enjoyed by them under the Merchant Shipping Acts. The particular section relied on, namely, section 32, is tucked away in Part IV of the Act, under the heading "Miscellaneous," together with a number of diverse and relatively unimportant provisions. It would be surprising indeed if the effect of an enactment in this form were held to be that the rights of limitation accorded to shipowners generally under a public general Act were excluded.

[14] Ibid. 13. [15] [1909] A.C. 1.

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Furthermore, I am not satisfied that on its true construction the wording of section 32 of the Manchester Ship Canal Act, 1936, is in conflict with the provisions of the Merchant Shipping Acts relating to limitation of liability. It is true that the section provides that *all* expenses incurred by the canal company under the section are to be recoverable from the owners of the vessel concerned, and that in the event of the proceeds of sale being insufficient *the deficiency* may be recovered. It seems to me, however, that the rights of recovery conferred by this section must be construed as subject to the general law with regard to proceedings for recovery of a debt. For instance, in the event of the owner of the vessel proceeded against becoming insolvent, I cannot think that the section could be invoked for the purpose of recovering these expenses in full in priority to the claims of other creditors. Similarly, there is no reason to suppose that section 2 (1) of the Limitation Act, 1939, would not apply to any proceedings taken by the canal company to recover the expenses of wreck-raising incurred under section 32 of their Act. In the same way it appears to me that the right of recovery must be construed as subject to whatever rights the owner of the vessel may have in relation to limitation of liability. For these reasons I find myself unable to hold that the effect of section 32 of the Manchester Ship Canal Act, 1936, is to exclude the provisions of the Merchant Shipping Act, 1900, so as to take away from the owner of the vessel such right as he may have to limit his liability.

I come back, therefore, to the question whether, on its true construction, the Act of 1900 does confer on persons in the position of the plaintiffs a right to limitation of liability in respect of expenses such as those incurred in the present case. I have already referred to the decision of Langton J. in *The Millie*.[16] I should add that that decision has recently been followed in the Court of Session in Scotland in *The Urka (Clifton Steam Trawlers Ld.* v. *Duncan MacIver Ld.*).[17] That case has not so far been reported, but the parties have been able to obtain and place before me a copy of the record in the case, together with a transcript of the opinion of Lord Sorn. In that case the pursuers were the owners of a trawler which came into collision in Stornoway Harbour with the defenders' coaling hulk *Portugal*. In consequence of the collision the *Portugal* sank and had to be raised. The defenders were required by the Harbour Commissioners, in pursuance of the latter's statutory powers, to raise the vessel, and they started to employ a firm of independent contractors to do so, including in their claim against the pursuers the sum which they had to pay to the contractors. The pursuers brought an action for limitation of liability, admitting that the collision and the consequent sinking of the *Portugal* were caused by the improper navigation of their trawler. No question arose as to the pursuers' right to limitation in respect of the physical damage caused to the *Portugal*. But they claimed also to limit their liability in respect of the

[16] [1940] P. 1.

[17] Now reported in [1953] 1 Ll.R. 478.

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expenses of raising the wreck. This claim was put forward under section 1 of the Merchant Shipping Act, 1900, but the Lord Ordinary, following the decision of Langton J. in *The Millie*,[18] held that that section did not confer a right to limitation of liability in respect of the expenses of raising the wreck, which he accordingly decided were not included in the limitation.

This decision is, of course, in no way binding on me, but in so far as it goes to reinforce the authority of *The Millie*,[18] I feel bound to accord it all due respect. At the same time, I am bound to say that I have difficulty in understanding why the claim for limitation was ever put forward under the Act of 1900. With all respect, I should have thought that the expenses of raising the *Portugal* were part of the loss caused to that vessel, or to her owners, so as to entitle the pursuers to claim limitation under section 503 (1) (*d*) of the principal Act. In *The Cairnbahn* [19] it was held (see *per* Lord Sumner [20]) that the word "loss" occurring in the phrase "damage or loss" in section 1 (1) of the Maritime Conventions Act, 1911, was "wide enough to include "that form of pecuniary prejudice which consists in compensating "third parties." For myself, I do not see why the almost identical phrase of section 503 (1) (*d*) of the Merchant Shipping Act, 1894, namely, "loss or damage . . . caused to any other vessel," should not receive the same construction, and, if so, it would seem that the words would have been amply wide enough to cover the expenses incurred by the owners of the *Portugal* in raising the wreck. This consideration, to my mind, robs the decision in *The Urka* [21] of much of its value as an authority in support of the construction placed by Langton J. in *The Millie* [22] on the words of section 1 of the Act of 1900.

I have already quoted the material passage of the judgment of Langton J. in *The Millie* [22] which contains what I conceive to be the true ratio decidendi of that case. Mr. Carpmael, in attacking this decision, reminded me of the observations on causation made by Viscount Simon L.C. in *Yorkshire Dale Steamship Co.* v. *Minister of War Transport*,[23] and contended that the expenses incurred by the canal company in raising the wreck of the *Stonedale No. 1* were proximately caused by the improper navigation of the plaintiffs' vessels. He relied on the decision of the Court of Appeal in *Dee Conservancy Board* v. *McConnell* [24] as authority for the proposition that, where a vessel through negligence has sunk in such a position as to cause an obstruction in a navigable channel maintained by a conservancy authority, the conservancy authority, quite apart from any statutory rights they may have, have also a right at common law to recover as damages the reasonable cost of removing the obstruction. This, it is contended, exactly covers the claim of the canal company

[18] [1940] P. 1.
[19] [1914] P. 25.
[20] Ibid. 33.
[21] [1953] 1 Ll.R. 478.
[22] [1940] P. 1, 10.
[23] [1942] A.C. 691, 698.
[24] [1928] 2 K.B. 159.

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in the present case for the expenses incurred in removing the plaintiffs' barge. In *Dee Conservancy Board* v. *McConnell*[24] it was held by Scrutton L.J.[25] that the conservancy authority, who had the duty of maintaining a navigable channel, had "a common "law right to remove the obstruction." This implies that the presence of the wreck constituted an invasion of the conservancy authority's rights, so as to come within the wide wording of section 1 of the Act of 1900, namely, "loss or damage . . . caused "to property or rights of any kind, whether on land or on water." Moreover, it is argued, this decision of the Court of Appeal destroys the contention of the canal company, accepted by Langton J. in *The Millie*[26] and again put forward in the present case, that the expenses of raising the wreck were not directly caused by the improper navigation of the plaintiffs' vessels. As was pointed out by Mr. Carpmael, *Dee Conservancy Board* v. *McConnell*[27] does not appear to have been cited in *The Millie*.[26] Had it been cited, it is contended that the decision of Langton J. must have been otherwise.

Mr. Naisby, on the other hand, sought to distinguish *Dee Conservancy Board* v. *McConnell*[27] on the ground that in that case the conservancy authority had no statutory right to recover the expenses of raising the wreck, such as that possessed by the Manchester Ship Canal Company in the present case. In the *Dee Conservancy Board* case[27] the only statutory rights which the conservancy authority had were those conferred by section 56 of the Harbours, Docks, and Piers Clauses Act, 1847. But these were of no avail, since the owners of the sunken vessel had abandoned her before the expenses of raising the wreck were incurred, and consequently, in accordance with *The Crystal*,[28] were no longer under any liability under the statute. The Dee Conservancy Board, therefore, were restricted to such rights as they could establish at common law. In the present case, on the other hand, the statutory right of the Manchester Ship Canal Company to recover the expenses of raising the *Stonedale No. 1* under section 32 of the Act of 1936 clearly applied as against the plaintiffs. While admitting that the Manchester Ship Canal Company, like the plaintiffs in the *Dee Conservancy Board* case,[27] could, if they had so elected, have exercised a common law right to proceed against the owners of the *Stonedale No. 1* in tort in respect of the raising expenses, Mr. Naisby contended that this was only one of several remedies open to them in the circumstances of this case. For, in addition to the right to proceed in tort, he contended that the canal company could sue in contract, on the basis of the exchange of letters to which I have already referred; or they were entitled to sue for the expenses as a simple debt under the statute. Mr. Naisby argued that the canal company were entitled to pursue the most advantageous remedy open

[24] [1928] 2 K.B. 159.
[25] Ibid. 167.
[26] [1940] P. 1, 10.
[27] [1928] 2 K.B. 159.
[28] [1894] A.C. 508.

to them, and that, if they did so, the owners of the barge could not be heard to complain that the result might have been different if the canal company had elected to pursue another remedy. Whatever might have been the position if the canal company had elected to proceed in tort, on the basis of the improper navigation of the plaintiffs' vessels, it was contended that by suing in contract or for a debt under the statute they were entitled to recover the expenses in full, regardless of whether there had been any improper navigation on the part of the plaintiffs' vessels.

For myself, I doubt whether it is right to say that the canal company could have sued in contract for the recovery of these expenses. As I previously pointed out, one of the propositions urged on behalf of the canal company was that a contractual obligation on the part of the plaintiffs to pay these expenses in full is to be implied from the fact that by their letter they specifically requested the canal company to proceed with the lifting operations. In my judgment, however, as I have previously stated, the plaintiffs' letter is rather to be construed as a notice given with reference to section 32 (3) of the Act of 1936, and I find myself unable to spell out of it a contractual obligation whereby the plaintiffs undertook in all circumstances to pay the expenses in full.

The question to be decided, therefore, comes to this. Assuming that the canal company, in raising the wreck of the *Stonedale No. 1*, were, in the contemplation of both parties, acting under the statutory powers conferred by section 32 of the Act of 1936, as I am satisfied they were, are they entitled to recover the expenses in full, notwithstanding that the sinking of the *Stonedale No. 1* was caused by the improper navigation of the plaintiffs' vessels? The defendants say that the improper navigation of the plaintiffs' vessels is an irrelevant consideration; for it was the plaintiffs' failure to remove the obstruction, and not the negligent making of the obstruction, which was the cause of the expenses being incurred by the canal company, and which therefore forms the basis of their claim. The plaintiffs, on the other hand, contend that since the decision of the Court of Appeal in *Dee Conservancy Board* v. *McConnell* [29] it is impossible to escape the conclusion that the cost of removing this wreck was a loss or damage resulting directly from the improper navigation of the plaintiffs' vessels, and, as such, clearly within the wide words of section 1 of the Merchant Shipping Act, 1900. They contend, furthermore, that, having regard to the express words of section 3 of the Act, it can make no difference whatsoever whether their liability is regarded as arising at common law or (as the defendants say) under the defendants' private Act.

For myself, I confess that I find the logic of the plaintiffs' argument difficult to resist, and if the matter were res integra I should be disposed to hold that the expenses here in question

[29] [1928] 2 K.B. 159.

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THE STONEDALE No. 1.

Willmer J.

were (a) within the words "loss or damage . . . caused to property "or rights," and (b) were caused "by reason of the improper "navigation or management" of the plaintiffs' vessels. But I find myself quite unable to distinguish *The Millie*,[30] which is a direct decision to the contrary. As Langton J. himself said in that case,[30] the point to be decided is "a nicely balanced one." I bear in mind that in any limitation suit a heavy burden is upon the plaintiffs to establish their right to relief. In this case they must, in my view, accept the added burden of satisfying the court that *The Millie* [30] was wrongly decided. I find myself unable to say that the plaintiffs have discharged this burden to my satisfaction. If *The Millie* [30] was indeed wrongly decided, I think that it is for the Court of Appeal, and not for me, to say so. For myself, I do not feel able to do other than follow the decision of Langton J. and to hold that the plaintiffs have not made out their claim to limit their liability as against the canal company. In my judgment, therefore, the action fails so far as the canal company is concerned.

*Claim dismissed.*

Solicitors: *Batesons & Co., Liverpool; Hill, Dickinson & Co., Liverpool.*

[30] [1940] P. 1, 14.

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[CHANCERY DIVISION.]

1953
*Oct.* 2.

Roxburgh J.

* *In re* HEILBRONNER, DECD. NATHAN *v.* KENNY.

[1952 H. No. 3849.]

*Will — Construction — Ademption — Gift of "my bank deposit at the "M. Bank"—Whether applicable to savings certificates and bonds —Current account—Balance withdrawn during testator's last illness.*

The will of a testator, made in 1947, after appointing executors and directing payment of debts and funeral expenses, continued: "I give and bequeath unto Nurse A. K. in recognition for her sacri- "ficing work and unselfish behaviour during my various illnesses "my bank deposit at the Midland Bank." He further gave a number of pecuniary legacies and certain specific legacies of jewelry and effects. He died in 1951.

At all material times the testator had a current account, but no deposit account, at a branch of the Midland Bank, and there were also deposited there the documents of title to certain National Savings Certificates and Savings Bonds. There were no other ascertained assets, though it was believed that the testator had a claim to some 3,300 "marks" in Germany. During his last illness and a few days before his death the testator withdrew his bank balance and handed it to the plaintiff N., one of the executors of the will. This was done so that N. could pay the testator's household accounts, as the testator was unable to go out or to sign cheques. At the date of the death N. held some £236.

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HEILBRONNER, DECD., *In re.*

**At the hearing of a summons taken out to ascertain whether the gift to A. K. comprised (a) the savings certificates and savings bonds, and (b) the balance of cash in the hands of N. at the testator's death:—**

***Held*, (1) that the words of the gift comprised only money at the bank on current or deposit account, and did not include the savings certificates or bonds; (2) that the gift to A. K. of the balance on current account had not, in the circumstances, been adeemed by its withdrawal from the bank; so that the sum in the hands of N. at the testator's death passed to A. K.**

ADJOURNED SUMMONS.

Alfred Salomon Heilbronner, who was of German origin, by his will dated October 23, 1947, directed as follows on a printed form completed in his own handwriting: "I appoint my cousin "Lionel Nathan and George F. Patrick to be my executors and "direct that all my debts and funeral expenses shall be paid "as soon as conveniently may be after my decease. I give and "bequeath unto Nurse Ada Kenny in recognition for her sacrificing "work and unselfish behaviour during my various illnesses my "bank deposit at the Midland Bank. I further bequeath £50 "each to both my executors as well as £50 to Mr. Jai Haas, my "late ledger clerk of Embassy House, also £50 to the Misses "Lottie and Susan Vogel and Mrs. Lottie Langley née Adels-"berger of Lymington Road. I also bequeath to Nurse Kenny "all my furniture and linen the diamond bracelet and the two "diamond rings (in my safe keeping) to be left to the owner "Mrs. Helma Maria Salerno née Nenburger, at Venice. I wish "that Nurse Kenny should hand over any small remembrance "my relations should like to have in memory of me. My sealing "ring and wedding ring to go to Nurse Kenny, the family memory "ring to Helma Maria Salerno." There was no residuary gift. The testator died on May 10, 1951. Nurse Kenny died in 1951, not long after the testator.

According to the evidence, which is more particularly set out in the judgment, the testator at all material times had a current account, but no deposit account, at a branch of the Midland Bank, and kept deposited there a number of documents of title to National Savings Certificates and Savings Bonds. These securities, together with his bank balance and personal chattels, constituted the whole of his estate, with the exception of a possible claim to some "marks" in Germany of unspecified description.

Shortly before his death the testator caused the whole of his credit balance on current account to be withdrawn and paid to Lionel Nathan, an executor and the first plaintiff. At his death a balance of £235 16s. 7d. remained in the hands of Nathan, after certain liabilities had been discharged in the testator's lifetime.

The question raised was whether the bequest to Ada Kenny comprised any, and if so what, of the following: (1) 250 National Savings Certificates (£1 issue); (2) 500 ditto (7th issue); (3) £1,500 and £1,000 3 per cent. Savings Bonds, 1960 70; (4) £250

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HEILBRONNER, DECD., *In re.*

and £750 ditto, 1965/75, all deposited at the bank; (5) the sum of £235 16s. 7d. held by Lionel Nathan at the testator's death. It appeared from the evidence that if the whole of these assets passed to the estate of Ada Kenny there would be nothing with which to satisfy the pecuniary legacies.

*G. M. Parbury* for the executors.
*N. S. S. Warren* for the personal representative of Ada Kenny.
*A. P. McNabb* for the persons entitled on intestacy.
The pecuniary legatees did not appear.

The following cases were cited in argument: *In re Prater* [1]; *In re Adkins*.[2]

ROXBURGH J. This testator, who was of German birth but who acquired considerable facility in the English language, most unfortunately considered himself able to make his own will. I am quite certain that nothing that I could decide would really accord with his intention, because it is my duty to give due weight to the meaning of the English language and the propositions of law which have been established in England and, as regards the latter, I am sure that this testator was wholly ignorant.

[His Lordship read the provisions of the will and continued:] Mr. Warren has reminded me of the principle in these courts that no testator, when he has attempted to make a will, is likely to intend to die intestate as to what must be the greater part of his estate, and I feel the great force of that contention. Moreover, there is, in my view, plain indication in this will of an intention to confer a pecuniary benefit on Ada Kenny, and I am quite certain that the testator did not intend her to have no money at all. But for this view, I might have felt it necessary to decide wholly against her claim. On the other hand, I must have regard to the meaning of the English words, which to my mind are reasonably clear; and moreover I must have regard to the extraordinary consequence which would follow on the construction of this will if I accepted Mr. Warren's major contention, namely, that there would be nothing with which to meet the debts or pecuniary legacies. I can well believe that what the testator intended to do was to give his property to Ada Kenny charged with the payment of his debts and funeral expenses and the legacies which he has bequeathed. But I can see no possible way in which I could so construe this will, and that is why I said at the outset that I do not feel that I can, consistently with legal principles, achieve what I suspect the testator intended.

Before discussing the meaning of the will I must refer to some of the evidence: "The testator had no deposit account at the "Midland Bank either at the date of his said will or the date of

[1] (1888) 37 Ch.D. 481; 4 T.L.R. 249. [2] (1908) 98 L.T. 667.

1953

HEIL-BRONNER, DECD., *In re.*

Roxburgh J.

" his death and so far as can be ascertained never at any time " had any deposit account at the Midland Bank or any other " bank. He had a current account at the Midland Bank, 60 " Gracechurch Street Branch," but the whole of the balance standing to the credit of that account was drawn out shortly before his death because he was unable to go out or to sign cheques. I stress those words, " unable to sign cheques," because I am pretty sure that at the date when the testator authorized the bank to transfer any cash balance in hand to the account of his cousin, which, as Mr. Nathan says, was done to enable him to pay housekeeping expenses, the testator was not in a state of health sufficient to enable him to consider how such a transaction would affect the testamentary dispositions which he had made in 1947.

The result, therefore, was that at his death the testator had nothing, strictly speaking, in any account, whether current or deposit, at any bank and, therefore, if I put a strict meaning upon the language of the will, Ada Kenny would get nothing at all.

Mr. Nathan testified as follows regarding the transfer to him of the testator's balance on current account: " On May 3, 1951, " there was standing to the credit of the testator's current account " at the said branch of the Midland Bank the sum of £176 1s. 5d. " On this date the balance of the said account was paid to me. " The testator gave written instructions to the bank for this pur- " pose. The testator had previously, namely on April 20, 1951, " given me a cheque for £100 drawn on his said account. These " sums were paid to me by the testator in order that I could pay " his household accounts for him. At the date of the death of " the testator I held on his behalf the sum of £235 16s. 7d., the " said sum of £235 16s. 7d. being the balance of the said sum of " £100 after payment of accounts amounting to £40 4s. 10d. and " the said sum of £176 1s. 5d." Then: " At the date of his said " will there were deposited at the Midland Bank, 60 Gracechurch " Street branch, in the name of the testator the documents of " title relating to the following investments:—250 National " Savings Certificates £1 issue, 500 National Savings Certificates " 7th issue, £1,500 3 per cent. Savings Bonds 1960/70, £250 3 per " cent. Savings Bonds 1965/75. The documents of title relating " to these investments remained so deposited at the date of his " death, and in addition thereto there was also so deposited at " such date the document of title relating to a further sum of " £750 3 per cent. Savings Bonds 1965/75," which were purchased a very few days after the date of the will

At the date of the will there was £1,734 1s. 5d. standing to the credit of the testator in his current account, though that sum was reduced two days afterwards by £750 more or less for the purchase of the £750 3 per cent. Savings Bonds. But even after that transaction, as the current account then stood, there would have been £1,000 for Ada Kenny, and there would have been plenty of assets, namely, the bonds and certificates, to discharge all the pecuniary legacies and all the debts and expenses. So

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Roxburgh J.

that it would not be unreasonable to hold that the disposition at that date in favour of Miss Kenny was intended to be, in effect, about £1,000. I stress that because I do not think I am going to put an unreasonable construction on the will.

Mr. Warren contends that the will gives everything to Miss Kenny. I must enter one caveat. Lionel Nathan says that, in addition to the assets I have mentioned above, the testator had some furniture and jewelry which is, or most of it except something of very small value, specifically bequeathed by the will. Then comes this phrase: "In addition to the above assets it is "possible that the testator had a sum of 3,300 marks or there-"abouts at Mainz in Germany. Enquiries are being made but "so far they have been without result."

I cannot possibly act upon that evidence as proof that the testator had in 1947 a sum of 3,300 marks or thereabouts. It is much too vague. Moreover, I do not know whether the marks referred to are Reichsmarks or Deutsche marks. If they are Reichsmarks, they are practically valueless, and if they are Deutsche marks, they would have a very considerable value. This point is, in my judgment, a very important feature in this case. But Mr. Parbury at the Bar gave to Mr. Warren whatever information there was about these marks, and Mr. Warren—no doubt very wisely—elected not to take the risk of incurring the costs of pursuing the question of the marks. If I disregard those marks, then it is quite plain, if I accept Mr. Warren's major contention, that there was nothing out of which to pay either the debts, funeral and testamentary expenses or the legacies.

The will quite plainly appoints executors and directs them to pay the debts and funeral expenses. I am quite certain that the testator meant the executors to pay them and meant them to have funds out of which to pay them. Moreover, he bequeathed a number of pecuniary legacies, and I am quite certain that he intended the executors and not Nurse Kenny to pay those legacies. I am quite certain, therefore, that he must have contemplated that there would be assets out of which to pay them. Therefore, I do not approach this will with any conviction that the testator meant to give everything to Nurse Kenny. It may well be that he did intend to give everything to her charged with these outgoings, but I cannot possibly hold that he has in fact so done.

I do not find these words at all difficult to construe. I would stress that the phrase is not "my deposit at the Midland Bank," nor is it "my bank deposit." That is important. "My bank "deposit" might mean "my deposit at the Midland Bank," but "my bank deposit at the Midland Bank" cannot, in my judgment, mean merely all that is deposited at the Midland Bank. That is giving no meaning whatever to the word "bank" which qualifies the word "deposit" and cannot in this context be an indication of local situation. I do wish to stress that. I might well have reached a different conclusion if the phrase had been

" my deposit at the Midland Bank " or " my bank deposit." It is " my bank deposit at the Midland Bank." That is reasonably clear. It means that money deposited at the Midland Bank whether on current or deposit account.

It is said: " Why did not he say ' current account ' " ? I do not know why he did not; but one reason might be that he thought he might have some money deposited at the bank at the date of his death and that he wished to include that as well as the current account. I do not know, but that is a possible explanation.

In my judgment, it is going too far to say that " my bank " deposit at the Midland Bank " has not got a reasonably clear meaning. It is quite true, in one sense, that no money is really deposited at a bank, because the relation between banker and customer is that of debtor and creditor. The actual money which is deposited is, of course, free for the bank to spend as it thinks fit. But that is a legal notion. It is common to speak of " deposit account " and " current account," but there is no difference between a deposit account and a current account, except that in one case interest is usually paid and in the other case it is usually not, though that is not invariable. In the case of a deposit account notice is required, though it is very often waived; and in the case of a current account it is never required. Those are differences in the terms of the loan and nothing else. The relationship between the banker and the customer is that of debtor and creditor. Therefore, there is no great art in the words " deposit account " and, in my judgment, when a man says " my bank deposit " at a particular bank, primarily he means " the money which I have on current or deposit account."

I can only repeat that if the words had been different, I might have reached a different conclusion. It seems to me that I must hold that these words mean the money which is at the Midland Bank on deposit or current account. If I were to adhere strictly to that conclusion, Nurse Kenny would get nothing. She is dead, but that does not affect the matter in any way.

There is a line of cases indicating that where furniture in a house is given, and at the testator's death the furniture has been removed to a warehouse, or some other place for a purely temporary purpose, the bequest operates upon the furniture in its temporary habitation: see Theobald on Wills, 10th ed., at p. 128. Whether that doctrine has ever been applied to this sort of subject-matter, I do not know, but I am quite willing to be the first to apply it, feeling as strongly as I do that this testator intended to give Nurse Kenny some money. There is no doubt that this money, both the £100 which was drawn in favour of Nathan in April, and the balance of £176 which was drawn later on authority, was drawn for a temporary purpose, namely, to enable Nathan to pay household expenses when the testator was too ill to go out or to sign cheques. It was, of course, hoped that he would get better or, at any rate, get sufficiently well to

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HEILBRONNER, DECD., *In re.*

Roxburgh J.

rearrange his affairs, and I dare say to make a new will. But unfortunately that opportunity never occurred.

I do think that I can, by analogy, apply the doctrine I have mentioned, so that that balance of the sum of £235 16s. 7d., though actually in the hands of Nathan as trustee at the date of the death of the testator, must be deemed to have been on current account at the bank and, therefore, to pass under the bequest to Nurse Ada Kenny. This will not achieve, I am sure, the intention of the testator in full, but it is the best that I can do for Nurse Kenny on the language which he has used and by which I am bound.

The result will be that there will be residue which will be available for the funeral and testamentary expenses and payment of the legacies, and any balance will, of course, go to the persons entitled on an intestacy.

There will be a declaration that the bequest in favour of Ada Kenny of the testator's bank deposit at the Midland Bank comprises the sum of £235 16s. 7d. cash held at the death of the testator by the plaintiff Lionel Nathan on his behalf. Nothing else passes under the gift.

*Declaration accordingly.*

Solicitors: *Gasquet, Metcalfe & Walton; Charles Russell & Co.; Hunters.*

F. R. D.

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[CHANCERY DIVISION.]

1953
*June* 11.

Wynn-Parry J.

* *In re* NORTH DEVON AND WEST SOMERSET RELIEF FUND TRUSTS. HYLTON *v.* WRIGHT.

[1953 N. No. 830.]

*Charity—Flood damage—Relief fund—Surplus assets—Construction of appeal—General charitable intention—Cy-près application.*

Floods due to torrential rain in North Devon and West Somerset caused loss of life and great damage to property in the area. A relief fund was opened by an appeal in the following terms: "We "invite not only the people of the West country, but everyone who "has known and loved Lynmouth, and the quiet villages of North "Devon and West Somerset, which have suffered so grievously in "this disaster, to contribute to a fund for the relief of all who have "suffered. . . . Many holiday makers . . . have suffered grievously. "These need help every bit as much as our own people and for that "reason we do ask the whole country to support this fund. . . ."

A large sum was collected, and it was expected that a considerable surplus would remain after all proper claims under the appeal had been met:—

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NORTH DEVON AND WEST SOMERSET RELIEF FUND, *In re.*

*Held*, (1) that the trusts of the fund were valid charitable trusts; (2) that the appeal disclosed a general charitable intention and that the surplus assets could be applied cy-près.

*In re Welsh Hospital (Netley) Fund* [1921] 1 Ch. 655 followed.

ADJOURNED SUMMONS.

On the evening of August 15, 1952, torrential rain fell over a wide area in North Devon and West Somerset, causing disastrous floods. The area affected had a population of about 85,000, who depended to a great extent on agriculture for their livelihood, but the tourist industry was also of great importance to them.

An appeal was issued by Lord Hylton, the Lord Lieutenant of the County of Somerset, and Earl Fortescue, the Lord Lieutenant of the County of Devon, in the following terms: "We invite not only the people of the West country, but every "one who has known and loved Lynmouth and the quiet villages "of North Devon and West Somerset, which have suffered so "grievously in this disaster, to contribute to a fund for the relief "of all who have suffered. . . . The material damage will run "into a figure far beyond the resources of the inhabitants of "these stricken valleys. In human suffering it can perhaps "never be computed. At Lynmouth alone 20 houses and two "hotels have disappeared and at least 40 houses are damaged; "at least 30 people, including six from one family, are missing. ". . . But those who have suffered are not only the local people. "Many holidaymakers, notably the Boy Scouts who were "camping at Filleigh, have suffered grievously. These need help "every bit as much as our own people, and for that reason we do "ask the whole country to support this fund. . . ."

Earl Fortescue owned property in the area affected and for that reason he retired from the trusteeship, and Lord Roborough, Vice-Lieutenant of the County of Devon, was appointed as trustee in his place.

As a result of the appeal, £1,341,230 12s. was collected. It was contemplated that there would be a large surplus of the fund after providing for all proper claims; it was, however, impossible to estimate at the present time what that amount would be. Lord Hylton stated in evidence that, in his opinion, it would be not less than £250,000.

The questions on the summons relevant to this report were: (1) whether this relief fund was held on valid charitable trusts; (2) whether any surplus of the fund, after what was required for the purposes of the trusts, could be applies cy-près for some other charitable purpose.

*Geoffrey Cross Q.C.* and *J. V. Nesbitt* for the trustees of the relief fund.

*Neville Gray Q.C.* and *E. M. Winterbotham* for a former lord mayor of Plymouth, representing donors to the fund.

*Sir Lionel Heald A.-G.* and *Denys Buckley* for the Attorney-General.

1953

NORTH DEVON AND WEST SOMERSET RELIEF FUND, *In re.*

Cases cited in argument: *In re Bradbury* [1]; *In re Elliott* [2]; *In re Foveaux* [3]; *In re Hillier* [4]; *In re Hobourn Aero Components Ld.'s Air Raid Distress Fund's Trusts* [5]; *In re Roadley* [6]; *In re Welsh Hospital (Netley) Fund* [7]; *Williams' Trustees* v. *Inland Revenue Commissioners* [8]; *In re Wilson.*[9]

WYNN-PARRY J. The first question which I have to decide is whether the trusts affecting the funds in question are valid charitable trusts. In a case such as this where the trust is clearly of a public nature, in order that the trusts be good charitable trusts they must be not only to be beneficial to the community, or a defined section of the community, but beneficial in the way which the law regards as charitable. For that proposition I need refer to no other authority than the opinion of Lord Simonds in *Williams' Trustees* v. *Inland Revenue Commissioners.*[1]

The method by which this question should be approached was laid down authoritatively by Chitty J. in *In re Foveaux,*[2] where he said [3]: "Cases arise, such as the present, in which it "is not easy to ascertain whether a particular institution is or "is not a charity. Charity in law is a highly technical term. "The method employed by the court is to consider the enumera- "tion of charities in the Statute of Elizabeth, bearing in mind "that the enumeration is not exhaustive. Institutions whose "objects are analogous to those mentioned in the statute are "admitted to be charities; and, again, institutions which are "analogous to those already admitted by reported decisions are "held to be charities. The pursuit of these analogies obviously "requires caution and circumspection. After all, the best that "can be done is to consider each case as it arises, upon its own "special circumstances."

Before considering the vital document in this case, I would observe in passing that Lord Greene M.R., in *In re Hobourn Aero Components Ld.'s Air Raid Distress Fund,*[4] said [5]: "I am "not concerned to dispute the proposition that a fund put up "for air raid distress in Coventry generally would be a good "charitable gift. I have very little doubt that it would be. But "there is all the difference in the world between such a fund and "a fund put up by a dozen inhabitants of a street, or, it may be, "a thousand employees of a firm, to provide for themselves out "of moneys subscribed by themselves some kind of immediate

[1] [1950] W.N. 558; [1951] 1 T.L.R. 130; [1950] 2 All E.R. 1150n.
[2] (1910) 102 L.T. 528.
[3] [1895] 2 Ch. 501; 11 T.L.R. 540.
[4] [1944] 1 All E.R. 480.
[5] [1946] Ch. 194; 62 T.L.R. 313; [1946] 1 All E.R. 501.
[6] [1930] 1 Ch. 524; 46 T.L.R. 215.
[7] [1921] 1 Ch. 655.
[8] [1947] A.C. 447; 63 T.L.R. 352; [1947] 1 All E.R. 513.
[9] [1913] 1 Ch. 314.
[1] [1947] A.C. 447; 63 T.L.R. 352; [1947] 1 All E.R. 513.
[2] [1895] 2 Ch. 501.
[3] Ibid. 504.
[4] [1946] Ch. 194; 62 T.L.R. 313; [1946] 1 All E.R. 501.
[5] [1946] Ch. 200.

"relief in case they suffered from an air raid. The Attorney-"General and Mr. Upjohn wish to attribute to the fact that these "people were putting up money for their own benefit a very "slight importance. To my mind, it is of the greatest import-"ance and is quite conclusive in stamping the character of a "private and personal trust upon this fund."

At the end of his judgment Morton L.J. said [6]: "No doubt "the provision of relief for air raid distress is a most excellent "object, and I should not myself doubt that a fund for the relief "of air raid distress in Coventry was a fund held upon charitable "trusts."

With those considerations in view, I approach the appeal which was launched, because on the principles disclosed by the authorities, the question is solely one of construction of this comparatively short document. In the first place, it is legitimate, and, indeed, necessary to remember that this appeal was issued only three days after the disaster of August 15, 1952, and it bears the stamp of having as its authors people who had not had time, if indeed the desirability ever crossed their minds, of consulting their legal advisers. In the case of a document issued in such circumstances it does not appear to me to be proper that the court should be astute to fix on any particular word or words and give to it too wide or, in some circumstances, too narrow a meaning.

The appeal is headed "Appeal by the Lords Lieutenant of "Devon and Somerset," and it opens with these words: "We "invite not only the people of the West country, but everyone "who has known and loved Lynmouth and the quiet villages of "North Devon and West Somerset, which have suffered so "grievously in this disaster, to contribute to a fund for the relief "of all who have suffered."

In my view, too much emphasis can easily be placed on the word "all," and, indeed, reliance was sought to be made on the use of that word by Mr. Gray and Mr. Winterbotham in their respective arguments. I think that that sentence, applying the elementary rule of construction, must be read together with the whole of the rest of the document.

The document proceeds: "These villages have been over-"whelmed by a tragedy terrible in its suddenness and complete-"ness. Homes have been swept away with whole families. "Others are bereaved, or homeless, or have nothing left. In the "darkness of a single night part of the town of Lynmouth itself "has disappeared for ever." That is a most dramatic and, for the purposes of the appeal, well framed paragraph, and the whole emphasis there is on the results of the disaster so far as concerns distress, either through pecuniary suffering or through bodily suffering.

[6] Ibid. 210.

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The document goes on: "The material damage will run into "a figure far beyond the resources of the inhabitants of these "stricken valleys." That is a sentence which it is material to bear in mind, because it places a great emphasis on the circumstances which were considered by the authors of the document, and put by them before those to whom they appealed, that the intention was to help in a pecuniary way those who, by reason of the magnitude of the disaster, were, whatever otherwise would have been their means, unable adequately to help themselves.

The document then condescends to a number of details as regards material damage, and mentions the serious loss of human life and human suffering. Then it proceeds: "We hope and "believe that this fund will meet a general response far beyond "the confines of the West country, for in its romantic beauty "and appeal Lynmouth in particular was a possession not of "one county but of the nation."

In my view, in so far as the sentence could, on a strict view, be regarded as an intimation that the funds are required merely to restore amenities, it should not be given that construction, as that construction might tend to defeat what could otherwise have been extracted from the document, namely, an intention to help relieve hardship and suffering by the charity of the community. It is merely a paragraph put in to emphasize that this distress and suffering which the appeal was designed to relieve had fallen upon a district that was particularly beautiful.

The document continues: "But those who have suffered are "not only the local people. Many holidaymakers, notably the "boy scouts who were camping at Filleigh, have suffered "grievously. These need help every bit as much as our own "people, and for that reason we do ask the whole country to "support this fund."

The reasoning there is to put forward some circumstance which will help to justify an appeal to the whole country, and that reason is that there were at the time of the disaster within the area affected persons who could not be regarded as local people but who, being in the area at the time of the disaster, themselves have suffered grievously, and therefore need help; and the help for which the appeal was made was, of course, financial help, because that was of the essence of the appeal.

There is then a general statement: "This countryside, that "has given pleasure to so many, will, we feel sure, be generously "remembered in its hour of need by all those who have known it "in happier days."

In my judgment, looking at that document as a whole, I extract from it an intention upon the part of the authors to apply the money which may be subscribed at their invitation to relieve hardship and suffering which has been experienced both by what are called "the local people" and others who were within the area at the time of the disaster and had suffered by

the disaster, and to achieve that end by the charity of the community. I am unable to dissect this document in such a way as to discover in it, either by looseness of phrasing and therefore by inference, or by express words, any intention to benefit this part of the community in a way which the law would not regard as charitable.

For those reasons, I propose to declare that the trusts affecting the fund are valid charitable trusts.

The next question which I have to consider is whether any surplus of the said fund beyond what is required for the purposes of the said trusts is (a) applicable cy-près for some other charitable purpose, or (b) repayable to the donors who contributed to the fund in the proportions of their gifts or how the fund ought otherwise to be applied.

I do not find it altogether easy to answer this question. The principles on which the court should proceed were stated in the opening passage of the judgment of Parker J. in *In re Wilson*,[7] where the judge said[8]: "For the purposes of this case I think "the authorities must be divided into two classes. First of all, "we have a class of cases where, in form, the gift is given for a "particular charitable purpose, but it is possible, taking the will "as a whole, to say that, notwithstanding the form of the gift, "the paramount intention, according to the true construction of "the will, is to give the property in the first instance for a "general charitable purpose rather than a particular charitable "purpose, and to graft on to the general gift a direction as to "the desires or intentions of the testator as to the manner in "which the general gift is to be carried into effect. In that case, "though it is impossible to carry out the precise directions, on "ordinary principles the gift for the general charitable purpose "will remain and be perfectly good, and the court, by virtue of "its administrative jurisdiction, can direct a scheme as to how "it is to be carried out. In fact the will will be read as though "the particular direction had not been in the will at all, but "there had been simply a general direction as to the application "of the fund for the general charitable purpose in question.

"Then there is the second class of cases, where, on the true "construction of the will, no such paramount general intention "can be inferred, and where the gift, being in form a particular "gift,—a gift for a particular purpose—and it being impossible "to carry out that particular purpose, the whole gift is held to "fail. In my opinion, the question whether a particular case "falls within one of those classes of cases or within the other "is simply a question of the construction of a particular "instrument."

It is to be observed that in that case the court had to construe a will, the instrument by which a single donor had made the disposition which gave rise to the question. A number of authorities were cited to me, most of which arose substantially

[7] [1913] 1 Ch. 314. [8] Ibid. 320.

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in that way. I have to consider a very different type of case, one in which I have to discover the intention of many hundreds—it may be thousands—of donors, and the only document that I have to assist me is not a document brought into existence by any one of those donors, but by those who invited them to become donors.

The nearest reported case to the present case is *In re Welsh Hospital (Netley) Fund.*[9] That was a decision of P. O. Lawrence J., and the head-note reads as follows: "On the outbreak "of the war a hospital was erected at Netley, and equipped and "run during the war, for the benefit of sick and wounded Welsh "soldiers by means of large voluntary subscriptions raised in "Wales. In 1919 the hospital was closed, the staff disbanded, "and the property sold to the War Office, and after winding up "the affairs of the hospital there was a surplus of some "£9,000:—*Held*, on the evidence, that there was not a resulting "trust of the surplus for the subscribers to the hospital, but a "general charitable intention for sick and wounded Welshmen "which enabled the court to apply the fund cy-près." In the judgment of Lawrence J., reference is made to the terms of the appeal by which the subscriptions were invited. He said[10]: "The appeal shows that the first idea was that the hospital "should be one serving with the Expeditionary Force at the "Front in France. It also shows that six months' service in "France was estimated to cost £15,000, and it continues: "'But the sum subscribed is not limited to this amount, as "'further subscriptions can be used for prolonging the service "'or increasing the accommodation of the hospital,' and it winds "up with this expression: 'We believe that Wales will rise to "'the full height of its responsibilities in this great national "'crisis, and by subscribing the necessary sum within a few "'days prove that it is foremost in seeking to relieve and com-"'fort by the hands of their own fellow countrymen our sick "'and wounded across the seas.'" The appeal, as the judge pointed out, was an appeal to the inhabitants for Wales for subscriptions to a Welsh hospital.

He further said[11]: "The first question to be determined is "whether there is a resulting trust in favour of the subscribers "to the fund. Mr. Greene has argued on behalf of the sub-"scribers that there is a resulting trust for them, and that the "surplus ought to be paid back to the various subscribers. All "the other parties to the summons have argued that in the "circumstances it must be inferred that there was a general "charitable intent and that the court is at liberty to apply the "surplus cy-près. In my judgment this latter contention is well "founded. The fund was created by contributions from various "sources and in varying amounts, partly by donations from "private individuals of more or less substantial amounts, and

[9] [1921] 1 Ch. 655.
[10] Ibid. 659.
[11] Ibid. 660.

"partly by the proceeds resulting from concerts and other entertainments given and from collections in streets and at churches made in most of the towns and villages of Wales. So far as regards the contributors to entertainments, street collections, etc., I have no hesitation in holding that they must be taken to have parted with their money out and out. It is inconceivable that any person paying for a concert ticket or placing a coin in a collecting box presented to him in the street should have intended that any part of the money so contributed should be returned to him when the immediate object for which the concert was given or the collection made had come to an end. To draw such an inference would be absurd on the face of it. So far as regards individual subscribers of substantial amounts, the proper inference to be drawn is not quite so plain. In my opinion, however, these subscribers must be taken to have known that they were contributing to a general fund which was being raised in the manner I have described, and that their contributions would be aggregated with the proceeds of entertainments, street collections, etc., and would not in any way be ear-marked. They must, I think, also be taken to have known that the total funds collected from every source would be applied for the purpose of the charity without discriminating between the moneys derived from any particular source. In these circumstances I am of opinion that the true inference to be drawn is that these subscribers intended to part with their contributions out and out, and that they did not intend that the surplus, if any, of their contributions should be returned to them when the immediate object of the charity should have come to an end. In the result I hold that although the contributions were in the first instance made for the particular purpose of building, equipping and maintaining the Welsh Hospital at Netley, the main underlying object of the contributors was to provide money for the comfort of sick and wounded Welshmen, and that all the subscribers intended to devote their contributions not only to the particular object, but generally to the benefit of their sick and wounded countrymen."

It is impossible, on careful consideration, to draw a distinction of any substance between the facts of that case and those of the present case. It appears to me not in the least decisive that there is a reference in the appeal to persons other than local residents who suffered distress by the disaster. The main underlying object of that appeal was to benefit the people of the district in question. The appeal proceeds in this case, as it did in the case of the Welsh hospital, by emphasizing what in the Welsh case was called the immediate object, but which might quite easily in either case have been treated, on a strict construction of the appeal, as the only object. In the case before him, P. O. Lawrence J. found no difficulty in drawing the conclusion, for the reasons which he gave, that there was a more extended object than might be said at first sight to appear on the face of

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the appeal; and when I apply his reasoning to the appeal in question in this case, I feel driven to exactly the same conclusion, namely that there was here a general charitable intent. All the reasons which influenced the mind of P. O. Lawrence J. to the conclusion to which he came are present in this case. I find it impossible, therefore, to distinguish that case from this. In those circumstances, it is unnecessary for me to travel through the rest of the authorities.

I need only say that I find nothing in the judgment of P. O. Lawrence J. which is in any way inconsistent with the passage from the judgment of Parker J. in *In re Wilson* [12] which I have read. It is true that the latter case was not apparently cited to P. O. Lawrence J., but no doubt he was well aware of its existence. Indeed, the judgment of Parker J. in *In re Wilson* [12] did no more than state the effect of the authorities as it then existed; nor do I find anything in the later cases which carries the matter further. So far as I am aware, no adverse comment has ever been passed on the decision or judgment in *In re Welsh Hospital (Netley) Fund.*[13] I regard it as authority binding on me in this case and covering this case.

In answer to question 2 of the summons I propose to make a declaration that the surplus of the fund beyond that which is required for the purposes of the trusts is applicable cy-près for some other charitable purpose.

*Declaration accordingly.*

Solicitors: *Sharpe, Pritchard & Co. for H. G. Godsall, Exeter; Treasury Solicitor.*

I. G. R. M.

[12] [1913] 1 Ch. 314. [13] [1921] 1 Ch. 655.

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[PROBATE, ETC., DIVISION.]

1953
*July* 31.

Mr. Commr. Grazebrook Q.C.

* WARREN *v.* WARREN.

*Husband and Wife — Divorce — Insanity — "Care and treatment" — Incorrect word in form — "Declare" — "Certify" — Lunacy Act,* 1890 (53 & 54 *Vict. c.* 5), *s.* 38 (4) (*as amended by the amending Act of* 1891 (54 & 55 *Vict. c.* 65), *s.* 7)—*Matrimonial Causes Act,* 1950 (14 *Geo.* 6, *c.* 25), *s.* 1 (1) (*d*), (2) (*a*)—*Mental Treatment Rules,* 1930 (*S.R. & O.* 1930, *No.* 1083), *r.* 2 (2), *form* 27—*Mental Treatment Rules,* 1948 (*S.I.* 1948, *No.* 1071), *r.* 2 (2), *form* 20.

The special report and certificate of the appropriate officer or attendant as to the condition of a patient required by section 38 (4) of the Lunacy Act, 1890 (as amended in 1891) must "certify" that the patient is still of unsound mind, etc. In the case of a respondent to a petition for divorce on the ground of incurable insanity it appeared that the appropriate officer used the words in his report

and certificate "I hereby 'declare' . . ." instead of "certify." It was contended on behalf of the respondent that "declare" did not mean the same as "certify," and that as the report and certificate were not in the proper form the respondent had not remained under care and treatment within the meaning of section 1 (2) (*a*) of the Matrimonial Causes Act, 1950:—

*Held*, applying *In re Shuttleworth* (1846) 9 Q.B. 651, *Reg.* v. *Inhabitants of Minster* (1850) 14 Q.B. 349, and dicta in *Ex parte Greenwood* (1855) 25 L.T.(O.S.) 86; 1 Jur.(N.S.) Pt. 1, 522, that the word "declare" was merely an equivalent phrase to the word "certify," that the report and certificate did not in consequence fail to comply with the requirements of the rule and statute, and that as the respondent had been under "care and treatment" for the appropriate period, and was incurably of unsound mind, the petitioner had proved her case.

*Ex parte Greenwood*, supra; *Murray* v. *Murray* [1941] P. 1; 57 T.L.R. 90; [1940] 4 All E.R. 250 distinguished.

PETITION for divorce.

The parties were married in 1930 and finally separated in 1937, following a brief resumption of cohabitation after a separation of some three years following an order of the justices in 1934 on the ground of persistent cruelty. On June 17, 1947, the husband was admitted to a mental hospital, and the wife in due course presented a petition for divorce on the ground of incurable insanity, asking for the exercise of the court's discretion. The respondent by his guardian ad litem denied that he was incurably of unsound mind and/or that he had been continuously under care and treatment for the relevant period.

The following statement of facts is taken from the judgment: The court was satisfied upon the evidence that the husband was incurably of unsound mind, but the question arose for determination whether he could be said to have been under care and treatment continuously for a period of at least five years immediately preceding the presentation of the petition.

By section 1 (2) of the Matrimonial Causes Act, 1950: "For "the purposes of this section a person of unsound mind shall be "deemed to be under care and treatment (*a*) while he is detained "in pursuance of any order or inquisition under the Lunacy and "Mental Treatment Acts, 1890 to 1930, . . . and not otherwise." Under the Lunacy Act, 1891, s. 7 (which substituted a new section 38 (4) of the Act of 1890): "A reception order shall remain "in force for a year after the date by this Act or by an order of "the Commissioners appointed for it to expire, and thereafter for "two years and thereafter for three years, and after the end of "such periods of one, two, and three years for successive periods "of five years, if not more than one month nor less than seven "days before the expiration of the period at the end of which, "as fixed by this Act or by an order of the Commissioners under "sub-section (2), the order would expire, and of each subsequent "period of one, two, three, and five years respectively a special "report of the medical officer of the institution or of the medical

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" attendant of the single patient as to the mental and bodily " condition of the patient with a certificate under his hand certi- " fying that the patient is still of unsound mind and a proper " person to be detained under care and treatment is sent to the " Commissioners."

Form 27 in the schedule to the Mental Treatment Rules, 1930, and form 20 of the Mental Treatment Rules, 1948,* both indicated the matters which were to appear in the special report and certificate. The last clause of the form was in these terms: " I " hereby certify that he is still of unsound mind, and a proper " person to be detained under care and treatment." That had to be signed by the medical officer. In the present case the special report and certificate, dated May 24, 1948, and signed by the medical officer, contained all the matters required and indicated in the rules and the schedule, but had this final clause in it: " I hereby declare that he is still of unsound mind, and a " proper person to be detained under care and treatment." The word " declare " appeared in the printed form used, instead of " certify," the word appearing in the form in the schedule.

In the next special report and certificate, dated May 23, 1949, the word " declare " was struck out and " certify " typed in and initialled by the medical officer who signed the form; and in the next special report and certificate, dated May 21, 1951, the words " I hereby certify " appeared on the printed form. From the printing at the foot of the forms it appeared that the first two forms were printed in 1947 and the last form in 1949.

*F. E. Grundy* for the wife petitioner.

*G. K. Newman* for the Official Solicitor as guardian ad litem to the husband.

The cases cited in argument are referred to in the judgment.

MR. COMMISSIONER GRAZEBROOK Q.C. stated the facts, referred to the relevant sections and rules set out above, and continued: It has been argued that " declare " does not mean the same as " certify," and that therefore the special report and certificate not being in the proper form the reception order came to an end at the expiration of the year and that the husband was not continuing to be kept in the institution under the original reception order and, therefore, the case brought by the wife must fail as the husband was not under care and treatment.

I was unable to find much assistance on this particular matter in the cases to which I was referred. In *In re Shuttleworth* [1] the headnote contains these words: " . . . Under schedule (C) [to

* Which came into operation on July 5, 1948. The two forms were identical except for a reference at the top to " (Private or health service) " in lieu of " (Private or rate-aided)." By rule 2 (2) of the rules of both 1930 and 1948: " The forms set out in " the Schedule to these Rules shall " be used in all cases to which those " forms are applicable."

[1] (1846) 9 Q.B. 651.

"the Lunacy Act, 1845 (8 & 9 Vict. c. 100)]"—which relates to the medical certificate that was then required in cases of this type—"a medical certificate is sufficient which states, as grounds "for the opinion that the party is insane, 'that she labours under "'delusions of various kinds;' and 'that she is dirty and indecent "'in the extreme.' A medical practitioner, signing the certi- "ficate, instead of the words 'from the following fact or facts,' "inserted 'from the conversation I have had this day with the "'said' lunatic. *Held* sufficient, without more. . . ." In that case the contents in the body of the certificate were in question, and the court there held that, although the contents were not in the form according to the schedule which was referred to in that case, the contents of the certificate were sufficient.

I was also referred to *Reg.* v. *Inhabitants of Minster.*[2] I do not think that I need go into the details of the case, but it is stated in the headnote: "It is no valid objection to an order of "maintenance made, under stat. 8 & 9 Vict. c. 126 [Lunatic "Asylums and Pauper Lunatics Act, 1845], s. 62, . . . that the "medical certificate, annexed to the order for removal to the "asylum, varies from the form in schedule (E), No. 1 of stat. "8 & 9 Vict. c. 126, in not stating the place of abode of the "person signing it, or that he was a fellow or licentiate of the "College of Physicians or a graduate in medicine, or a member "of the College of Surgeons, or an apothecary authorized by the "Apothecaries' Company. . . ." That related to the requirements as to the description of the medical man signing the certificate, and in those circumstances the fact that the certificate was not in the form required in that case was held to be no valid objection.

The next case to which I was referred was *Ex parte Greenwood*,[3] which was under the Lunacy Act, 1853, and again related to the form of the medical certificate. The headnote reads: "The 4th section of the 16 & 17 Vict. c. 96 [Lunatics' Care and "Treatment Act, 1853], which enacts that no person (not a "pauper) is to be received as a lunatic into any licensed house or "hospital without the medical certificate, according to the form in "schedule (A), No. 2, of two persons, being physicians, surgeons, "or apothecaries, is not merely directory, but compulsory. It "appeared upon the return to a habeas corpus, that the certi- "ficates under which G. had been received into a private asylum "as a lunatic omitted to state the name of the street and number "of the house where the examination took place, in accordance "with the form in schedule (A) (No. 2); and it further appeared "by affidavit, that the examination did in fact take place in a "certain house in a certain street, and that the alleged lunatic "was not dangerous either to the public or himself:—*Held*, that "the certificates were defective in a material particular; and the "lunatic was ordered to be discharged from confinement."

[2] (1850) 14 Q.B. 349.

[3] (1855) 1 Jur.(N.S.) Pt. 1, 522.

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Coleridge J. said this[4]: "When from the enactments we "turn to the schedules referred to, we find them full of minute "particulars, manifestly framed with anxious carefulness, as if "to secure some important objects. It would seem dangerous to "enter into a comparison of these, and to class some as material, "which must be observed, and some as immaterial, which may "be disregarded." Later he said[5]: "It should be remembered, "this is not a case of the sufficiency of an equivalent phrase; if "it were, a different consideration might arise; but here that "which the statute requires has been wholly omitted, and nothing "substituted in its place. I come to the conclusion then, upon "principle, that the certificate is defective in a particular which "I have no right to consider as immaterial."

There was a further case to which I was referred, *Murray* v. *Murray*.[6] The relevant part of the headnote of that case is: "A wife, incurably of unsound mind, was in 1935 discharged "relieved, but not recovered, from a mental hospital under "section 25 of the Lunacy Act, 1890, for the purpose of her being "detained at an institution technically a 'workhouse' within "the meaning of that Act, but the further statutory requirement "under the same section that the medical superintendent of the "latter institution should issue a certificate to a certain effect "was not complied with. In 1939 the husband petitioned for "the dissolution of his marriage on the ground that the wife was "incurably of unsound mind and had been under care and treat- "ment for at least five years continuously immediately preceding "the presentation of the petition within the meaning of sections "2 (*d*) and 3 of the Matrimonial Causes Act, 1937, having been "under detention continuously in the two institutions since 1923: "—*Held*, (1) that the detention in the 'workhouse' was not "justified, owing to the lack of any certificate by the medical "officer of that institution, and that the petition therefore "failed; . . ."

Sir Wilfrid Greene M.R. said in his judgment[7]: "Periodical "certificates are required in order to keep a reception order in "force under section 7 of the Lunacy Act, 1891, which substitutes "a new sub-section (4) for the original subsection (4) of section "38 of the Act of 1890. That sub-section requires that at stated "intervals beginning with a year and running up to five years, "there must be a special report of the medical officer of the "institution as to the mental and bodily condition of the patient, "with a certificate certifying that the patient is still of unsound "mind and a proper person to be detained. Unless these reports "and certificates are given, the reception order automatically "expires. That is one of the safeguards which the legislature "has laid down for the benefit and protection of persons detained "under reception orders, and one would not expect to find that

[4] Ibid. 523.
[5] Ibid. 524.
[6] [1941] P. 1; 57 T.L.R. 90; [1941] 4 All E.R. 250.
[7] [1941] P. 1, 9.

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" the Act would allow any case to exist where a person detained " as an alleged lunatic could be detained indefinitely without the " necessity of periodical reports and certificates. In the present " case the reports and certificates required by that sub-section " were duly given, and if the patient had remained at Bexley, a " further report and certificate would have been due on July 17, " 1935, on which date the first five-yearly period expired." Then he went on to deal with the facts of that case.

In the present case I have already indicated what the difficulty is, namely, that in the special report and certificate the word " declare " appears instead of " certify." I have, as I have already indicated, to consider whether the word " declare " instead of " certify " is sufficient compliance with the requirements of the Act. What seems to me to have some considerable bearing in arriving at a conclusion in dealing with this matter is what was said in the judgment of Coleridge J. in *Ex parte Greenwood.*[8] In that case, put shortly, there was a total omission of the requirements in the medical certificate, and Coleridge J. stated this[9]: " It should be remembered, this is not a case of the sufficiency " of an equivalent phrase; if it were, a different consideration " might arise."

In the present case I consider that this word " declare " instead of " certify " is merely a substitution for the word " certify," and that it can be regarded as an equivalent word to " certify." In those circumstances, the conclusion to which I have come is that the special report and certificate of May 24, 1948, was in appropriate form and, therefore, the petitioner has made out her case as regards not only the incurable insanity of the respondent but that he has been continuously under care and treatment for a period of at least five years immediately preceding the presentation of the petition.

In the circumstances of the case, the petitioner asking for the exercise of the court's discretion in her favour in respect of her own adultery, I am prepared to exercise my discretion in her favour and grant her a decree, and I so do.

*Decree nisi.*

Solicitors: *P. Lupton, Divorce Department, The Law Society; The Official Solicitor.*

[8] 1 Jur.(N.S.) Pt. 1, 522. [9] Ibid. 524.

[QUEEN'S BENCH DIVISION.]

1953
*Oct.* 6.

Lord Goddard C.J., Sellers and Havers JJ.

# * SOUTHGATE BOROUGH COUNCIL *v.* PARK ESTATES (SOUTHGATE) LD.

*Highway—Private street works—Objection to proposals—"Unreasonable"—Proposed work premature—Jurisdiction of justices—Private Street Works Act,* 1892 (55 & 56 *Vict. c.* 57), *s.* 7 (*d*).

In considering objections under section 7 (*d*) of the Private Street Works Act, 1892, on the ground that proposed street works are "unreasonable," justices have power to determine that the work, although reasonable in the future, is premature, and therefore unreasonable if carried out at the time proposed.

Where, therefore, an owner of premises, shown in a provisional apportionment as liable to be charged with part of the expenses of executing certain street works, objected on the ground that, if the road were made up immediately, it would subsequently have to be cut into to provide various public utility services for new houses about to be built:—

*Held*, that the justices had jurisdiction to find that the proposed works were unreasonable and to quash the apportionment.

*Mansfield Corporation* v. *Butterworth* [1898] 2 Q.B. 274; 14 T.L.R. 431 applied.

CASE STATED by Middlesex Quarter Sessions.

On July 29, 1952, the respondents, Park Estates (Southgate) Ld., appeared before the quarter sessions as appellants against the dismissal by a court of summary jurisdiction of all objections made by them under section 7 (*d*) of the Private Street Works Act, 1892,[1] in respect of private street works to be carried out at Seafield Road, Southgate.

On the hearing of the appeal the following facts were proved or admitted: By a resolution dated July 31, 1951, the present appellants, Southgate Borough Council, resolved to execute the street works pursuant to section 6 of the Act of 1892. On November 27, 1951, the council resolved to approve the specification of the works, and the plans, sections, estimate of probable expenses and the provisional apportionment of those expenses.

The respondents were the owners of premises shown in the provisional apportionment as liable to be charged with part of the expenses of executing the works. Part of the premises consisted of vacant land on which the respondents wished to build houses. The approximate cost of making up the road would be £6,000, of which the respondents would be liable to pay about £3,000 in respect of all the premises owned by them. A very light form of construction was proposed.

[1] Private Street Works Act, 1892, s. 7: "During [one month from the "date of the first publication] any "owner of any premises shown in a "provisional apportionment as liable "to be charged with any part of the "expenses of executing the works "may, . . . object to the proposals of "the urban authority on any of the "following grounds; . . . (*d*) That the "proposed works are insufficient or "unreasonable, or that the estimated "expenses are excessive."

The respondents objected to the proposals to execute the works on the ground that they were insufficient or unreasonable, or that the estimated expenses were excessive, but on May 2, 1952, their objections were dismissed by a court of summary jurisdiction. On May 21, 1952, the respondents applied to the borough council for permission to develop the land by the erection thereon of 46 dwelling-houses, but the council, acting as agents for the local planning authority, refused permission. The building operations which the respondents proposed to carry out would necessitate the cutting into the road to lay gas, electricity and water services, and the heavy traffic necessitated by the building operations would churn up the new surface with the result that the money spent on making up the street would be largely wasted.

It was contended by the borough council that in considering an objection under section 7 (*d*) that the works were unreasonable the justices were not entitled to consider whether it was reasonable that the works should be executed at all; that the possibility of damage to the road was not a matter to be taken into consideration under the section; that whether or not the works should be carried out was a matter solely within the discretion of the council, and that the justices had no power to adjudicate on the exercise of that discretion; that there was no evidence that the council had exercised their discretion on a wrong principle, and that the works were not unreasonable.

The respondents contended that the council's proposal to make up Seafield Road was premature, and that in the event of the Minister of Housing and Local Government allowing an appeal which the respondents proposed against the council's refusal to grant permission to develop the vacant land, then the road as made up would have to be cut into to provide the various public utility services for the new houses. Further, having regard to the light surface proposed, the road would be churned up during the building operations, and for that reason also the work was "insufficient" within section 7 (*d*). The respondents also contended that the council were not making a bona fide exercise of their powers under the Act of 1892 in requiring the respondents to pay approximately £3,000 towards making up the road on land which the council had refused to allow to be developed.

Quarter sessions found that the works were premature and therefore unreasonable within the meaning of section 7 (*d*), and ordered the plans, specifications, estimates and provisional apportionments to be quashed.

The borough council appealed.

*J. Ramsay Willis* and *Christopher Hodson* for the borough council.

*Desmond Ackner* for Park Estates (Southgate) Ld.

All cases cited in argument are referred to in the judgment.

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LORD GODDARD C.J., having stated the facts, continued: The case came before this court originally in April of this year, and the position, we were then told, was that quarter sessions had allowed the respondents' appeal, so the works were stopped, and the respondents by that time had heard that the Minister of Housing and Local Government had allowed their appeal. It was therefore open to them to build, which they were proposing to do. It seemed to the court then that it would be absurd to hear the appeal and give a decision which might be completely academic because, if the building was going on, it was obvious that this work might very easily be entirely thrown away, and that work which would have to be done if the street became a street with houses on both sides would be very different from that which was required when there were only a few houses there. We adjourned the case in the hope that there would be some settlement between the parties. By a series of misfortunes, however, the work has not yet been started because, owing to war damage some time ago, the plans which had all been prepared for the respondents were missing, but at last they have been found, and just after they were found the managing director of the respondents became seriously ill, though happily he has now recovered, and it appears that the work may now begin. But we were pressed to hear this appeal today and to give a decision whether or not the quarter sessions had power to allow the appeal on the ground they did, namely, that the work was unreasonable because they thought that it was premature.

Section 7 of the Private Street Works Act, 1892, provides that the persons liable to be charged with any part of the expenses of executing the works may object to the proposals on the grounds, among others, "(*d*) That the proposed works are insufficient or "unreasonable, or that the estimated expenses are excessive." There are three disjunctive words or phrases in that paragraph: "insufficient," "unreasonable," and "the expenses are excessive." Section 8 provides for a determination of the objections, which are to be heard by a court of summary jurisdiction, and by subsection (1): "The court may quash in whole or in part "or may amend the resolution, plans, sections, estimates, and "provisional apportionments, or any of them, on the application "either of any objector or of the urban authority." If the statute allows an objection on the ground that works are unreasonable, and if a court has to decide whether the objection is well founded, it seems to follow that the court must consider whether the works are reasonable or not. The word "unreasonable" is very wide and is intended to give wide power to a court which has to decide whether an objection to these works is well founded or not.

Mr. Willis, on behalf of the borough council, has contended that the statute on its true construction does not enable the justices or, ex hypothesi, quarter sessions on appeal from the justices, to consider whether or not the works are desirable, or whether they should be done at one particular time or another.

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So far as the last objection is concerned, I do not think that quarter sessions would have power to say: "We think that these "works are desirable, but they must be put off; we do not think "that they ought to start this week but next week." But in considering whether the works are reasonable or not the real question is whether the justices or quarter sessions can say: "We "have come to the conclusion on a review of all the circumstances "that at any rate for the present there is no need to make up "this road"? The contention of Mr. Willis is that the cases have established that the justices have no power to upset the original resolution, that is, the resolution of the council that it was desirable that the work should be done. It was held in *Sheffield Corporation* v. *Anderson*,[1] a decision of the Court of Appeal, that it is only the second resolution, that is, the resolution approving the specification and apportionment, which can be attacked, but however that may be, if the justices give effect to the objection, the statute enables them to quash the second resolution, and that would at any rate put a stop to the proceedings for the time. Whether there can be another resolution and another apportionment we have not to consider. We have only to consider whether the justices had power to give the decision which they gave because in their opinion these works were premature.

In my opinion, this case has been decided for us by *Mansfield Corporation* v. *Butterworth*,[2] and especially by the judgment of Wills J. The court there were considering section 7, and Wills J., dealing first with the word "insufficient" in paragraph (*d*), said[3]: "I think 'insufficient' means that the specified works are "insufficient to carry out the purpose which is proposed to be "effected by them; it does not mean that they are insufficient "having regard to something which, if done, might make a better "scheme for the neighbourhood in general; it does not enable "the justices to take into consideration other things which are "altogether outside the character of the works in respect of their "sufficiency to produce the effect desired. The word 'insuffi-"'cient,' in my opinion, points exclusively to a comparison "between that which is proposed to be done and the means of "effecting it. The word 'unreasonable' has undoubtedly a wider "meaning, and I think that it does give the justices jurisdiction "to say whether, having regard to the scheme as a whole, it is "reasonable or not that the proposed works should be done at all. "That seems to follow from the decision of the Court of Appeal "in *Sheffield Corporation* v. *Anderson*,[4] where the court held that "a resolution approving plans for draining a street, the drainage "of which the justices thought was already sufficiently provided "for, might be quashed on the ground that it was unreasonable."

Kennedy J., who was the other member of the court, said[5]: "Now, the insufficiency meant by the Act must, in my view,

[1] (1894) 64 L.J.M.C. 44.
[2] [1898] 2 Q.B. 274; 14 T.L.R. 431.
[3] [1898] 2 Q.B. 281.
[4] 64 L.J.M.C. 44.
[5] [1898] 2 Q.B. 283.

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"mean the insufficiency of the proposed works to carry out the "object for which they are proposed. The justices have held "that the proposed works were unreasonable, not in respect of "the street as a street which wanted paving, sewering, and "lighting, but because the scheme did not go further and say that "the street should also be widened."

The *Mansfield* case [6] has stood for 55 years, and counsel has not been able to draw our attention to any case in which it has ever been questioned. Accordingly, we must take it that the case is binding on this court and we cannot, after a lapse of 55 years, take a different view from the decision there laid down. It surely must follow that if the court was right in saying that the justices could hold that the proposed work should not be done at all, they can say at any particular time: "This work is not "required and is not to be done." That does not mean that the work is never to be done, but that the justices consider that it is unreasonable to do the work at the present time. It seems to me that, on the plain words used by both the judges in the *Mansfield* case,[6] it follows that the justices, having been asked to decide on an objection that the work is unreasonable, have power to say: "We have come to the conclusion that it is unreasonable because "we do not think that it should be done now, but we are not "saying that it should never be done." For that reason, I think that quarter sessions had power to come to the decision that they did, and it is not for us, if they had that power, to consider whether we should have come to the same decision if we had been sitting as quarter sessions.

Our attention has also been drawn to *Chester Corporation* v. *Briggs*,[7] in which Salter J., giving judgment last, said [8]: "In "considering an objection under section 7 (*d*) that the proposed "works are unreasonable, the justices are entitled to consider, "among other things, whether the proposed works are reasonable "in the sense that it is reasonable that such work should be done "at the frontagers' expense." But in *Allen* v. *Hornchurch Urban District Council* [9] the court said that that was a dictum of one judge, unsupported by the other two judges, and that it must be regarded as overruled. But it was because of that dictum that the justices in *Allen* v. *Hornchurch Urban District Council* [9] came to the decision that they did. They decided that the particular work would cast an unreasonable burden on the frontagers, and quashed the resolution and apportionment. That case, however, does not in any way throw doubt on the decision in the *Mansfield* case,[10] because it deals with a different point. It simply says that Parliament puts on the frontagers the burden of paying for these improvements, and therefore it is not an objection to the carrying out of the improvements that the court

[6] Ibid. 274.

[7] [1924] 1 K.B. 239; 40 T.L.R. 85.

[8] [1924] 1 K.B. 247.

[9] [1938] 2 K.B. 654; 54 T.L.R. 1063.

[10] [1898] 2 Q.B. 274.

may think it hard on the frontagers that they have to pay for some particular form of road. If the justices had found in the *Hornchurch* case [11] that it was an unreasonable thing to put down a road of that sort, or that the expense would be excessive, that would have given them ground within the *Mansfield* case [12] for quashing the resolution and setting aside the subsequent apportionment.

For these reasons, I think that this court must consider itself bound by *Mansfield Corporation* v. *Butterworth*,[12] and cannot depart from it. Therefore, quarter sessions were entitled to come to the decision they did, and this appeal fails.

SELLERS J. I agree. The power of the justices is derived from section 7 (*d*) of the Private Street Works Act, 1892, and it depends in this case on the proper interpretation to be given to the word "unreasonable." My Lord has pointed out that that part of the Act, including particularly the word "unreasonable," was construed as far back as 1898, and, as my Lord has said, I do not think that this court can place a different interpretation upon it. If the interpretation given by Wills J. and Kennedy J. in that case is right, then, on the facts before quarter sessions in the present case, they were amply justified in coming to the conclusion which they did.

HAVERS J. I agree with both the judgments which have been delivered. Quarter sessions held on the facts before them that the proposals of the Southgate Borough Council were premature and on that ground were unreasonable. Few people would doubt that the conclusion at which the justices arrived was a very practical and common-sense conclusion; but Mr. Willis, on behalf of the borough council, has contended before us that quarter sessions had no jurisdiction to come to the conclusion at which they arrived, and that the word "unreasonable" has to be construed in a somewhat narrow and restricted sense. Obviously, the word "unreasonable" is a word of very wide import, and I agree with my Lord that this court is bound by the decision in *Mansfield Corporation* v. *Butterworth*.[12] If that is so, accepting the interpretation that Wills J. put on the word "unreasonable" in section 7 (*d*), it follows that quarter sessions had jurisdiction to take the course they did.

*Appeal dismissed.*

Solicitors: *Gordon H. Taylor; Vincent & Vincent and Rawlinson & Son.*

[11] [1938] 2 K.B. 654.

[12] [1898] 2 Q.B. 274.

[QUEEN'S BENCH DIVISION.]

[COMMERCIAL LIST.]

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*Oct.* 8.

Devlin J.

## *ROSS T. SMYTH & CO. LD. (LIVERPOOL) *v.* W. N. LINDSAY LD. (LEITH).

*Contract—Frustration—Option—Sale of goods—C.i.f.—Prohibition of export—Prohibition begun during period for shipment—Ten days' grace before taking effect—Cancelling clause.*

By a contract dated September 14, 1951, on the London Corn Trade Association's form of contract No. 62, a parcel of 500 tons of Sicilian horse beans was sold for shipment from a Sicilian port or ports as per bill or bills of lading to be dated October and/or November, 1951, at £31 15s. per ton c.i.f. Glasgow. The contract provided that "should the fulfilment of this contract be rendered "impossible by prohibition of export . . . any unfulfilled part "thereof to be cancelled." At the date of the contract the export of horse beans was permitted, but by an Italian regulation, dated October 20, 1951, as and from November 1, 1951, export was only allowed under specific licence. The sellers failed to ship the contract goods and the buyers declared them in default. The sellers relied on the prohibition of export clause and alternatively, upon frustration, and the matter was referred to an arbitration tribunal. The tribunal made no express finding of fact that the sellers had used any diligence to effect shipment between October 20 and November 1, but held that performance of the contract by the sellers had become impossible of performance by reason of a change in the law of Italy during the currency of the contract and that the sellers were not liable in damages to the buyers. On a special case stated by the arbitration tribunal:—

*Held*, that, had the prohibition of export been instantaneous on October 20, it would have been the effective cause of the sellers' inability to ship, but the prohibition having given them ten days in which to ship, in the absence of a finding that during that period the sellers had exercised diligence and that shipment was impossible notwithstanding, they were not excused from performing the contract, and were liable in damages to the buyers.

*In re Anglo-Russian Merchant Traders Ld. and John Batt & Co. (London) Ld.* [1917] 2 K.B. 679 distinguished.

SPECIAL CASE stated by Appeal Committee of London Corn Trade Association.

By a contract in writing, dated September 14, 1951, on the London Corn Trade Association Ld.'s form of contract No. 62, Ross T. Smyth & Co. Ltd. (Liverpool) sold to W. N. Lindsay Ld. (Leith) a parcel of 500 tons of Sicilian horse beans for shipment from a Sicilian port or ports as per bill or bills of lading to be dated October and/or November, 1951, at a price of £31 15s. per ton including cost of freight and insurance to Glasgow. The contract provided, among other things, "should the fulfilment "of this contract be rendered impossible by prohibition of export, "blockade or hostilities this contract or any unfulfilled part "thereof to be cancelled."

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The sellers failed to make shipment of the contract goods and the buyers declared the sellers to be in default and claimed arbitration in accordance with various terms, not material to this report, in the contract. On April 3, 1952, an award was made by an umpire awarding that the sellers were in default under the contract and that they should pay to the buyers the difference between the contract price and the value of the goods on the day of default. The sellers appealed to the London Corn Trade Association's Committee of Appeal, requesting that tribunal to state their award in the form of a special case.

The following facts were found by the appellate tribunal: The sellers failed to make shipment of the contract goods during October and/or November, 1951, or at all. At the date when the contract was entered into, the export of horse beans from Italy was permitted under the terms of an open general licence pursuant to a regulation of the Ministry of Foreign Commerce, Rome, of July 10, 1951, but by a regulation dated October 20, 1951, issued by the Ministry of Foreign Commerce, horse beans could only be exported under open general licence until October 31, 1951, and as on and from November 1, 1951, the export of horse beans was only allowed under a specific licence. Evidence was tendered by the sellers of four applications for the export of horse beans, each dated November 7, 1951, but there was no evidence that any one of those applications was in respect of the contract goods. There was no evidence that the sellers made application for a licence to export the contract goods, nor was a licence granted by the Ministry of Foreign Commerce for the export of horse beans between the period November 1, 1951, and December 31, 1951. There was no evidence that the sellers made any endeavour to purchase documents for the contract goods nor that tenderable goods were available to be bought. On November 2, 1951, the sellers wrote to the buyers setting out a telegram they had received "from our Italian sellers" dated October 31, 1951, reading "Decreed today embargo exportation "horse beans with immediate effect act accordingly." In the circumstances the sellers considered the contract cancelled in accordance with its terms, and the tribunal held that that letter amounted to a repudiation by the sellers of the contract which the buyers did not accept as a final breach, but kept the contract alive.

The sellers contended that the contract was discharged by reason of the provision for cancellation should fulfilment become impossible by prohibition of export, which came into operation prior to the expiration of the time for shipment; that the contract was discharged by operation of law, performance within the permitted time becoming impossible or unlawful by a change in the law of the country of shipment whereby the contract was frustrated or discharged and that, in the premises, they were excused from performance of the contract and were not in breach.

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The buyers contended that the contract was a c.i.f. contract which could be performed by shipment of the goods during the contract period or by buying documents for the contract goods; that there was no "subject to export licence" clause in the contract; that the sellers had failed to exercise due diligence in endeavouring to obtain a licence during November, 1951, and that there was no frustration.

The questions of law stated for the opinion of the court were whether or not (1) the sellers were entitled to rely upon the contract clause providing for cancellation should fulfilment be rendered impossible by prohibition of export and thereby to treat the contract as cancelled or be relieved of their obligations to the buyers under it, or (2) the contract was discharged by operation of law by reason of the shipment of the contract goods in Italy having become impossible or unlawful owing to change of Italian law during the currency of the contract.

Subject to the opinion of the court the tribunal awarded that the performance of the contract by the sellers became impossible by reason of a change in the law of Italy during the currency of the contract and the sellers were not liable in damages to the buyers.

*Eustace Roskill Q.C.* for the buyers.
*A. A. Mocatta Q.C.* and *Neil Lawson* for the sellers.

The following case was referred to in argument: *In re Anglo-Russian Merchant Traders Ld. and John Batt & Co. (London) Ld.*[1]

DEVLIN J. stated the facts and continued: In my judgment this case turns on a very short point. Were it not so it would doubtless be necessary to investigate the effects of orders on this sort of clause covering prohibition of export in relation to unascertained goods. For the purpose of this judgment, however, I can assume that from November 1 onwards the sellers were excused from performance of their contract, and that either there was a prohibition of export to excuse them, or alternatively, the contract was frustrated, it matters not which. If that assumption be correct, the effect is that the period of time during which the sellers had the right to ship was curtailed. Instead of being October/November it became only October.

The facts appear to find—subject to an argument by Mr. Mocatta which I shall have to consider later—that the regulation which prohibited export was made on October 20, 1951, and came into force on November 1. Accordingly, the sellers had ten days during which they could have exported the goods and they neglected to do so. What is the general result of that? It appears to me that if a party is going to rely on a prohibition of export or frustration, whichever it is, he has to show that it covers the whole contract period. If the prohibition covers only

[1] [1917] 2 K.B. 679.

a part of the period which the contract gives for shipment then performance of the contract is not rendered impossible for the seller, it is merely rendered more difficult for him. Instead of having the full rights which the contract apparently gives him—two months in which to select a date—he has to select a date within a more limited period, but that is not rendering performance impossible. The position is exactly the same under a contract of this sort, where there is liberty to ship on any date during a given period, as it would be in a contract which offers to one party an option of doing a thing in two or more ways, let us say, to pay in gold in New York or in sterling in London. If after the contract it becomes illegal for him to pay in gold in New York he is not thereby relieved altogether from his obligation, he is merely deprived of his option. He has to pay in sterling in London. He cannot elect to tender gold in New York and then say: "That is the way I chose to perform the contract, "and as I cannot perform it in that way I am excused from "performance altogether." I see no difference in principle between a case of that sort and a case where a party is, in effect, given 61 options. He is given an option to ship on any one of the 61 days in October and November, and if he is prevented by law from shipping for 30 or 21 of those days his rights are so far reduced, but it does not excuse him from shipping in the remaining period.

There is a qualification to be made to a rule of that sort, which is illustrated by *In re Anglo-Russian Merchant Traders and John Batt & Co. (London) Ld.*[1] to which Mr. Mocatta referred me. In that case, the period of shipment was December, 1915, to January, 1916, and the prohibition on shipment came down on December 7th, 1915, and came into operation forthwith. On that aspect of the case, Viscount Reading C.J., at the end of his judgment, said[2]: "The result is that it would "have been illegal for the sellers to have shipped the aluminium "from America on or after December 7, 1915. Their obligation "under the contract was to ship during December, 1915, or "January, 1916. They were entitled to the whole of that time "to perform the contract. They were not in default on Decem-"ber 7. By reason of the operation of regulation 30A they were "unable to ship after December 7, 1915. There was therefore no "breach by them of their obligation to ship to Vladivostok "during December, 1915, or January, 1916, and upon that "defence, which is now open to them, they succeed."

One can well understand the principle on which that reasoning proceeds. Up to December 7 in that case, and up to October in the present case, the sellers were entitled to suppose that they had a period of two months in front of them from which they could select the appropriate date for making their shipment. Up till October 20 in the present case they were not in default,

[1] [1917] 2 K.B. 679. [2] Ibid. 688.

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and the result of the prohibition of export, had it been instantaneous—as it was in the *Anglo-Russian Merchant Traders'* case [3] —would have been the effective cause of their inability to ship. Up to October 20 they would have been acting as they were entitled to do, and after October 20 the prohibition would have come down upon them. It is unnecessary for me to decide the point because I do not think that it arises in this case, but I concede, and I assume for the purpose of this judgment, that, if the sellers here had been unable to ship notwithstanding that they had ten days' grace within which to effect the shipment, they would have been able to say: "The position was "that by using the utmost diligence we were unable to effect a "shipment within those ten days and, therefore, the prohibition "of export"—and I am treating it for the purposes of this case as being an absolute ban—"caused those ten days' grace to be "unavailable to us and it was therefore the real and effective "cause of our being unable to fulfil the contract after October "20." The sellers might have been in a position to contend that up till October 20 they were not in default, that they were doing what they were entitled to do within the principle laid down by Lord Reading, and that thereafter they were effectively prevented from fulfilling their contract. But in my view the bare fact that a regulation dated October 20 prohibited export from November 1 onwards is not enough for them. They must have a further finding of fact in their favour to show what they were doing in the intervening ten days, and neither expressly nor by implication can I find any such finding of fact in this case.

I have to deal with this case on the facts that are found and ask myself whether on these facts the conclusion at which the tribunal arrived is justified. It is suggested—and it is mere hypothesis on the facts that are found—that the sellers may not have been made aware of the regulation on the date when it was published. If they were not, that may have been due to their own lack of diligence or it may have been due to the fact that copies of the regulations were not available—I do not know. All those are matters about which I cannot surmise. There is nothing in the facts of the case to show that they took any steps whatever between October 20 and November 1. In those circumstances Mr. Mocatta was driven to seek to extract a finding of fact from the terms in which the tribunal ultimately phrased its award. They read as follows: "Subject to the opinion of the "court upon the points of law above set out we award and direct "... that the performance of the contract by the sellers became "impossible of performance by reason of a change in the law of "Italy during the currency of the contract and the sellers are not "liable in damages to the buyers." Mr. Mocatta contended that I should read into that the implication that the sellers must have done all that they could reasonably be expected to do between

[3] Ibid. 679.

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October 20 and November 1, otherwise the finding that the contract became impossible of performance by reason of the change in law could not be sustained. If I were to accede to that doctrine it would hardly matter, it seems to me, what facts were found in the case and what were not because at the end of it the party who desired to sustain the award would merely point to the terms of the award and say the court was bound to infer that all the facts that were necessary to establish the point had been found in their favour by the tribunal. I do not think that that is a doctrine which can possibly be accepted. I am quite sure that this tribunal (which is very experienced in the statement of cases) would never have intended that a paragraph, which is phrased as being "Subject to the opinion of the court" and is headed: "We award and direct," was intended to prove the statement of fact. Accordingly, on the facts which are set out in the case I think that the conclusion of the tribunal was a wrong one, and, therefore, the award which they made cannot be sustained.

*Judgment for buyers.*

Solicitors: *Jaques & Co. for Dodds, Ashcroft & Cook, Liverpool; Thomas Cooper & Co.*

J. F. L.

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[COURT OF APPEAL.]

## *WHITE *v.* JOHN WARWICK & CO. LD.

C. A.

1953 *June* 24.

[1951 W. No. 1399.]

Singleton, Denning and Morris L.JJ.

*Contract — Exemption clause — Negligence — Tort — Personal injury — Claim based on breach of contract—Alternative claim for negligence—Hire of tradesman's cycle.*

The plaintiff hired a tradesman's cycle from the defendants. The defendants agreed to maintain the cycle in working order, and clause 11 of the agreement provided: "Nothing in this agreement "shall render the owners liable for any personal injuries. . . ." While the plaintiff was riding the cycle the saddle tilted forward, and he was thrown and injured:—

*Held*, that, although clause 11 exempted the defendants (even if they were negligent) from their liability in contract, which was more strict than their liability in tort, it did not exempt them from liability in negligence.

Dicta of Lord Macmillan in *Donoghue* v. *Stevenson* [1932] A.C. 562, at 609; 48 T.L.R. 494 referred to.

*Rutter* v. *Palmer* [1922] 2 K.B. 87; 38 T.L.R. 555 and *Alderslade* v. *Hendon Laundry Ltd.* [1945] K.B. 189; 61 T.L.R. 216; [1945] 1 All E.R. 244 applied.

New trial ordered on the issue of negligence, on which there had been no finding by the trial judge.

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APPEAL from Parker J.

By a written agreement, dated April 13, 1948, the plaintiff, who carried on business as a newsagent and tobacconist, agreed to hire from the defendants a tradesman's cycle, fitted with a large carrier in front, for the purpose of delivering the newspapers supplied by him. Clause 1 of the agreement, which was on a printed form used by the defendants, provided that the cycle should be let at the weekly rent of five shillings payable quarterly in advance. Clause 2 provided that "in consideration of such sum "the owners agree to maintain the machine in working order and "conditions (punctures excepted) and to supply spare carriers as "soon as possible when the hirers' machines are being repaired "without any charge beyond the agreed amount as above:" By clause 11: "Nothing in this agreement shall render the owners "liable for any personal injuries to the riders of the machines "hired nor for any third party claims, nor loss of any goods "belonging to the hirer, in the machines."

The defendants supplied a machine which was used by the plaintiff for a considerable period until the end of May, 1950, when it became in need of repair. The defendants were duly informed, and on June 3 their representative called at the plaintiff's premises with a spare cycle to take the place of the one in need of repair, which he took away. The plaintiff did not examine the new cycle, but shortly after its delivery he mounted it to go about his work. When he had covered about a quarter of a mile the saddle of the cycle tilted forward and he was thrown to the ground and suffered injury. After the accident the plaintiff found that the saddle of the machine was sloping right down on to the crossbar, and it was later found that the nut which should have held the saddle firmly, was rusted and could not be tightened.

The plaintiff brought an action against the defendants claiming damages for personal injuries. In his claim he alleged two causes of action: (1) that the defendants were responsible to him in damages for breach of warranty in that they were under a duty by the terms of the agreement made by them with him to supply a cycle which was reasonably fit for the purpose for which it was required, and that they had failed to do so, and, alternatively, (2) that the accident was due to the negligence and/or breach of contract of the defendants.

In answer to the plaintiff's claims the defendants denied that there had been any negligence or breach of duty or breach of contract on their part, and in paragraph 4 of their defence pleaded that "by clause 11 of the written agreement between the parties "the defendants are not liable for any personal injuries to the "plaintiff when riding a machine provided for him."

Parker J. gave judgment for the defendants. He held (1) that, contrary to the plaintiff's contention, the provisions of clause 11 applied to the spare cycle as well as to the one originally hired by the plaintiff, and (2), without deciding whether or not there had been negligence on the part of the defendants, that they were

protected by clause 11 of the agreement. He accordingly gave judgment for the defendants, provisionally assessing the damages to which the plaintiff would have been entitled if he had succeeded in the action at £505.

The plaintiff appealed.

The facts are referred to in greater detail in the judgment of Singleton L.J.

*Donald McIntyre* for the plaintiff.
*E. Brian Gibbens* for the defendants.

In addition to the cases referred to in the judgments the following were cited in argument: *Chapelton* v. *Barry U. D. C.*[1]; *Canada Steamship Lines Ld.* v. *The King.*[2]

SINGLETON L.J. The plaintiff is a newsagent and tobacconist carrying on business at Canonbury, and he entered into an arrangement with the defendants, who own a number of carrier cycles and other things of that nature, that they should supply him with a tradesman's cycle, a cycle with a large carrier in front of it, so that he could deliver his newspapers by that means. The arrangement was embodied in a written contract of April 13, 1948. When I say "written contract" I mean that it is on a printed form used by the defendant company on which their name appears in print, and the agreement is stated to be made between them and the plaintiff, who is spoken of as the hirer, while the defendants are described as the owners.

Clause 1 of the agreement is as follows: "The owners agree "to let, and the hirer agrees to hire, carrier cycle No. 13409 for "the term of two years from the date hereof (and thereafter "from year to year) at the weekly rent of five shillings payable "quarterly in advance at the owners' above address, the first "payment being on delivery of the machine."

Clause 2: "In consideration of such sum the owners agree "to maintain the machines in working order and condition "(punctures excepted) and to supply spare carriers as soon as "possible when the hirer's machines are being repaired without "any charge beyond the agreed amount as above"; and in other clauses the owners agree to supply lamps and accessories and the like, and to repair damage in certain cases.

Under that agreement, the owners supplied a machine which was used by the plaintiff for a considerable period, and which, so far as we know, was kept in order until towards the end of May, 1950, when the machine was in need of repair, and the defendants were informed of the fact. On Saturday, June 3, 1953, a representative of the defendants went to the plaintiff's newsagent's shop and left a spare cycle in place of the cycle which

[1] [1940] 1 K.B. 532; 56 T.L.R. 331; [1940] 1 All E.R. 356.
[2] [1952] A.C. 192; [1952] 1 T.L.R. 261; [1952] 1 All E.R. 305.

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was out of order, and took away the cycle which required repair. In doing that, the defendants were purporting to perform their obligation under clause 2 of the contract. The plaintiff very soon mounted the cycle to go about his work. He did not examine the cycle, but rode off up the road, and when he had gone about a quarter of a mile the saddle of the cycle went forward in such a way that he was thrown off the machine on to the ground, and hurt his right leg rather badly and was shaken. He said that he got up and pushed the cycle back to his shop, and the saddle was sloping right down on to the crossbar, and when he examined the cycle again he found that the saddle was quite loose and moved about. It was not thought at first that the plaintiff was badly hurt, but unfortunately he had suffered an injury to his knee, and was in hospital for some considerable time suffering from synovitis, and his present condition, as shown by the medical reports, is that there is a certain amount of stiffness in the knee joint and that he is likely to have further trouble from time to time.

Parker J. said that if he had found the plaintiff was entitled to damages he would have awarded the sum of £505. That was a provisional assessment and no more. Mr. Gibbens, on behalf of the defendants, has submitted that that amount is too much having regard to the nature of the injury and to the medical report. It was indicated to him, when he argued that part of the case, that this court could not see any reason why it should interfere with the provisional assessment of damages by the judge.

But more serious questions arise, and to appreciate them it is desirable that I should say a word or two upon the facts. The evidence given by the plaintiff and by his wife, and by a young man named Anthony, who was employed by the plaintiff, seemed to show that the cycle was out of order in that some nuts under the seat were rusty and could not be moved. The chief witness on that point was Anthony, whose evidence impressed the judge. He was not employed by the plaintiff at the time of the trial, but was engaged in delivering newspapers and the like for the plaintiff in June, 1950. He said that after hearing of the accident he saw the cycle, and found that the saddle had tilted back. On several occasions thereafter he used the cycle, and the saddle used to slip and caused him to lose control. He said that the saddle generally slipped backwards when he was riding the cycle; he tried to tighten the nut, but it was too rusty to shift. There was other evidence upon that question on both sides.

The plaintiff set up two causes of action; the first was that the defendants were responsible to him in damages for breach of warranty, since they were under a duty under the contract to supply a cycle which was reasonably fit for the purpose for which it was required. It was said that they did not do so, and that the plaintiff was entitled to damages.

The plaintiff made an alternative claim in paragraph 6 of his statement of claim, which was as follows: "The said accident

"was due to the negligence and/or breach of contract of the "defendants their servants or agents whereby the plaintiff has "sustained personal injury and suffered damage. Particulars "of negligence and/or breach of contract: The defendants their "servants or agents failed to take any or any proper care to "ensure that the said spare carrier tricycle was in proper work-"ing condition or in a proper state of repair or equipped or pre-"pared for use by the plaintiff and handed over the same and "permitted the plaintiff to mount and ride such spare tricycle "without warning when they knew or ought to have known that "by reason of its defective condition as aforesaid the saddle there-"of was not properly fastened and was dangerous whereby an "accident and injury such as occurred was to be apprehended."

The second claim of the plaintiff was therefore to this effect: You, the persons from whom I had this cycle, owed a duty to take reasonable care; that is, to take that care which a reasonably careful cycle owner would take on the letting to another of a cycle for his use, and you failed in that duty. If you had examined the cycle you would have found that the nuts were rusty and that the saddle was loose; I used the cycle in the way in which it was intended that I should use it, and I sustained an accident because you had not fulfilled your duty; you had not taken reasonable care; you were negligent, and I am entitled to damages.

In reply to those two claims the defendants in the first place denied negligence and said that there was no breach of duty or of contract. They added a plea in paragraph 4 of the defence in the following terms: "By clause 11 of the written agreement "between the parties the defendants were not liable for any "personal injuries to the plaintiff when riding a machine provided "for him." That clause was in the following terms: "Nothing "in this agreement shall render the owners liable for any personal "injuries to the riders of the machines hired nor for any third "party claims, nor loss of any goods, belonging to the hirer, in "the machines." The important part of that is in the first line in the printed form: "Nothing in this agreement shall render the "owners liable for any personal injuries to the riders of the "machines hired."

It was conceded by Mr. McIntyre, for the plaintiff, that clause 11 of the agreement would prevent the plaintiff from succeeding on a claim based on breach of contract, but his submission was that in the circumstances proved there was negligence on the part of the defendants, and that clause 11 was no bar to an action for damage for negligence.

Parker J. appears to have accepted the evidence of the plaintiff as to the condition of the cycle in preference to that given on behalf of the defendants, but he did not say in so many words that he found that there was negligence on the part of the defendants or of their servants. He said: "The defendants, how-"ever, rely on clause 11 of that written agreement," and he

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added: "The first answer to that defence made on behalf of the "plaintiff is that the accident in question did not occur with a "machine hired, but with a spare machine. It is submitted that "this agreement, on its true construction, applies, and can only "apply, to a hired machine. In other words, it was said that "the clause of the agreement which specifically mentioned "machines hired gave the defendants exemption or an escape "only in respect of a machine which was a machine hired under "the terms of the contract and not in respect of a spare machine "provided to replace the hired machine when the hired machine "was out of order." That was the first point taken by Mr. McIntyre on behalf of the plaintiff in this court.

It is to be observed that the printed form of the agreement seems to contemplate that the hirer is going to take more than one machine; it deals with "machines" in the plural generally; and when one comes to clause 11 it is found that the exception is given in respect of personal injuries to the riders of "the "machines hired." In my opinion, "machines hired" as used in that clause covers a spare machine which takes the place of the machine hired in the first instance. I have formed that view after considering clauses 2 and 12 of the agreement. I think that it is the natural reading of the agreement, and that the submission made on behalf of the plaintiff on that head fails.

The next submission for the plaintiff was that though clause 11 relieved the defendants in respect of a claim for breach of contract arising from the agreement, it did not absolve them if there was a cause of action established on the ground of negligence.

Mr. Gibbens, on behalf of the defendants, submitted that if there was negligence, it was negligence in connexion with the performance of the contract; that the machine which was supplied was supplied in performance of the obligation arising under the contract, and that that which was done was something done under the agreement; that, consequently, the cause of action, if there was one, arose out of the agreement, and that whether there was negligence or not, clause 11 prevented the plaintiff from succeeding in an action of this nature.

That gives rise to a question of some nicety. Parker J. said: "There are many cases where a claim can properly be brought "either in contract or in tort. Two examples spring to mind; "the first is a case of a claim against a carrier. It can be "brought on a written contract; it can also be brought at "common law for breach of the carrier's agreement at common "law. Similarly, in the case of bailment, if a bailee fails to "deliver goods at the end of the bailment the claim can be "based on breach of contract; it can also properly be based on "tort, on the ground that the bailee has detained or converted "the bailor's goods, but in the present case there is, as it seems "to me, no room for an alternative claim at common law."

I am not sure that that is right. We have had an advantage in this court which was not given to Parker J., in that we have

had cited to us a number of authorities. I am inclined to think that for the present purpose most help is given by reference to the speech of Lord Macmillan in *Donoghue* v. *Stevenson*.[1] The passage is as follows: "On the one hand, there is the well established principle that no one other than a party to a contract can "complain of a breach of that contract. On the other hand, there "is the equally well established doctrine that negligence apart "from contract gives a right of action to the party injured by that "negligence—and here I use the term negligence, of course, in its "technical legal sense, implying a duty owed and neglected. The "fact that there is a contractual relationship between the parties "which may give rise to an action for breach of contract, does not "exclude the co-existence of a right of action founded on "negligence as between the same parties, independently of the "contract, though arising out of the relationship in fact brought "about by the contract. Of this the best illustration is the right "of the injured railway passenger to sue the railway company "either for breach of the contract of safe carriage or for negligence "in carrying him. And there is no reason why the same set of "facts should not give one person a right of action in contract "and another person a right of action in tort. I may be per-"mitted to adopt as my own the language of a very distinguished "English writer on this subject. 'It appears,' says Sir "Frederick Pollock, Law of Torts, 13th ed., p. 570, 'that there "'has been (though perhaps there is no longer) a certain "'tendency to hold that facts which constitute a contract cannot "'have any other legal effect'."

It is clear from those words of Lord Macmillan that there may be, arising from the same set of facts, an action for damages for breach of contract and an action for a tort. It is said that that position arises in this case, and that though an action for damages for breach of contract may be said to be barred by clause 11 of the contract, it cannot be said that the words of that clause operate to shut out the plaintiff from that which he would normally have, namely, an action for damages for the tort of negligence.

In *Taylor* v. *Manchester, Sheffield, and Lincolnshire Railway Company*,[2] A. L. Smith L.J. said: "It is clear that a "person lawfully upon railway premises may maintain an action "against a railway company for injuries sustained whilst there "by reason of the active negligence of the company's servants, "whether he has a contract with the company or not."

We were also referred to *Kelly* v. *Metropolitan Railway Company*,[3] and to *Olley* v. *Marlborough Court, Ld.*,[4] where there is a reference in the judgment which I delivered[5] to words of

[1] [1932] A.C. 562; 609; 48 T.L.R. 494.
[2] [1895] 1 Q.B. 134, 140; 11 T.L.R. 27.
[3] [1895] 1 Q.B. 944; 11 T.L.R. 366.
[4] [1949] 1 K.B. 532; 65 T.L.R. 95; [1949] 1 All E.R. 127.
[5] [1949] 1 K.B. 547.

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Scrutton L.J. in *Rutter* v. *Palmer*[6]: "First, the defendant is "not exempted from liability for the negligence of his servants "unless adequate words are used." Denning L.J. said[7]: "In "cases where it is clearly a common inn or, indeed, where it is "uncertain whether it is a common inn or a private hotel, I am "of opinion that a notice in these terms would not exempt the "hotel company from liability for negligence but only from any "liability as insurers." In *Olley's* case[4] the words of the notice were: "The proprietors will not hold themselves responsible for "articles lost or stolen, unless handed to the manageress for safe "custody. Valuables should be deposited for safe custody in a "sealed package and a receipt obtained."

Mr. McIntyre also referred the court to *Alderslade* v. *Hendon Laundry, Ld.*,[8] and in particular to the words of Lord Greene M.R. where he summarized the effect of the authorities in this way[9]: "The effect of those authorities can I think be "stated as follows: where the head of damage in respect of "which limitation of liability is sought to be imposed by such "a clause is one which rests on negligence and nothing else, "the clause must be construed as extending to that head of "damage, because it would otherwise lack subject-matter. "Where, on the other hand, the head of damage may be based "on some other ground than that of negligence, the general "principle is that the clause must be confined in its application "to loss occurring through that other cause, to the exclusion "of loss arising through negligence."

In the circumstances of the present case the primary object of the clause, one would think, is to relieve the defendants from liability for breach of contract or for breach of warranty. Unless, then, there be clear words which would also exempt from liability for negligence, the clause ought not to be construed as giving absolution to the defendants if negligence is proved against them. The result is that clause 11 ought not, I think, to be read as absolving the defendants from liability for negligence; that is, if it is proved that the accident which the plaintiff sustained was due to negligence; in other words, to lack of that care which one in the defendants' position ought to take when handing out a cycle for the use of the plaintiff. If that is proved, then the defendants do not escape liability by reason of clause 11.

The difficulty in this case arises from the fact that there is no finding on negligence. It may well be said that Parker J., in accepting the plaintiff's evidence in preference to that of the defendants, was inclined to the view that there was negligence on the part of the defendants, but he did not so say. He placed an interpretation on clause 11 which would cover negligence on the part of the defendants; he assumed that it would. In

[4] [1949] 1 K.B. 532; 65 T.L.R. 95; [1949] 1 All E.R. 127.
[6] [1922] 2 K.B. 87; 38 T.L.R. 555.
[7] [1949] 1 K.B. 550.
[8] [1945] K.B. 189; 61 T.L.R. 216; [1945] 1 All E.R. 244.
[9] [1945] K.B. 192.

those circumstances, I am afraid that we are not in a position to determine this case finally, and it appears to be necessary that there should be a new trial upon the subject of negligence, with the expression of the opinion of this court that if negligence is proved against the defendants they do not escape liability by reason of the terms of clause 11.

That being so, I think that this appeal should be allowed, and that there should be an order for a new trial between the parties.

DENNING L.J. In this case the defendants supplied a cycle on hire to the plaintiff, who was a newsvendor, intending that he and his servants should ride it. The cycle was defective and, in consequence of the defect, the plaintiff was thrown off and injured, and he now claims damages for breach of contract or for negligence. The defendants claim to be protected by the printed clause of the agreement which has been read.

In this type of case two principles are well settled. The first is that if a person desires to exempt himself from a liability which the common law imposes on him, he can only do so by a contract freely and deliberately entered into by the injured party in words that are clear beyond the possibility of misunderstanding. The second is: if there are two possible heads of liability on the part of defendant, one for negligence, and the other a strict liability, an exemption clause will be construed, so far as possible, as exempting the defendant only from his strict liability and not as relieving him from his liability for negligence.

In the present case there are two possible heads of liability on the defendants, one for negligence, the other for breach of contract. The liability for breach of contract is more strict than the liability for negligence. The defendants may be liable in contract for supplying a defective machine, even though they were not negligent. (See *Hyman* v. *Nye*.[10]) In these circumstances, the exemption clause must, I think, be construed as exempting the defendants only from their liability in contract, and not from their liability for negligence.

Mr. Gibbens admitted that if the negligence was a completely independent tort, the exemption clause would not avail; but he said that the negligence here alleged was a breach of contract, not an independent tort. The facts which gave rise to the tort were, he said, the same as those which gave rise to the breach of contract, and the plaintiff should not be allowed to recover merely by framing his action in tort instead of contract. That was the view which appealed to Parker J., but I cannot agree with it.

In my opinion, the claim for negligence in this case is founded in tort and not on contract. That can be seen by considering what would be the position if, instead of the newsvendor himself, it was his servant who had been riding the cycle and had been

[10] (1881) 6 Q.B.D. 685.

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injured. If the servant could show that the defendants had negligently sent out a defective machine for immediate use, he would have had a cause of action in negligence on the principle stated in *Donoghue* v. *Stevenson*,[11] and, as against the servant, the exemption clause would be no defence. That shows that the defendants owed a duty of care to the servant. A fortiori they owed a like duty to the newsvendor himself. In either case a breach of that duty is a tort, which can be established without relying on any contract at all. It is true that the newsvendor in the present case could also rely on a contract, if he had wished, but he is not bound to do so; and if he can avoid the exemption clause by framing his claim in tort he is, in my judgment, entitled to do so.

Mr. Gibbens relied on a passage in the speech of Lord Finlay in *Elder, Dempster & Co.* v. *Paterson, Zochonis & Co. Ld.*[12] In that case a clause in a bill of lading exempted the charterers *and the owners* from liability for bad stowage, and the question was whether the owners (who were not parties to the contract) could take advantage of the exemption. It was held that they could. The decision, as I read it, was that when a party to a contract has deliberately in plain words agreed to exempt a third party from liability for negligence, intending that the third party should have the benefit of the exemption, he cannot go back on his plighted word and disregard the exemption. It is one of the cases where a third party can take advantage of a contract made for his benefit, of which I gave some illustrations in *Smith & Snipes Hall Farm* v. *River Douglas Catchment Board*.[13] It has, however, no application to this case.

Mr. Gibbens also relied on the judgment of Scrutton L.J. in *Hall* v. *Brooklands Auto-Racing Club*,[14] where he said: "When "the defendant has protection under a contract, it is not permis- "sible to disregard the contract and allege a wider liability in "tort." This passage only refers to cases where there is a contract by the plaintiff which plainly gives an exemption to the defendant from liability for the tort. For instance, if a transport company expressly stipulates with the plaintiff for exemption from liability for damage, *howsoever caused*, the plaintiff cannot overcome that exemption by suing in negligence instead of contract. But the contract in such a case must be by and with the plaintiff. In a case such as *Donoghue* v. *Stevenson*[15] a manufacturer cannot exempt himself from liability to the consumer simply by putting an exemption clause in his contract with the wholesaler, even though the clause is brought to the consumer's notice and says that the consumer is to have no claim for negligence.

[11] [1932] A.C. 562; 48 T.L.R. 494.
[12] [1924] A.C. 523, 548; 40 T.L.R. 464.
[13] [1949] 2 K.B. 500, 514; 65 T.L.R. 628; [1949] 2 All E.R. 179.
[14] [1933] 1 K.B. 205, 213; 48 T.L.R. 546.
[15] [1932] A.C. 562; 48 T.L.R. 494.

It is not a clause for the benefit of a third party, but to his prejudice and is not binding on him.

Neither of those cases affect the present case, which turns on the construction of the exemption clause. In my judgment, it exempts the defendants from liability in contract, but not from liability in tort. If the plaintiff can make out his cause of action in negligence, he is, in my opinion, entitled to do so, although the same facts also give a cause of action in contract from which the defendants are exempt.

I agree, therefore, that this appeal should be allowed, but as there is no definite finding of negligence or no negligence, and we have no transcript of the evidence on which to decide it ourselves, there must be a new trial to decide that point.

MORRIS L.J. The determination of the matters raised in this appeal depends upon construing clause 11 of the agreement. Mr. MacIntyre has submitted, in the first place that the words "machines hired" bear reference only to machines originally supplied and not to any that are delivered in substitution during a period when the original ones are under repair. I do not think that submission can prevail. Clause 2 of the agreement provides that there is an obligation "to supply spare carriers as soon as "possible when the hirer's machines are being repaired without "any charge beyond the agreed amount as above." There was, therefore, to be payment for the substituted machine, and that, in my judgment, was payment by way of hire. I think that a consideration of clauses 4 and 8, referred to by Parker J. in his judgment, and a consideration of clause 12, additionally referred to by Singleton L.J., all make it impossible to sustain that contention raised by Mr. MacIntyre.

The far more difficult part of the case concerns the interpretation of clause 11 so as to decide whether it does, or does not, provide an exemption from liability in all circumstances. During the course of the argument I entertained some doubt in regard to this matter, but on consideration I have reached the clear conclusion that clause 11 does not provide an exemption if negligence is alleged and proved, and I am in agreement with the judgments which have been delivered.

Although the wording of this particular clause differs from the wording of other similar clauses, and perhaps by its special language raises certain difficulties, there is no doubt in regard to the general approach in a case of this kind. That approach was clearly laid down by Scrutton L.J. in *Rutter* v. *Palmer*,[16] and the three considerations set out by him were these[17]: "In con-"struing an exemption clause certain general rules may be "applied: First the defendant is not exempted from liability "for the negligence of his servants unless adequate words are "used; secondly, the liability of the defendant apart from the

[16] [1922] 2 K.B. 87; 38 T.L.R. 555.

[17] [1922] 2 K.B. 92.

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"exempting words must be ascertained; then the particular "clause in question must be considered; and if the only liability "of the party pleading the exemption is a liability for negligence, "the clause will more readily operate to exempt him"; and to the same effect really were the words of Lord Greene M.R. in *Alderslade* v. *Hendon Laundry Ld.*,[18] in the passage quoted by Singleton L.J.

Applying those principles to the words in clause 11, it seems to me that Mr. MacIntyre is right when he says that the words in the clause may refer to other matters than matters based upon an allegation of negligence. The opening words of clause 2 are: "In consideration of such sum the owners agree to maintain the "machines in working order and condition." Clause 11, as an exempting clause, might operate upon such a provision as is set out in those opening words of clause 2; and doubtless there are other provisions upon which clause 11 might operate. The clause can apply to some injury occurring without negligence. Applying the principles of construction laid down by Scrutton L.J. and by Lord Greene, I have reached the conclusion that clause 11 is not clear so as to exempt from liability if negligence is proved. I therefore concur in the course which has been proposed for the reasons which my Lords have given.

*Appeal allowed. New trial ordered on issue of negligence.*

Solicitors: *Alfred H. Silvertown & Co., London, for Arnold K. Maplesden, London; Doyle, Devonshire & Co. for Dennis Berry & Co., Reading.*

P. B. D.

[18] [1945] K.B. 189; 61 T.L.R. 216; [1945] 1 All E.R. 244.

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[QUEEN'S BENCH DIVISION.]

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*Oct.* 13.

## *ALMY v. THOMAS.

Lord Goddard C.J., Sellers and Havers JJ.

*Dentist—Practice of dentistry—Repair of split dental plate by dental technician—Impression taken of mouth—"Treatment, advice or attendance"—Dentists Act*, 1921 (11 & 12 *Geo.* 5, *c.* 21), *s.* 14 (2).

By the Dentists Act, 1921, s. 1 (1), no person shall unless he is a registered dentist, practise or hold himself out as being prepared to practise dentistry, and by section 14 (2): "... any person who "performs any operation or gives any treatment, advice, or attendance ... in connection with the fitting, insertion, or fixing "of artificial teeth shall be deemed to have practised dentistry "within the meaning of this Act."

A woman took a dental plate which was split in the centre to the defendant, a dental technician. The defendant told her that it would have to be relined, work which entailed thickening the

plate where the split had occurred; he took the plate to his laboratory and coated it with "S.S. White Paste" and then asked the woman to put it in her mouth and bite on it as hard as she could. This she did for five minutes to allow the paste to set in conformity with the shape of her mouth. She then handed the plate to him and he later replaced the hardened paste with permanent plaster. He was charged with unlawfully practising dentistry contrary to section 1 of the Act of 1921:—

*Held*, that, on the facts the defendant had given treatment or attendance in connection with the fitting of artificial teeth, and, accordingly, had practised dentistry within the meaning of section 14 (2) and was guilty of an offence.

*Twyford* v. *Puntschart* (1947) 63 T.L.R. 329; [1947] 1 All E.R. 773 distinguished.

CASE STATED by Devonshire justices sitting at Torquay.

An information was preferred against the defendant, a dental technician, that he, "not being registered under the Dentists Act, "1878, did unlawfully practise dentistry, contrary to section 1 of "the Dentists Act, 1921." [1]

At the hearing of the information the following facts were proved or admitted: The defendant had never been registered in the Dentists' Register under the Dentists Act, 1878, but at all material times lived and held himself out to practise as a dental technician and repairer of dentures at premises in Torquay. Outside the door of the premises was a notice reading "F. D. Thomas, "Dental Technician. Dental repairs received here." In May, 1952, the defendant repaired the upper dental plate of one Mrs. Osborne who, on November 17, 1952, took the upper plate, to which were attached fourteen artificial teeth, to the defendant at his premises; the plate was at that time split in the centre and required repairing and the defendant told Mrs. Osborne that it would have to be relined. That work entailed the thickening and strengthening of the plate where the split had occurred and the defendant quoted the price of £2, to which Mrs. Osborne agreed. She thereupon handed the plate to the defendant who took it to his laboratory and coated it with "S.S. White Paste." He returned to Mrs. Osborne and handed the plate to her asking her to replace it in her mouth and bite as hard as she could. She did so and the defendant left her for five minutes with the plate in her mouth in order to allow the paste to set in conformity with

[1] Dentists Act, 1921, s. 1 (1): "No "person shall, unless he is registered "in the dentists' register under the "Dentists Act, 1878 . . . practise or "hold himself out, whether directly "or by implication, as practising or "as being prepared to practise dentistry. (2) Any person who acts in "contravention of the provisions of "this section shall, . . . be liable on "summary conviction to a fine. . . ."

S. 14 (2): "For the purposes of "this Act, the practice of dentistry "shall be deemed to include the performance of any such operation and "the giving of any such treatment, "advice, or attendance as is usually "performed or given by dentists, and "any person who performs any operation or gives any treatment, advice, "or attendance on or to any person as "preparatory to or for the purpose of "or in connection with the fitting, "insertion, or fixing of artificial teeth "shall be deemed to have practised "dentistry within the meaning of "this Act."

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the shape of her mouth. He then asked her to return the plate to him which she did; she left the premises and he later replaced the hardened paste with permanent plaster. Subsequently Mrs. Osborne called at the premises, took possession of the plate and paid £2. At no time did the defendant touch Mrs. Osborne.

The work done to the plate was in fact a chemical binding by which additional material was fixed to the top of the damaged plate, thus being merely the repair of an existing denture, and the actions of the defendant were necessarily incidental to the carrying out of that repair and did not amount to an operation, treatment, advice or attendance on or to Mrs. Osborne as preparatory to or for the purpose of or in connexion with the fitting, insertion or fixing of artificial teeth.

On behalf of the prosecutor it was contended that the defendant had practised dentistry within section 14 (2) contrary to section 1 (1) of the Act of 1921.

On behalf of the defendant it was contended that his conduct was not within section 14 (2) of the Act.

The justices were of the opinion that work on an existing denture, or merely altering an existing denture, did not amount to the practice of dentistry within section 14 (2) of the Act; that there had been no operation, treatment, advice or attendance within the meaning of the section; and that the defendant had not practised dentistry as alleged in the information: they dismissed the information and the prosecutor appealed.

*John G. Hobson* for the prosecutor.
*Sir Shirley Worthington-Evans* for the defendant.

The following cases were referred to in argument: *Twyford* v. *Puntschart*,[3] and *Hennan & Co. Ld.* v. *Duckworth*.[4]

LORD GODDARD C.J. In my opinion this appeal must succeed but, although we are taking a different view from the magistrates, that is no reflection on them because the view which they took is understandable, and these dental cases, in which the line is very fine, always present some difficulty.

His Lordship read section 14 (2) of the Dentists Act, 1921, and continued: Sir Shirley has stressed that the word "denture" does not appear in subsection (2), but, as everybody knows, except in what is called the crowning operation, artificial teeth are fitted to a person's mouth by means of a denture, and I do not think it has ever been doubted that a denture can come within section 14; if it did not there would be a very great gap which was never intended in the Act.

The facts found by the magistrates are that a Mrs. Osborne took her denture to the defendant to repair as it was split in the centre. It was conceded that if what was required amounted to a

[3] (1947) 63 T.L.R. 329; [1947] 1 All E.R. 773.
[4] (1904) 20 T.L.R. 436.

mere work of repair it could be done by a person who was not a registered dentist without offending against the Act. Mrs. Osborne was told by the defendant, however, that the plate would have to be relined. Speaking for myself, I should have thought that relining was an operation usually performed by a dentist, but the case goes on to find that: "This work entailed the thickening "and thus strengthening of the plate where the split had occurred. "The [defendant] quoted the price of £2 to which Mrs. Osborne "agreed. Thereupon Mrs. Osborne handed the plate to the "[defendant] and he took it to his laboratory and coated it with "paste known as 'S.S. White Paste.' He returned to Mrs. "Osborne, handed the plate to her asking her to replace it in her "mouth and bite as hard as she could. She did so. The [defen-"dant] left her for five minutes with the plate in her mouth in "order to allow the paste to set in conformity with the shape of "her mouth."

Once there is that finding, it is difficult to say that the defendant was not taking an impression of the woman's mouth. Why do dentists take impressions unless it is for the purpose of fitting the mouth with artificial teeth? The case continues: "The "[defendant] then asked Mrs. Osborne to return the plate to "him, which she did. She left the premises, and he later replaced "the hardened paste with permanent plaster. . . . The work done "to the plate was in fact a chemical binding, by which additional "material was fixed to the top of the damaged plate."

In view of those findings, I find it impossible to say that the defendant did not give treatment or attendance in connection with the fitting of artificial teeth. For these reasons, I take a different view from that taken by the magistrates; the offence was committed, and the case must be returned to the magistrates with an intimation to that effect.

SELLERS J. I agree. The distinction between the present case and *Twyford* v. *Puntschart* [1] is a fine one, but I think it is a very definite distinction, and the facts my Lord has indicated show that there was evidence which required the magistrates to come to a different conclusion from that to which they did.

HAVERS J. I agree. If the work the dental mechanic was asked to do could have been done simply by taking the plate out and relining it without asking Mrs. Osborne to put it in her mouth and bite on it and allow it to remain in her mouth for five minutes, in my opinion there would be no offence against the provisions of the Act. But it is plain from the finding of the magistrates that the relining was an operation—using that word not in its technical sense under the Act, but as meaning the work required to be done—which was required to be performed in a

[1] (1947) 63 T.L.R. 329; [1947] 1 All E.R. 773.

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Havers J.

number of stages. It required the attendance of Mrs. Osborne and her co-operation. These cases must depend very largely on a question of fact whether what was done amounted to treatment, advice and attendance within the section and, looking at the facts of this case, I find it impossible to say that there was not attendance for treatment within the meaning of the section. I agree, therefore, that the magistrates were wrong in the conclusion at which they arrived and the appeal must be allowed.

*Appeal allowed.*

Solicitors: *Waterhouse & Co.; Church, Adams, Tatham & Co.*

J. F. L.

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[COURT OF APPEAL.]

C. A.

1953
*Oct.* 2.

Singleton, Birkett and Hodson L.JJ.

* ALI *v.* ELLMORE AND OTHERS.

[1952 A. No. 164.]

*Evidence—Fresh evidence—Court of Appeal—New trial—Police witnesses—Facts as to witnesses' credit made public after original trial—Whether fresh evidence relevant to issue.*

The plaintiff, after being acquitted on a criminal charge of seeking to corrupt a police superintendent, brought an action for, inter alia, conspiracy against four police officers. At the trial of the civil action the jury returned a verdict for the defendants and judgment was entered for them.

Several months later, after the time for entering an appeal had expired, two of the defendants were found guilty, on an investigation by the local watch committee, of breaches of the police disciplinary code, in that they had wrongfully received moneys from bookmakers.

On a motion by the plaintiff for leave to appeal out of time on the ground that the facts made public by the investigation constituted fresh evidence which would have been highly relevant at the trial of the civil action:—

*Held*, that, as the fresh evidence concerned the credit of only two of the defendants, and did not relate to an issue in the case but to events which took place at dates after the hearing of the civil action, it was contrary to public interest to prolong the litigation by granting a motion, which was in substance a request for a new trial or for the reception of fresh evidence by the court, and the application must accordingly be dismissed.

*Per* Singleton and Hodson L.JJ. There is no valid distinction between a police officer and any other citizen in the witness-box.

Principles laid down in *Braddock* v. *Tillotson's Newspapers Ltd.* [1950] 1 K.B. 47; 65 T.L.R. 553; [1949] 2 All E.R. 306 applied.

APPLICATION for leave to appeal, notwithstanding that time had expired, from Donovan J. and a jury.

By an affidavit, in support of the application, the applicant's solicitor said as follows:—On August 29, 1950, the applicant, Mojahir Ali, an Indian café proprietor, of Kingston-upon-Hull, went to Leeds for the purpose of obtaining bail for two Indians who were under arrest for offences involving drugs. On arrival at the police station he was met by the first defendant, then Superintendent Ellmore, the senior police officer of the Leeds City Police Force in charge of the case, who shook him by the hand and told him to send his taxi away as the police would provide him with transport back to the railway station. The applicant was then interviewed in the officer's private office, where there had been installed a two-way microphone set, one end of which was situated in an adjoining room, where the other three defendants, all officers in the Leeds City Police Force, John Arthur Mann, John Henry Simpson, and Harold Harriman, were installed. Before the interview ended, the applicant was arrested without warrant on a charge of seeking to bribe the superintendent not to prosecute the other Indians, and he was imprisoned at the police station until the following day, when he was brought before a magistrate, the first defendant opposing bail, both on that occasion and on two subsequent occasions, until, on September 19, the applicant was committed for trial on charges under the Prevention of Corruption Act, 1906.

At the trial, in November, 1950, the four defendants gave evidence against the applicant, but the jury returned a verdict of Not Guilty, and the applicant was discharged, the trial judge—McNair J.—ordering that the notebooks of the four defendants should be impounded and retained.

The applicant then started civil proceedings for false imprisonment and malicious prosecution against the first defendant Ellmore, and for conspiracy against all four defendants, alleging that they had conspired to give, and gave, false evidence against him in the criminal proceedings.

After a trial lasting seven days, in November, 1952, before Donovan J. and a jury, the jury returned a verdict in favour of the defendants. During the trial the Chief Constable of Leeds gave evidence as to the excellent character and integrity of the four defendants, and the judge, in directing the jury, laid stress on this aspect of the matter. He also stressed the apparent absence of any motive to cause the defendants to behave in the manner alleged in the action. After the verdict of the jury, the judge refused to make any award for costs in favour of the defendants.

On March 13, 1953, the Chief Constable of Leeds announced through the Press that he proposed to hold an investigation into allegations of payments made to officers of the City Police Force by bookmakers, and, immediately following the announcement, the defendants Ellmore and Simpson tendered their resignations, while the defendant Mann later similarly tendered his. On May 14, 1953, the defendants Ellmore and Simpson were found

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guilty, after an investigation by the Leeds Corporation Watch Committee, of breaches of the Police Disciplinary Code, in that they had wrongfully received moneys. The defendant Mann was acquitted on similar charges and later withdrew his resignation.

It was submitted that on the evidence given at the trial of the civil action, the jury were compelled to assume that the defendants were men of good character and integrity, whereas the above facts constituted fresh evidence which was not and could not have been available to the applicant at the trial; that such evidence would have been highly relevant to the trial in that, (*a*) if it had been available, the jury would have been compelled to form an entirely different view of the character and integrity of the defendants; (*b*) the defendants Ellmore and Simpson could not truthfully have denied in cross-examination that they had not previously been guilty of corrupt practices; (*c*) the fact that the defendants or some of them were corrupt men would have been invaluable on the issue of motive. Finally, it was submitted that such evidence would have formed a determining factor in the result of the trial, or was of such weight that it would have had an important influence on the result. The court was asked to exercise its discretion and to grant leave to appeal against the verdict of the jury and the judgment of Donovan J., notwithstanding that the time for appealing as provided for by the rules of court had expired.

*Richard Elwes Q.C.* and *A. W. Stephenson* for the applicant.

*G. D. Roberts Q.C.* and *P. A. W. Merriton* for the first and second defendants.

*Rudolph Lyons Q.C.* and *Alastair Sharp* for the third and fourth defendants.

SINGLETON L.J. As this is an important and a somewhat unusual case it is right that I should state the reasons which lead me to the opinion that this motion must be dismissed.

[His Lordship stated the facts as set out in the solicitor's affidavit, and continued:] There are two further matters to which I would refer. The first is that the plaintiff denied throughout that he had sought to corrupt Superintendent Ellmore, and he was found not guilty on his trial on the criminal charge. The second is that on the hearing of the civil action, not only the four police officers, but also the chief constable of Leeds were called. Mr. Elwes told us that the latter was called to give evidence to the fact that the four police officers were of good standing on whom he could place reliance. It appears to me that that evidence was irrelevant and unnecessary. If a witness, who is also a defendant, is a superintendent of Leeds City Police Force, that shows he is of good standing and that he has the confidence of his superior officers. Mr. Lyons, who appears for two of the defendants, told the court that the chief constable was in fact called on other matters, and that the evidence to which I have

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referred was given by him as he was in the witness-box. I quite accept what Mr. Lyons said on that matter.

This is solely an application as to whether leave should be given to appeal though the time for so doing has expired. If the court thought it right to give leave to appeal, then the court, or another division of it, would have to consider the merits of the appeal itself. It is clear from the affidavit that the desire of the plaintiff and his advisers is to have new evidence before the Court of Appeal or before a jury if the Court of Appeal should direct a new trial; and there is no doubt that if the plaintiff secured a retrial and was able to launch a fresh case before a jury, supported by evidence that two of the police officers who were defendants had subsequently been convicted of offences against the Police Disciplinary Code (offences involving the receiving of money from bookmakers), the plaintiff would be in a different position from that in which he was on the original trial. Mr. Elwes has impressed on the court that, so far as anyone could tell on the original hearing, there was no motive for the four police officers giving false evidence to bring about the conviction of the plaintiff, and submitted that it was much more likely that they would enter into such a conspiracy if they or some of them were people who were ready and willing at some date to commit offences against the disciplinary code such as taking money from bookmakers. I am not sure that that follows; it may depend to some extent on dates. The conspiracy in regard to the plaintiff is said to have been in September, 1950. On the other hand, it was not until March or May, 1953, that a word of criticism was made against the police officers by their superiors, and the complaints were not in relation to a conspiracy to pervert the ends of justice, but were complaints, so far as one gathers from this affidavit and from what has been said in court, in regard to the acceptance of money from bookmakers. Moreover, those complaints or criticisms affect only two of the defendants; the other two, Mann and Harriman, are not affected.

In *Braddock* v. *Tillotson's Newspapers Ltd.*,[1] this court had to consider whether an unsuccessful plaintiff in an action ought to be allowed to recall for cross-examination a witness as to whom it had been found, after the trial, that he had not a very good character in that he had been convicted of some criminal offences at some earlier dates. The court declined to allow that evidence, and held[2] "that the practice of the courts had been to confine "the admission of fresh evidence on appeal to evidence relating "to an issue in the case, or at any rate to an issue which could "or might be raised on a new trial of the action, and to evidence "which, if believed, either would be conclusive or would lead to "the reasonable probability that the verdict would have been "different. Assuming that the Court of Appeal had power "under Ord. 58, r. 4, to order the recall of a witness for

[1] [1950] 1 K.B. 47; 65 T.L.R. 553; [1949] 2 All E.R. 306.

[2] [1950] 1 K.B. 47.

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"cross-examination as to credit, it was a power which should be "exercised sparingly and only in very special circumstances."

In the present case, if it be right to say that the desire of the plaintiff is that fresh evidence should be heard, that evidence might be highly prejudicial to all the defendants, and it might be hardly fair to two of them. In any event, it does not go directly to an issue in the case; it really is something which goes to the credit of two of the defendants who were witnesses in the case. I agree in part with the submission of Mr. Elwes that the present appeal is not on all fours with the appeal in *Braddock's* case.[3] There is a further suggestion as to motive. On the other hand, there is no distinction in law between the position of a police officer and any other witness. In *Braddock's* case [3] no question of time arose; in the present case it does. I do not say that there has been any undue delay since the discovery made apparent by the police inquiry between March and May, 1953, but I cannot bring myself to think that this is a case in which the court ought to grant leave to appeal which, if it were granted, would only result in a further application either for fresh evidence to be heard by the Court of Appeal or for a new trial, the result of which, it is said, would, or might be, affected by fresh evidence. There ought to be finality in these matters both in regard to a plaintiff and in regard to defendants who, in the present case, are not all in the same position.

I think it right to add this: This matter has been well thrashed out. There have been two trials. Though in one sense it might appear that the result is not wholly satisfactory, I do not think that an appeal would serve any public good; nor do I think it would succeed if the ordinary rules as to evidence were followed. Everyone is desirous that a plaintiff placed as this plaintiff was should have his rights, and that nothing should be hushed up. I do not think that anything has been. The plaintiff failed in his litigation, and there is no reason why this court should grant his application. In my judgment the motion should be dismissed.

BIRKETT L.J. I agree. I have been impressed by the serious nature of the issues which have been raised by Mr. Elwes so forcefully and admirably, and it is well when such a case as this arises that there should be advocates who are fearless and who will present the view of the ordinary citizen. It would be idle for me to say that I have not in my mind certain grave suspicion, but this is an application merely for leave to appeal out of time, and the ordinary considerations which apply to such an application must therefore apply to this.

It is plain from the summing-up of Donovan J. that the gravity of the issue which had been raised was not merely appreciated, but was stated with great lucidity to the jury. One

[3] Ibid.

of the specific questions left to the jury was this matter of the conspiracy to give false evidence, and in the evidence which was given before the jury that issue was debated. For example, the solicitor for the plaintiff gave evidence on three distinct matters in respect of which the superintendent was guilty of inaccuracy at the least, and telling lies at the most, and throughout the case, therefore, the real issue was heard and was determined. But Mr. Elwes contends that the plaintiff was labouring under a considerable handicap in that the case was conducted on the footing that the defendants were all men of high character; that they were police officers of standing in the service; and it was suggested that in those circumstances the case made by the plaintiff that they conspired together to give false evidence was inconceivable, whereas, says Mr. Elwes, it is known that in 1953 two of the four lost their high character and were convicted of accepting bribes from bookmakers.

It is quite true that the conspiracy alleged was in 1950, but the trial of that issue was in 1952, judgment being delivered in December, 1952, and as early as March, 1953, the chief constable instituted the proceedings which resulted in the conviction of two of the four defendants. Mr. Elwes therefore asks for leave to appeal, and then if that is granted he asks for a new trial which can be conducted, not on the footing that the four men are men of high character, but that two of them have already been convicted.

While I have every sympathy with that argument, I must agree with what my Lord has said on that matter. It may be that the real truth, if ever it could be discovered, was that there had been a conspiracy and that the design of it was to screen men who were at that time engaged in accepting bribes and to give the outward appearance that they were incapable of so doing, and that they had taken extreme care in bringing the offender to justice. But that must remain a matter of speculation. It may, on the other hand, be that there was no conspiracy. Assuming that two of the four were convicted in 1953, two were blameless. The question would then arise, whether those two would have lent themselves in 1950 to a conspiracy of this kind. All those questions must remain in the realm of speculation.

I asked Mr. Elwes whether, had these facts arisen 15 years later, he would have applied and he said that he would not. It was because March, 1953, came so near to December, 1952, that the application was made. But it is important that there should be an end to litigation, and even if we were to grant this application, and there were to be a new trial, I cannot conceive that that would result in any great advantage.

HODSON L.J. I also agree. It was clear that everything depended on the jury's view of the credibility of the witnesses. Although this is an application for leave to appeal out of time, the object of it is to obtain a new trial, not on the ground of any

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misdirection on the part of the judge, nor, I think, in order that he might be able to call fresh evidence, but in order that a new trial might be had in the light of the now known fact that the police officers whose evidence was believed were, as to two of them, men who ought not to have been believed; Mr. Elwes says that his client is confident that if he could go to the court with that situation he would have a reasonable chance of obtaining a verdict after these officers had been cross-examined.

This matter has to be considered in the light of the decision of this court in *Braddock's* case,[4] in which Tucker L.J., delivering the leading judgment of the court, first set out the well-known principles on which fresh evidence is admitted, and continued[5]: "These varying expressions have, so far as the decisions of the "courts in this country are concerned, always been directed to "evidence directly relevant to the main issue in the action, or to "some issue which could, or would, have been raised at the trial "if the evidence had been discovered. It is not necessary in this "case to express any opinion as to which is the better view with "regard to the quality of the evidence in such a case. If, how-"ever, this court is to depart from its invariable practice of "confining such evidence to the relevant issues and is to admit "fresh evidence directed solely to credit, I am of opinion that "such a course would, if ever, only be justified where the evid-"ence is of such a nature and the circumstances of the case "are such that no reasonable jury could be expected to act upon "the evidence of the witness whose character had been called "in question. It would, in my view, be wrong for this court "to admit fresh evidence directed solely to credit, merely "because there is a possibility, or merely a reasonable "probability, that such evidence would result in a different "verdict."

Whether this is put before the court as an application to call fresh evidence, or as an application for a new trial in circumstances in which the defendants' characters would appear in a less favourable light than before, the position seems to me to be the same. No evidence is here sought to be tendered which is directly relevant to an issue in the case; the only question is as to the credibility of the witnesses, or some of them. Without questioning the power of the court to protect the public against an injustice being done, I am bound to say that in the present case I see no ground on which the time ought to be extended in order that this question of credit should be re-examined in the case of these two men. It is said with force by the solicitor in his affidavit and by Mr. Elwes on behalf of the plaintiff, that it is now fairly clear that these men, or two of them, gave evidence against the plaintiff in order to give the idea that they themselves were above the suspicion of bribery, and if only he could say that to a jury how different might the result be; but the result seems to me a matter of pure speculation. What has

[4] [1950] 1 K.B. 47. [5] Ibid. 53.

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happened here makes no difference whether the evidence of the chief constable as to the credibility of these people, which I think was wrongly admitted, is considered or not. Mr. Elwes said that he could cross-examine these men as to their character and take his chance on the answers they would give after the inquiry which the watch committee had held. Nevertheless, the court ought not to extend the time in order to enable matters to be investigated which have happened since the hearing. Mr. Elwes says that one cannot expect anyone to believe that if these men went wrong in 1952 or 1951 they were not bad men in 1950, but I do not think that will do. The mere fact that Mr. Elwes and his client are anxious to establish that two of the four defendants have fallen from honesty into dishonesty since the trial is not sufficient to allow this matter to be reopened.

I would add that I see no possible validity in the distinction which Mr. Elwes seeks to draw between a police officer and any other citizen in this country. Everyone in the witness-box stands on the same footing, and no one is entitled to take advantage of his cloth, whether it be the uniform of one part of the Service in this country or any other uniform.

*Application dismissed.*

Solicitors: *Devonshire & Co. for Pearlman & Rosen, Hull; Sidney Torrance & Co. for Levi & Co., Leeds; Sharpe, Pritchard & Co. for R. Crute, Leeds.*

M. M. H.

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[QUEEN'S BENCH DIVISION.]

## * D'ANDREA *v.* WOODS.

1953
*Oct.* 9.
Lord Goddard C.J., Sellers and Havers JJ.

*Criminal Law—Receiving stolen property—"Property"—Saving stamps stolen and converted into bank notes—Receipt of bank notes—Larceny Act*, 1916 (6 & 7 *Geo.* 6, *c.* 50), *ss.* 33, 46 (1).

A quantity of savings stamps were stolen by two girls who converted them into cash and handed the appellant the sum of £4 10s. in Bank of England notes which were part of the proceeds of the theft. The appellant admitted that at the time he received the notes he knew that they were part of the proceeds of the stolen stamps. He was convicted of receiving money knowing it to be stolen contrary to section 33 of the Larceny Act, 1916, but appealed on the grounds that the bank notes were the proceeds of stolen property and were not themselves stolen, and that therefore the charge could not be sustained:—

*Held*, that the £4 10s. in notes which he had received fell within the definition of property converted or exchanged in section 46 (1) of the Act and that as the appellant knew that the notes had been acquired by theft he had been properly convicted.

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[Reported by Mrs. E. M. WELLWOOD, Barrister-at-Law.]

1953

D'Andrea v. Woods.

Case stated by a metropolitan magistrate sitting at North London.

The respondent, a detective-sergeant in the Metropolitan Police, preferred an information against the appellant, Dominic d'Andrea, that he on March 19, 1953, received the sum of £4 10s., the moneys of one Sheila Cox, knowing the same to have been stolen contrary to section 33 of the Larceny Act, 1916. On the hearing of the information the following facts were proved or admitted: In March, 1953, Jeanne Boorer, Doreen Stone and Sheila Cox were living in a hostel at Highbury New Park, London. On March 18 or 19, Jeanne Boorer and Doreen Stone together stole a quantity of savings stamps to the value of £17 5s. belonging to Sheila Cox. Jeanne Boorer converted the stamps for their cash value and gave half the proceeds to Doreen Stone. On March 19 Jeanne Boorer handed to the appellant £4 10s. in Bank of England notes which were part of the proceeds of the conversion, at the same time telling the appellant how she had obtained the money. At the time that the appellant received the money he knew that it was part of the proceeds of the stolen savings stamps. On March 20, 1953, the appellant, being found by the respondent in possession of the £4 10s. in notes, admitted that he knew how the notes had been obtained.

It was contended on behalf of the appellant that as the Bank of England notes were the proceeds of stolen property, and were not themselves stolen, the charge could not be sustained and, further, that the notes could not be identified with the stolen property.

For the respondent it was contended that the word "property" in section 33 of the Larceny Act, 1916, included any property into or for which the same had been converted or exchanged by virtue of section 46 of the Larceny Act, 1916.

The magistrate, being of opinion that the respondent's contention was correct in law, convicted and fined the appellant.

*C. L. Collymore* for the appellant.
*P. G. Wrightson* for the respondent.

The following cases were cited in argument: *Rex* v. *Walkley* [1]; *Rex* v. *Barrow*.[2]

Lord Goddard C.J. stated the facts and continued: Stamps the property of Miss Cox were stolen and were converted into money. Under section 46 (1) of the Larceny Act, 1916, it is provided: "The expression 'property' includes any description of "real and personal property . . . documents of title" and includes "not only such property as has been originally in the "possession or under the control of any person, but also any "property into or for which the same has been converted or "exchanged, and anything acquired by such conversion or

[1] (1829) 4 C. & P. 132.

[2] (1934) 24 Cr.App.R. 141.

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Lord Goddard C.J.

"exchange, whether immediately or otherwise." Obviously the Act was contemplating the theft of property which was then changed into some other property or into money, and that money being used to buy something else, because it states: "Not only "such property as has been originally in the possession or under "the control of any person, but also any property into or for "which the same has been converted or exchanged, and any-"thing acquired by such conversion or exchange, whether "immediately or otherwise." It is sufficient to say here, that the £4 10s. falls exactly within the definition of property converted or exchanged. Therefore, as the appellant knew that the notes had been acquired by theft, he was properly convicted and this appeal fails and is dismissed with costs.

SELLERS J. I agree.

HAVERS J. I agree.

*Appeal dismissed.*

Solicitors: *Alban P. B. Gould; Solicitor for the Metropolitan Police.*

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[QUEEN'S BENCH DIVISION.]

## * PRACTICE NOTE (FORM OF CASE STATED).

1953
*Oct.* 7.

Lord Goddard C.J., Sellers and Havers JJ.

*Practice and Procedure — Justices — Case stated — New form of Case prescribed in Magistrates' Courts (Forms) Rules,* 1952—*Desirability of stating case in new form—Magistrates' Courts (Forms) Rules,* 1952 (*S.I.* 1952, *No.* 2191), *Form* 119.

AT the conclusion of the hearing in the Divisional Court of an appeal by case stated by justices LORD GODDARD C.J. said: I am not referring to the drafting of the particular case here, but I do want the attention of practitioners and magistrates' clerks directed to the fact that the form for a case stated is now prescribed in the Magistrates' Courts (Forms) Rules, 1952. I have been oppressed for a long time with the long and unnecessary recitals which are always put into cases, and, therefore, settled a form, which has been accepted by the Committee, in which cases should be stated, and which will be found to leave out a great deal of these unnecessary recitals, consequently reducing the costs. I hope practitioners and magistrates' clerks will remember that there is this form now prescribed and use it.

J. F. L.

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[PROBATE, ETC., DIVISION.]

1953
*July* 28.

Lord
Merriman P.

# * BONE *v.* BONE.

PRACTICE NOTE.

*Husband and Wife—Divorce—Maintenance—Practice—Prayer for maintenance in answer—Guardian ad litem—Appointment of guardian ad litem extended to ancillary matters—Form of order—Evidence—Decree to respondent on evidence of petitioner alone.*

A husband petitioned for divorce on the ground of alleged cruelty, and asked for the exercise of the court's discretion in respect of his adultery. The wife by her answer denied cruelty, alleged adultery, and prayed for a divorce and for costs. The husband by his reply admitted adultery and pleaded conduct conducing.

It appeared at the hearing that the mental condition of the wife was such that in the opinion of the court it was desirable to appoint a guardian ad litem, and such appointment was made at the hearing.

Although the answer contained no prayer for ancillary relief, the form of appearance indicated inter alia a wish to apply for alimony pending suit and maintenance, and also for access, custody, and maintenance in respect of the two children of the marriage, and a notice of application for alimony pending suit and maintenance of the children was filed.

Lord Merriman P., having heard the evidence of the husband, who did not pursue his prayer for a decree and who testified to the truth of his discretion statement, pronounced a decree nisi of divorce on the prayer of the answer. His Lordship gave leave to amend the prayer of the answer by adding a prayer for ancillary relief, and the following order was drawn up:

"The President and by consent having given leave to the respondent that F. W. H. be appointed guardian ad litem to the above-named respondent for the purpose of this suit and for all ancillary matters including maintenance connected therewith, and that the renewal of the registrar's certificate be dispensed with, and that the respondent do amend the prayer of her answer (without re-service) by adding thereto a claim for maintenance, the petitioner then not proceeding with the charge of cruelty as contained in his petition, and having taken the oral evidence of the petitioner in support of the petition filed in this cause, the respondent not being called upon to give evidence in support of her answer filed herein, and having heard counsel on behalf of both parties thereon, pronounced that the petitioner had not sufficiently proved the contents of the said petition, that the respondent had sufficiently proved the contents of the answer and on the said answer decreed that the marriage . . . be dissolved by reason that since the celebration thereof the peti-

" tioner had been guilty of adultery unless sufficient cause be " shewn to the court within six weeks. . . ." (The custody of the younger child was to remain with the petitioner: the older child was over sixteen at the date of the hearing.)

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BONE v. BONE.

Provision for maintenance was made in a draft deed, the terms of which were approved by his Lordship. His Lordship said: The substance of the deed I approve. It should be plainly understood that it was really with reference to this deed [the terms of which had been considered in chambers during an adjournment] that I thought it necessary that the duties of the guardian ad litem should be extended to ancillary matters, including, of course, maintenance.

*P. R. Hollins* for the husband.
*Roger Ormrod* for the wife.

Solicitors: *J. H. Hortin & Nash; Bower, Cotton & Bower.*

J. B. G.

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[COURT OF APPEAL.]

C. A.

1953
*Oct.* 6.

Singleton, Birkett and Hodson L.JJ.

* CUTTRESS AND OTHERS *v.* SCAFFOLDING (GREAT BRITAIN) LD. AND HUNTINGDON BUILDING AND DEVELOPMENT CO. LD.

[1949 C. No. 815.]

*Negligence—Duty—Reasonable foreseeability—Children—Scaffolding—Overturned by boys—Other children injured—Whether events which happened reasonably foreseeable.*

The first defendants erected an independent scaffolding unit for the use of the second defendants' workmen engaged in repairing a bomb-damaged wall of a building, in front of which was an open site frequented by the public and used by children as a playground. At the top of the 35-ft. high scaffolding was a pulley with a long rope attached for use with the pulley.

The workmen used the scaffolding for several days, and then, before leaving work at the week-end, they coiled and tied up the rope at the top of the pulley, and removed all ladders and planks giving access to the scaffolding from the ground level.

On the Sunday afternoon one of a group of boys aged between twelve and sixteen swarmed up to the top of the scaffolding, unloosed the rope, and threw it down to his fellows, some of whom then pulled on it in a lateral direction, while others dangled on it. They persisted in this operation until the scaffolding, about 4½ tons in weight, came over in one piece, injuring three infants playing on the site.

In an action by the infants and their respective parents for damages for negligence, the trial judge found that both defendants

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were negligent, and held, inter alia, that they ought reasonably to have foreseen the probability of the events which in fact happened. On appeal by both defendants:—

*Held*, allowing the appeals, that (1) on the evidence, and contrary to the judge's findings, the defendants were not negligent since the first defendants had erected a scaffolding proper and sufficient for its purpose and the second defendants had left it in a safe condition at the week-end; (2) the defendants were not responsible in law for the events which happened, since those events were wholly outside the range of what a reasonable man ought to have foreseen as the probable result of his acts or omissions.

Decision of Jones J. reversed.

Tests as to reasonable probability and possibility in *Bolton* v. *Stone* [1951] A.C. 850; [1951] 1 T.L.R. 977; [1951] 1 All E.R. 1078 applied.

APPEAL from Jones J.

In December, 1948, the first defendants, Scaffolding (Great Britain) Ld., a firm experienced in erecting scaffolding and said to have been pioneers in tubular scaffold erection, contracted to erect for the second defendants, the Huntingdon Building & Development Co. Ld., an independent scaffolding unit along the front of the wall of a bomb-damaged house in Great Homer Street, Liverpool, for use by their workmen engaged in repairing the brickwork and plaster of the wall. In front of the building was an open space, a bombed site, currently used by the public and on which children habitually played.

The scaffolding, 35 ft. high, 54 ft. long, with a base 4 ft. 4 in. wide, and weighing between 4 and 4½ tons, was of a type to which regulation 12 of the Building (Safety, Health and Welfare) Regulations, 1948,[1] would apply in relation to persons for whose benefit or protection those regulations were made. It was braced, but not strutted or tied to the bombed building. The uprights rested on base plates and the structure was designed to be adjustable to unevenness of the ground so as to give stability to the whole. At the top of the scaffolding was a pulley, with a rope 150 ft. long for use with the pulley in taking materials up and down.

The scaffolding was handed over to the second defendants on January 6, 1949, and was used by their workmen for several days, without complaint. During that time, children did some slight damage to the mortar of the new brickwork, but did not interfere with the scaffolding.

At noon on Saturday, January 8, before the workmen left the site for the week-end, they rolled up the pulley rope and tied it above the cathead, removed the planks from the lower stages of the scaffolding, and put away the ladder. On Sunday,

[1] Building (Safety, Health and Welfare) Regulations, 1948, reg. 12: "(1) Every scaffold shall be securely "supported or suspended and shall "where necessary be sufficiently and "properly strutted or braced to ensure "stability and, unless it is properly "designed and constructed as an independent scaffold, shall be rigidly "connected with the building."

January 9, at about 3.30 p.m., according to the evidence of three young girls at the trial of the action, a group of unidentified youths, aged from 12 to 16, approached the scaffolding. One of them swarmed up to the top of the scaffolding, the first stage of which was 6 ft. from the ground, unfastened the rope, threw it down to his fellows below, and after that, 11 or 12 other boys pulled on the rope in a horizontal direction away from the scaffolding, while three others dangled on the rope. They persisted in this in spite of being stopped temporarily by a passing workman and a police constable, until eventually the scaffolding quivered and came down in one piece, and three little boys, aged 8, 12, and 10, respectively, who were playing on the site, were injured, the youngest very severely, the youths themselves escaping.

The infants, Francis Cuttress, Robert Disley, and John Dunleavy, suing by their respective parents and next friends, brought an action against both defendants, claiming damages for alleged negligence in erecting and/or maintaining the scaffolding in a dangerous manner and condition, by reason of which it collapsed suddenly and fell and injured the infant plaintiffs. The defendants denied that they had been negligent, and claimed that the scaffolding had been brought down by the action of the group of youths.

At the hearing before Jones J. evidence was given for the plaintiffs by an engineer who knew nothing of the boys' presence and their horizontal pull: he expressed the opinion that the scaffolding, which he had not seen at any time, should have been braced or tied to the building, or at the least buttressed. For the defendants a number of experienced witnesses, including a witness from the surveyors' department of the Liverpool Corporation, gave evidence to the effect that the scaffolding was erected in accordance with the ordinary and the best practice known, and was indeed re-erected in precisely the same way after the accident as before, without struts, without tying, and without buttresses; that it was sufficient for the purpose for which it was required; and that in order to cause the scaffolding to fall away from the building there would have to be a horizontal pull of 5½ to 6½ cwts. from the top, i.e. a pull by about 11 men or grown-up boys. Witnesses also gave evidence that they had never heard of such a happening before, and would never have contemplated anything of the kind.

Jones J. found that the scaffolding fell in one piece; that though the immediate cause of its fall was the interference with and the pressure put on it by the boys, they could not have pulled it over if it had been properly constructed and sufficiently strutted; that sole-plates as recommended in a safety pamphlet before the court should have been provided; and that the first defendants were negligent in not providing struts and sole-plates, their negligence being a contributing cause to the fall of the scaffolding. He found further that the scaffolding was liable to

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fall and was a danger to passers-by using the open space. As to the second defendants, the judge found that they should have realized that the scaffolding was insufficiently secured and that children would probably interfere with it; that they were negligent in leaving a rope attached to the top of the scaffolding when they left it unattended; and that their negligence was a contributing cause to the fall. He found further that it was obvious to the defendants' servants that the open space was used by the public as a thoroughfare and by children as a playground and that the scaffolding would be attractive and alluring to children, particularly to boys aged about 15 and 16, as a place on which to climb and play, especially if so attractive and alluring a piece of equipment as a rope was left on it; and that the servants of both defendants should have realized that any reasonably active boy would be able to climb to the top of the scaffold, and should have foreseen that if the rope was left on the top, even though coiled up, it was probable that some boy or boys would climb up and detach the loose end and that others would pull the scaffold over and cause injury to passers-by.

He held that each of the defendants owed a duty to the infant plaintiffs to take all reasonable steps to prevent the scaffolding falling on them and had failed to discharge that duty, and that each of them was liable to each of the plaintiffs in damages for negligence. He awarded £2,500 to the first infant plaintiff, small sums by way of damages to two of the plaintiffs who were not much hurt, and out-of-pocket loss to the parents and next friends. The defendants appealed.

*S. Scholefield Allen Q.C.* and *R. G. Clover* for the first defendants.

*Robertson Crichton Q.C.* and *R. H. Forrest Q.C.* for the second defendants.

*E. Wooll Q.C.* and *E. E. Youds* for the plaintiffs.

The following cases were cited in the argument: *Latham* v. *Johnson (R.) & Nephew Ld.*[2]; *Donovan* v. *Union Cartage Co. Ld.*[3]; *Shiffman* v. *Venerable Order of the Hospital of St. John of Jerusalem*[4]; *Bolton* v. *Stone.*[5]

SINGLETON L.J. said that the action was important both for the plaintiffs and their relations and for those engaged in the building trade or industry. His Lordship went on to state the facts and the evidence, and then considered in detail the findings of the judge. One of the questions, he said, in a case of this kind was whether those who erected a scaffolding of this sort ought reasonably to expect something of the kind which

[2] [1913] 1 K.B. 398; 29 T.L.R. 124.
[3] [1933] 2 K.B. 71; 49 T.L.R. 125.
[4] [1936] 1 All E.R. 557.
[5] [1951] A.C. 850; [1951] 1 T.L.R. 977; [1951] 1 All E.R. 1078.

happened, since the scaffolding was sufficient for the purpose for which it was erected.

On the judge's finding that though the immediate cause of the scaffolding's fall was the interference with it and pressure put on it by the boys, it fell because it was not properly constructed and not sufficiently strutted, and that it was liable to fall and was a danger to passers-by using the open space, his Lordship commented that the judge seemed to adopt the view that though one might have an independent scaffold, it must be strutted or buttressed. He (his Lordship) did not think that the evidence taken as a whole warranted any such conclusion. The scaffolding which was erected was sufficient for all the purposes for which it was intended. As to the judge's finding that sole-plates should have been provided, his Lordship could see no evidence which warranted that finding.

[Referring to the judge's finding that the servants of the second defendants should have realized that the scaffold was insufficiently secured and that children would probably interfere with it; that they were negligent in leaving a rope attached to the top of the scaffold when they left it unattended; and that their negligence was a contributing cause to the fall of the scaffold, his Lordship said:]

It seems to me that that is going a long way. People engaged on a building or repair operation have a scaffolding erected at the end of a building, and when they cease work at midday on Saturday they take away all the planks on the lower part of the staging; they take away the ladder; and it is said that they are negligent because they leave a rope at the top on a pulley 35 ft. above ground, which is wrapped round the pulley, not hanging down, nor in any sense a temptation to anyone, though, I suppose, it could be seen. For myself I should hesitate a long time before I found that there was negligence on the part of responsible employees of the builders. I do not think that they ought to have anticipated that someone would climb up the scaffolding, get hold of the rope, and throw it down. I should not describe it as negligence, and even if it could be so regarded, and if the most careful thought would have caused them to take the rope away at the week-end, it is only one stage in this matter.

The next finding of the judge is as follows: "I find that it "was obvious to the servants of both defendants that this open "space was used by the public as a thoroughfare and by children "as a playground and that the scaffold would be attractive and "alluring to children, particularly to boys aged about 15 and "16, as a place on which to climb and play, especially if so "attractive and alluring a piece of equipment as a rope was "left on it. In my opinion the servants of both defendants "should have realized that any reasonably active boy would be "able to climb to the top of the scaffold and should have "foreseen that if the rope was left on the top, even though

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" coiled up, it was probable that some boy or boys would climb " up and detach the loose end and that others would pull the " scaffold over and cause injury to passers-by."

Quite a few witnesses were asked questions on that. I think I am right in saying that every one of them said: " I should " never have contemplated that for a moment." The foreman said: " If I had contemplated that I would have taken the rope " away."

I hope I am not unduly critical, but every witness who was asked about this said that he had never heard of an accident of this kind before, and there was no cross-examination as to that. It cannot then be right for the judge to say that the defendants ought to have realized that it was probable that some boy or boys would climb up and detach the loose end, and that others would pull on it, pull the scaffold over, and cause injury to passers-by. Why should they have realized that, or thought of it, if, so far as one can find from the evidence, such a thing had never been heard of before? Of course, when one hears afterwards what went on that afternoon, one may think of it as something that boys might resort to, but I cannot accept that the defendants ought to have realized beforehand that a boy might climb up and that other boys would probably pull the whole thing down.

The next finding is :" I find that the servants of Scaffolding " Ld. should have foreseen this probability as they knew that the " scaffolding could be pulled over," and later: " I find that it " should have been obvious to the workmen that if they left this " independent unattached scaffold unattended, with a rope " attached, even if coiled up at the top of the scaffold, it was " probable that some boy would climb up and throw down the " end of the rope and other boys pull on it, and that if they did " so the scaffold would fall over in the absence of ties or struts " to prevent that happening."

The judge said that as there were no struts, there is liability on the defendants. I realize that the plaintiffs were in difficulty in the way of witnesses of expert character, but a case of this kind must be determined on the evidence given, and liability ought not to be put on defendants unless it is shown that in doing that which they did, they failed to exercise the care which a reasonable person charged with their duties would exercise. This is not, as Mr. Wooll said, the ordinary case of allurement, that is, of a young child being tempted or enticed into a trap. The case depends on whether either of the defendants, or both, ought to have foreseen, as they left the structure in the condition in which it was left at midday on Saturday, January 8, a probability of some interference with their structure which might result in injury to passers-by. The judge found that they ought to have foreseen that which happened.

It is one stage to say that they ought to have foreseen that someone might go and drop the rope down, and that, having

done that, someone might swing on the end of the rope; but far, far removed, I think, from that stage is the position which arose here, that 11 or 12 boys should be pulling on the rope in a direction which would tend to bring the whole structure away from the building, and that while that was being done others should swing on the rope between those boys and the structure itself. If the defendants ought reasonably to have anticipated anything like that happening, then they are responsible in law; but on this evidence I do not see that they can be.

We were referred to *Bolton* v. *Stone* [1] (the cricket ball case) in which Lord Porter said [2]: "In the words of Lord Thankerton "in *Bourhill* v. *Young* [3] the duty is to exercise 'such reasonable "'care as will avoid the risk of injury to such persons as he "'can reasonably foresee might be injured by failure to exercise "'such reasonable care', and Lord Macmillan used words to "the like effect.[4] So, also, Lord Wright in *Glasgow Corporation* "v. *Muir* [5] quoted the well-known words of Lord Atkin in "*Donoghue* v. *Stevenson* [6]: 'You must take reasonable care to "'avoid acts or omissions which you can reasonably foresee "'would be likely to injure your neighbour'."; and Lord Porter added [7]: "It is not enough that the event should be such as can "reasonably be foreseen; the further result that injury is likely "to follow must also be such as a reasonable man would con-"template, before he can be convicted of actionable negligence. "Nor is the remote possibility of injury occurring enough; there "must be sufficient probability to lead a reasonable man to "anticipate it. The existence of some risk is an ordinary "incident of life, even when all due care has been, as it must "be, taken." And Lord Normand said [8]: "It is therefore not "enough for the plaintiff to say that the occupiers of the cricket "ground could have foreseen the possibility that a ball might "be hit out of the ground by a batsman and might injure people "on the road; she must go further and say that they ought, as "reasonable men, to have foreseen the probability of such an "occurrence."

Applying those tests, it seems to me impossible, on the evidence given in this case, to say that the defendants ought to have foreseen the probability of anything such as that which happened on Sunday, January 9, 1949. For these reasons I feel that these appeals must be allowed.

BIRKETT L.J. I am of the same opinion. I think that this judgment ought to be reversed primarily on the ground that the judge failed to assess properly the true quality of the evidence given. He ignored for the most part the evidence given for the defence, by men of great experience, expert in the particular

[1] [1951] A.C. 850.
[2] Ibid. 858.
[3] [1943] A.C. 92, 98.
[4] Ibid. 104.
[5] [1943] A.C. 448, 460.
[6] [1932] A.C. 562, 580.
[7] [1951] A.C. 850, 858.
[8] Ibid. 861.

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matter of scaffolding, and relied on certain evidence which, if truly appreciated, has not very much relevance to the issue to be determined. [His Lordship then summarized the judge's findings and considered them in the light of the evidence, and continued:] I venture to think that the judge was mistaken in assessing the evidence which was given before him, and that there was no real ground on which the findings which have been recited by my Lord could be sustained.

The only other point is whether it was reasonable that the defendants should have anticipated that a gang of boys would come on that piece of waste land and see the scaffolding; that one of them would be so adventurous as to climb to the top without a ladder (which no workman, I gather from the evidence, would have done), take the rope which was coiled, uncoil it, throw it down to his 10 or 11 companions, and then descend and join with them, while three of them hung on the rope in pendulum fashion; and then that 11 or 12 of these youths should pull in that horizontal way. All that was to be reasonably anticipated! For my own part, I think it is asking far, far too much of anyone to anticipate that that most extraordinary and unusual thing would in fact take place. I could very well understand children coming on to the site might play about with the uprights; but the idea that someone would go right to the top and uncoil the rope and throw it down, and that they should all indulge in this kind of thing seems to be asking people far too much in the way of reasonable anticipation. On the two main points in this case, therefore, first with regard to the evidence on which the findings are based, and, second, on this matter of reasonable foreseeability, or reasonable apprehension of events, the judge, with great respect, was wrong on both. I agree that this appeal ought to be allowed

HODSON L.J. I also agree. This accident happened because some mischievous boys between the ages of 12 and 16 pulled over a scaffold, and three smaller children who were on the spot were injured. The action is not brought against the boys; it is brought against the scaffolding company which built the scaffold, and against the builders who were using it, and the judge has found as against the constructors of the scaffolding that it was not properly constructed and not sufficiently strutted, and against the builders who were using the scaffolding that they should have realized that it was insufficiently secured, and against both defendants on the ground that it was reasonably foreseeable by either of them that such interference as took place here would probably occur.

Dealing with the last point first, I need add little to what Birkett L.J. has just said. It seems to me quite fantastic to say that the scaffolders, the constructors, or the builders, should reasonably have foreseen that boys would not only climb up the scaffolding (a task which, I suppose, is not particularly difficult

for an active young man), but should untie a rope which was coiled at the top 35 ft. from the ground, let the rope down, and it being a long rope 150 ft. long as against the 35 ft. height of the scaffolding, should be able to get far enough away from the scaffolding to give a lateral pull on the rope strong enough to pull the scaffolding over. I am bound to say I find it quite impossible to hold that that is reasonably foreseeable, in the language of *Bolton* v. *Stone*,[9] and in particular of the passage in Lord Normand's speech[10]: "It is therefore not enough for "the plaintiff to say that the occupiers of the cricket ground "could have foreseen the possibility that a ball might be hit out "of the ground by a batsman and might injure people on the "road; she must go further and say that they ought, as "reasonable men, to have foreseen the probability of such an "occurrence."

On the first question, whether there was evidence on which a judge could find that the scaffolding was insecure, I agree with my Lord.

[The remainder of his Lordship's judgment was devoted to a consideration of the judge's findings in relation to the evidence. He concluded as follows:] This was a scaffolding which was being used for workmen who were employed to plaster the wall, and all that had to be done was not only to carry the weight of the men and material, but to haul up and down vertically from the ground loads of up to about one cwt. at a time, and no question of horizontal pull was involved; so this point really merges in the point of foreseeability, which I have already mentioned. There was no question of constructing a scaffolding to resist horizontal pressure at all; the scaffolding was required for vertical work and not for horizontal stress; no abnormal horizontal stresses were to be expected and, to my mind, there is nothing in the point when one considers the evidence that this particular scaffolding ought to have been buttressed. I agree, therefore, that the appeal of both defendants should be allowed.

*Appeals allowed.*
*Judgment entered for both defendants.*

Solicitors: *Dodds, Ashcroft & Cook, Liverpool; Barrell & Co., Liverpool; Mawby, Barrie & Letts for Silverman & Livermore, Liverpool.*

M. M. H.

[9] [1951] A.C. 850.

[10] Ibid. 861.

[QUEEN'S BENCH DIVISION.]

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*Oct.* 6.

Lord Goddard C.J., Sellers and Havers JJ.

# *REGINA *v.* BARRY (GLAMORGAN) JUSTICES. *Ex parte* NAGI KASHIM.

*Justices — Practice — Clerk retiring with justices when considering question of fact.*

When justices retire to consider their decision and the only question for their consideration is one of fact, it is improper for their clerk, whose duty it is to advise them on the law, to retire with them.

Dictum of Lord Goddard C.J. in *Reg.* v. *East Kerrier Justices, ex parte Mundy* [1952] 2 Q.B. 719; [1952] 1 T.L.R. 1618; [1952] 2 All E.R. 144 applied.

*Per* Sellers J. It is the clerk's function to advise justices as to his own powers, and if they improperly ask him to retire with them, he should indicate to them that the only matter for consideration is one of fact.

APPLICATION for order of certiorari.

On February 13, 1953, the applicant, Nagi Kashim, a café proprietor, was convicted by the Barry justices of keeping 680 uncustomed American cigarettes with intent to defraud Her Majesty of the duty thereon. According to the applicant's affidavit, in his closing address his counsel requested the justices not to ask their clerk to retire with them, drawing their attention to the direction of the Divisional Court on this question in *Reg.* v. *East Kerrier Justices, ex parte Mundy.*[1] Although there was no suggestion that there was any matter on which the clerk could advise the justices, when they retired the clerk retired with them. It was contended that in view of the presence of the clerk with the justices when considering questions of fact the conviction was bad and ought to be quashed.

*T. E. Rhys-Roberts* for the applicant.
*R. Geraint Rees* for the justices.
*J. P. Ashworth* for H.M. Customs and Excise.

Cases cited in argument are contained in the judgments.

LORD GODDARD C.J. Last year *Reg.* v. *East Kerrier Justices, ex parte Mundy*[1] came before this court, and it emerged in the course of that case that the justices' clerk had retired with the justices when the only question that was before them was a question of fact. The court dealt with the particular facts of that case and came to the conclusion that the conviction must be quashed. When in my judgment I had announced the decision of the court, I said[2]: "I wish to mention another matter. I

[1] [1952] 2 Q.B. 719; [1952] 1 T.L.R. 1618; [1952] 2 All E.R. 144.

[2] [1952] 2 Q.B. 723.

"think that it has been said more than once in this court that "it is not right that the justices' clerk should retire with them. "It has been often said that the decision must be the decision of "the justices, not the decision of the justices and their clerk, "still less the decision of the clerk; and if the clerk retires with "the justices, the inevitable conclusion that people will form is "that he may influence the justices or may take some course "which it is for the justices alone to take. Justices can always "send for the clerk if they require advice on a point of law, "because that is what the clerk is there for; but it is not "desirable, and is irregular, for a clerk to retire with justices as "a matter of course when they are considering the facts. If they "want his advice, they should send for him from the court, where "he should remain until the justices either return into court or "send for him. I need not say whether we should have quashed "the conviction on the ground that the justices' clerk retired with "them. We think that it is undesirable and we hope in future "that justices' clerks will not retire with their bench; they should "only go if the justices require their advice."

In a case last Sittings—*Reg.* v. *Welshpool Justices, ex parte Holley* [3]—which, it is only fair to say, was not reported before the present case was before the Barry justices, I was at some pains to explain the position, and I said [4]: "Justices will, "I feel sure, recognize that it is their duty to obey a direction of "this court not only in the letter, but in the spirit, and that "they are not to get round the direction which was given in the "*East Kerrier* case [5] merely by pretending that they require the "presence of their clerk to advise them when there is nothing "but fact to be considered." We did not mean, of course, in the *East Kerrier* case [5] that if a question of law was raised the clerk should have to stay in the court room till the justices said: "Come out with us."

In the present case it seems that, at the end of the case for the prosecution, counsel for the applicant submitted that there was no case to answer in law. That, of course, at once raised a legal point, and the justices were entitled to tell their clerk to come out with them to give them his advice on the question of law that was raised. The question of law having been decided against the applicant, it remained for him to try to satisfy the justices, if he could, he being charged with being in possession of uncustomed goods, that he was in possession of them innocently or that they were not in fact uncustomed. That was a pure question of fact. Whether it is desirable for counsel before the justices retire to remind them of the *East Kerrier* case,[5] I confess I have some doubt. The fact that they are reminded of it may lead them to take another view, and the course which counsel took may not be desirable. But when they retired on the second occasion they took their clerk with them. All the justices have

[3] [1953] 3 W.L.R. 583; [1953] 2 All E.R. 807.

[4] [1953] 3 W.L.R. 586.

[5] [1952] 2 Q.B. 719.

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filed affidavits, and not one of them has suggested that there was any sort of question on which they required the advice of their clerk. Why, then, did the clerk go out with them? If I was asked to draw an inference, I should say that the clerk always had gone out with them and he and the justices were intending to show that the clerk should go out with them whatever this court had said. The justices cannot get round the direction this court gave in the *East Kerrier* case [5] merely by asking their clerk to go out with them when they do not want him for any purpose whatever, and they do not pretend in the present case that they wanted him. Therefore, they ought not to have asked him to go out, and when the clerk found there was nothing on which the justices required his assistance he ought to have come out. It is as well that clerks and justices should understand that this court requires them to follow directions which this court has given from time to time. Ever since there have been justices of the peace in this country they have been subject to the control of the Court of Queen's Bench, now the Queen's Bench Division of the High Court, and if they, knowing quite well the directions this court has given, flout the directions of the court and act contrary to those directions, this court will have no hesitation in sending their names to the Lord Chancellor and calling attention to what has been done.

I regret very much the attitude which the justices have taken up in this case. They apparently do not understand what lies at the root of the direction given in the *East Kerrier* case.[5] The direction was given because the decision must be the decision of the bench, and only on a point of law are they entitled to take the advice of their clerk. On a point of fact, it is essential that the public should be able to see and to understand that the decision is the decision of the justices and of nobody else, and one of the considerations which the court had in mind in the *East Kerrier* case [5] was the very thing that has happened in the present case. The case does not raise any particular merits on the applicant's part, but that is neither here nor there. The point is that he had previous convictions in courts in which this very clerk had been sitting as clerk. I am not going to impute to the clerk any misconduct in the justices' room, or suggest for a moment that when he went into the justices' room he said to the justices: "This man, Kashim, "has been before the courts time and again." But what would the applicant and the people who knew that the applicant had been before a court in which the same clerk had been sitting think? It is important to bear in mind that justice must not only be done but must be manifestly seen to be done. If it appears that there is an opportunity of giving information to justices other than proved in open court, it causes distrust in the minds of people and it leads defendants to think that they have not had a fair trial.

In the present case I have no doubt that the right course for

[5] [1952] 2 Q.B. 719.

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the court to take is to quash this conviction to show that this court is resolved that justices shall obey the directions which the court gives, and if they do not obey the directions in the spirit as well as in the letter, other consequences will follow. The order will go for certiorari to quash.

SELLERS J. I agree. I would only emphasize that it is the clerk's function to advise the justices as to his own powers as they have been defined by this court, and even if the justices do ask him to retire with them, if he is satisfied that the only matter for consideration is one of fact, he should so indicate that to his justices.

HAVERS J. I entirely agree with everything which my Lord has said, and I have nothing to add.

*Application granted.*

Solicitors: *D. B. Levinson & Co. for F. P. Jones-Lloyd & Jones, Barry; Torr & Co. for R. H. C. Rowlands, Cardiff; Solicitor, Customs and Excise.*

J. D. P.

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* *In re* WATKINS, DECD.
WATKINS *v.* WATKINS

1953
*Oct.* 9, 13.

Harman J.

[1952 W. 148.]

*Husband and Wife—Marriage—Validity—Proof—Desertion by former husband—Former husband not heard of for twenty-five years—No evidence of his death—No inquiries—Subsequent marriage with testator—Presumption of death—Family provision—Wife formerly testator's housekeeper—Inheritance (Family Provision) Act*, 1938 (1 & 2 *Geo.* 6, *c.* 45).

An application for provision under the Inheritance (Family Provision) Act, 1938, was made by a woman who had gone through a ceremony of marriage with the testator in 1948. The plaintiff stated in evidence that her first husband had deserted her in 1923 and that she had not seen him since or heard from him or (with the exception of information which she had received that he had died in 1942) heard anything about him, and that his father and sister, with whom she kept in touch until their deaths in 1927 and 1937, seemed to know nothing of him. In the belief, therefore, that her first husband was dead (founded also on a death certificate, which it was afterwards discovered did not relate to her first husband), she married the testator on January 30, 1948.

The testator died on July 26, 1951, leaving net estate of the value of approximately £15,000. By his will he provided for the payment of an annuity of £2 a week to the plaintiff and bequeathed the residue of his estate to his brother and four sisters in equal shares. The plaintiff, who had formerly been the testator's housekeeper, being dissatisfied with the provision made for her under the will, took out a summons in which she asked for reasonable provision to be made for her.

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*Held*, that, although the plaintiff had apparently not made any adequate search to ascertain whether her first husband was alive, as he had not been heard of by his nearest relatives since 1922, at this distance of time, a jury would be entitled to infer or presume that he was dead by 1948; the plaintiff was therefore entitled, by 1948, to assume that she was free to marry and describe herself as a widow; she was therefore a dependant of the testator and entitled to make an application for provision; and £4 a week should be provided for her.

*Prudential Assurance Co.* v. *Edmonds* (1877) 2 App.Cas. 487; *In re Peete* [1952] W.N. 306; [1952] 2 T.L.R. 383; [1952] 2 All E.R. 599, considered.

ADJOURNED SUMMONS.

The plaintiff, Mary Ella Watkins, married the testator in 1948. Her former husband, William Edwards (who was believed to have died in 1942) deserted her in 1923 and they never resumed cohabitation. In 1946, in accordance with the request of the testator, she went to reside with him as his housekeeper and on January 30, 1948, they were married.

The plaintiff's first husband was not heard of by her after 1923 (with the exception of information given to her by a cousin of her first husband in 1942 that he had died at Bath on October 30, 1942); and, although she had kept in touch with his father and sister, they appeared to have had no communication with him nor to have heard anything of him. At the date, therefore, of the second marriage the plaintiff had apparently caused no adequate search to be made to ascertain whether or not he was alive. Assuming, therefore, that she was a widow and free to marry the testator, she married him on January 30, 1948.

The testator died on July 26, 1951, having, by his will dated February 7, 1948, directed his trustees to set aside a fund to provide for his widow an annuity of £2 a week free of duty; and he directed that his residuary estate should be divided between his brother and his four sisters in equal shares. His net estate was approximately of the value of £15,436.

The widow, being of opinion that the provision made for her was inadequate, took out a summons in which she asked that such reasonable provision might be ordered to be made out of the net estate of the testator for her maintenance as the court might think fit.

*James A. Gibson* for the plaintiff.

*R. W. Goff Q.C.; K. W. Rubin* for defendants.

Cases referred to in argument: *In re Peete* [1]; *Prudential Assurance Co.* v. *Edmonds* [2]; *Tweney* v. *Tweney* [3]; *Doe d. France* v. *Andrews* [4]; *Nepean* v. *Doe d. Knight* [5]; *Doe d. Lloyd* v. *Deakin* [6]; *Doe d. Jesson.* [7]

[1] [1952] 2 T.L.R. 383; [1952] 2 All E.R. 599.
[2] (1877) L.R. 2 A.C. 487.
[3] [1946] P. 180; 62 T.L.R. 266; [1946] 1 All E.R. 564.
[4] (1850) 15 Q.B. 756; 117 E.R. 644.
[5] (1837) 2 M. & W. 894.
[6] (1821) 4 B. & Ald. 433.
[7] (1805) 6 East 80.

HARMAN J. This is an application for provision under the Inheritance (Family Provision) Act, 1938. The plaintiff started the proceedings on the footing that she was the widow of the testator and therefore was a dependant entitled to apply to the court under the Act. The brother and sisters of the deceased, who were the beneficiaries in remainder under the will, and who oppose the application, challenge that statement in limine by contending that the plaintiff is not their brother's widow and therefore she does not qualify for provision under the Act.

A great deal of evidence has been filed on the opposition side. The first statement which the plaintiff made when she, so to speak, opened her case, is contained in a statement exhibited to her first affidavit: "I am the widow of the above named "William Elias Watkins. I was married to the deceased in "1948. At the time of our marriage I was a widow and the "deceased was a bachelor. My former husband, who died in "1942, deserted me in or about 1923 and we never resumed "cohabitation." There is a plain statement, and in an ordinary case that would be quite a sufficient one: but that was challenged at once on behalf of the defendants by David Thomas Watkins, the brother of the deceased, who obtained through the plaintiff's solicitors the death certificate of the man whom the plaintiff had mentioned as being her husband who deserted her in 1923 and died in 1942. When that is produced, it turns out to be the certificate of a death on October 30, 1942, of one Ernest William Edwards, of 21, Kingsmead Terrace, Bath; a Ministry of Works caretaker, aged 67 years, the informant being the son, N. M. Edwards.

In addition to producing that certificate, David Thomas Watkins produced the first marriage certificate, or what he said was, and what I must take to be, the first marriage certificate, of the plaintiff, which shows that she was married on November 21, 1913, she being then 22 years old and a spinster, to one William Edwards, a bachelor, aged 25 years, he being a coal-miner; they both being inhabitants of Pontypool. Of course there are differences between the description of her husband in the marriage certificate and that of the man who died at Bath in October, 1942; and it is now conceded by the plaintiff that she was wrong in supposing that the man who died at Bath in 1942 was her husband, and that she has no grounds on which she can properly rely to show that her husband died at Bath, or indeed anywhere else, in 1942. That being so, it is said on behalf of the defendants that the plaintiff is not qualified as a dependant at all.

In answer to that she puts forward the certificate of her marriage to the testator, a marriage celebrated on January 30, 1948, in which she is described as a widow and he as a bachelor. There is no doubt that that is evidence of the marriage, and I

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think I must so take it, as Pilcher J. did in *Tweney* v. *Tweney*,[1] in these terms: "The petitioner's marriage to the respondent being "unexceptionable in form and duly consummated remains a good "marriage until some evidence is adduced that the marriage was, "in fact, a nullity."; and again: "This court ought to regard "the petitioner, who comes before it and gives evidence of a "validly contracted marriage, as a married woman, until some "evidence is given which leads the court to doubt that fact." So, then, the certificate is, if no more evidence is produced, sufficient evidence that she was a widow, which she gave herself out to the registrar to be.

Roxburgh J. had this question before him last year in *In re Peete*,[2] and there the circumstances were these. Again the plaintiff described herself in a marriage certificate, which she produced, as a widow, and that was prima facie evidence of the fact that she was in a position to contract a valid marriage, but it appeared, when the matter was gone into, that she had told the registrar that she was a widow, because she supposed on hearsay evidence that her husband had been killed in an explosion at a factory three years before the second marriage, one date being 1916 and the other 1919. Roxburgh J., when he looked into the evidence on which she made that statement, came to the conclusion that it was unreliable and held that the statement that she was a widow was of no probative value and that she had failed to prove that she was a widow; and, therefore, he dismissed her application in limine. He said at the end of his judgment[3]: "That being so, it seems to me that the plaintiff "has not proved that she was the widow of the deceased, because "she has not proved that her first husband died before June 23, "1919, and that she had the capacity to marry the deceased "when she went through the ceremony of marriage to him. It "occurred to me that, if I was not prepared to accept the evid-"ence of what the sister of the first husband had told the "plaintiff, the latter"—that is the plaintiff—"might be able "to set up a case that the husband had disappeared over a long "period in circumstances in which she would be entitled to pre-"sume that he was dead at the time of the marriage, but the "evidence does not prove any such case." So that Roxburgh J. was prepared to envisage a case in which, although no direct evidence of the death of the first husband was forthcoming, the court would be asked, on the circumstance of the lapse of time alone, to assume that the first husband was dead and that the plaintiff was really in a position to contract a second marriage.

In the present case the lapse of time is really considerable. The plaintiff last saw her first husband in 1922; she did not marry the testator till 1948, and, therefore, there was a very long interval between the two dates; and it seems to me that there

[1] [1946] P. 180, 182; 62 T.L.R. 266; [1946] 1 All E.R. 564.

[2] [1952] 2 All E.R. 599; [1952] 2 T.L.R. 383.

[3] [1952] 2 All E.R. 599, 602.

can be very little doubt that, if she had at one time or another made enquiries from the people who might be supposed to have heard of him, or if there was evidence aliunde about the knowledge of such people, it would be quite easy for me sitting as a jury to assume that the man was dead.

This is a state of things which has been provided for from time to time by statute as a matter of convenience. It was long the law that when a spouse had not been heard of for more than seven years a man or woman, even though he or she was a deserting party to the marriage, could not be convicted of bigamy if he or she contracted a second one, because the law under a Statute of Charles II was that, where there were leases for lives, if one of the lives had not been heard of for more than seven years it might be assumed to have dropped; and that often was the prevailing fact in ejectment actions brought under the old fiction of an action by John Doe against the tenant. It has always been possible since 1937 for a man or a woman to petition the Divorce Division for dissolution of a marriage where the spouse has not been heard of for seven years and there is no reason to suppose that the spouse is alive.

Those are all, of course, matters where convenience in conducting human affairs has brought about statutory interference. It has led to a view that there is a kind of magic in seven years, and indeed there are indications of statements that for seven years one will presume a man to be alive, though one does not hear of him, but at the end of that time the presumption drops, and presumably then a presumption arises that the man is dead. But Mr. Goff asks me to say that, although it is true that during the first seven years one presumes a man to be alive, after the seven years one does not assume him to be dead, unless there are circumstances justifying that assumption, and he argued: What is there here? The first husband was a miner. He was in the army and, after the first war, served in 1920 or so in Ireland in the troubled times there. He appears not to have set up any matrimonial home in a regular way with the plaintiff. They had two children, one of whom was born in 1913 and the other in 1919. The husband deserted the plaintiff for another woman in 1921. He appears to have returned one day in 1922 and asked the plaintiff to take him back, saying, according to her, and I have no reason to doubt this, that, if she would not, she would never see him again; and she would not take him back, and she never has seen him again; and, says Mr. Goff, of course there is every reason to suppose that he would keep out of the way. He says there is no reason to suppose that he is dead, because, first, he would be only 65 and had a trade which takes men all over the world, and which does not attach them to one place or another, namely, that of a miner; and really, Mr. Goff contends, there is no evidence that the man is dead beyond the fact that he has kept out of his wife's way ever since he said he was going to leave her for ever; and he had good reason for keeping out of

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the way, because, of course, he has not maintained her. Nor do his children know anything about the matter. They both at a late stage have given evidence.

There is thus a very long period of time. There is this fact, that the plaintiff did keep in touch with her husband's father until his death in, I think, 1927, and he apparently had no communication with his son. She also from time to time had some communication with her husband's sister, who died in 1937, and, says she, no mention was ever made between them of the husband. I am asked to infer from that, and I think I can, that they both assumed that he was dead, or, at any rate, they neither of them ever heard anything of him. She says that he had two brothers, but she never kept in touch with them.

The truth of the matter is that so long as the plaintiff saw no prospect of re-marrying she did not trouble herself much about it. She heard this rumour about his being dead from some relation of her former husband in 1942 and, when she wished to persuade the testator that she was in a position to marry him, she bethought herself of what was no more than a rumour, and obtained this certificate, which satisfied her and apparently the testator also, and which we now know was no proper evidence of her capacity.

What then ought I to assume? Supposing I was charging a jury here, should I have to tell them that they were not at liberty to assume from this that he was dead by 1943, or should I have to tell them that the lapse of time was such that they were entitled to suppose him dead?

There is a good deal of authority on both sides on this point. On the side of the plaintiff there are several common law cases, beginning with *Nepean* v. *Doe. d. Knight.*[4] That was an ejectment action, and the point decided was that, though there was a presumption after a certain lapse of time that a man was dead, there was no presumption that he died at any particular point of time in that period, and, therefore, the actual point decided is not directly material. The case came before the Exchequer Chamber (in error), and Lord Denman C.J. gave the court's judgment, which was a considered one. He said this[5]: "The "doctrine there laid down"—that is the doctrine of the Court of King's Bench—"is, that where a person goes abroad, and is "not heard of for seven years, the law presumes the fact that "such person is dead, but not that he died at the beginning or "the end of any particular period during those seven years." Then he goes on: "After fully considering the argument at the "bar, we are all of opinion that the doctrine so laid down is "correct." Then he referred to the statutory provisions about the falling in of lives, and continued: "It is true, the law pre-"sumes that a person shewn to be alive at a given time remains "alive until the contrary be shewn, for which reason the onus

[4] (1837) 2 M. & W. 894. [5] Ibid. 912, 913.

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" of shewing the death of Matthew Knight lay in this case on the " lessor of the plaintiff. He has shown the death, by proving the " absence of Matthew Knight, and his not having been heard of " for seven years, whence arises, at the end of those seven years, " another presumption of law, namely, that he is not then alive." There the presumption, therefore, is stated as arising simply from the lapse of the seven years.

I think that much to the same effect is to be found in *Doe d. George* v. *Jesson*.[6] There the question was of a real property limitation at the time, and the judgment was given by Lord Ellenborough C.J. in these terms: " As to the period when the brother " might be supposed to have died, according to the Statute of 19 " Car. II, Chapter 6, with respect to leases dependent on lives, " and also according to the Statute of Bigamy (1 Jac. 1, c. 11) " the presumption of the duration of life, with respect to persons " of whom no account can be given, ends at the expiration of " seven years from the time when they were last known to be " living. Therefore, in the absence of all other evidence to show " that he was living at a later period, there was fair ground for " the jury to presume that he was dead at the end of seven years " from the time when he went to sea on his second voyage, which " seems to be the last account of him." There again, it is, as it were, suggested, though it is not stated in so many words, that presumption of life is for the first seven years, but drops at that point, and another presumption replaces it, which is the presumption that the man is dead.

Similarly, in *Doe d. Lloyd* v. *Deakin*,[7] the court cited Lord Ellenborough's decision in *Doe d. George* v. *Jesson*,[8] which I have just read, and agreed with it; but there the person not heard of was a person who was the tenant of certain lands, and, therefore, there was good reason to suppose that he would come and collect the rents or take some action regarding them; and, as he had not done so for seven years, it was natural to presume that he was dead.

It is said, on the other hand, that mere lapse of time without anything more is of no effect at all, and for that two cases are relied on; one, *Doe d. France* v. *Andrews*,[9] where in an ejectment action in a case of a lease for lives the third life was someone about whom nothing whatever was apparently known. The head note states that " No witness was called who had ever known the " third; and, except the mention of him in the lease (which " described him as aged ten years), there was no proof that he " had ever existed. No evidence of search for him was given. " Held that, to raise the presumption of his death, there should " have been evidence that he had not been heard of by those " persons who would naturally have heard of him had he been " alive, or that search had been ineffectually made to find such a

[6] (1805) 6 East 80, 85.
[7] (1821) 4 B. & Ald. 433.
[8] 6 East 80.
[9] (1850) 15 Q.B. 756.

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"person; and that the mere fact that no witness called had "heard of him was not sufficient." I think that fairly sums up the result of the case. Patteson J. said this [10] "The mere lapse "of time does not raise a presumption of death, unless you go "farther and show that the person has been absent, and not "heard of by those who would have heard of him if he had "returned," and there no enquiries had been made.

Lastly, there is *Prudential Assurance Co.* v. *Edmonds*,[11] a case of a policy. Lord Blackburn referred to *Doe d. France* v. *Andrews*,[12] which I have just cited, and said this: the plaintiff "relied upon the rule of law which is generally laid down in some-"thing like these terms; if a man has not been heard of for seven "years that raises the presumption that he is dead. It is generally "so enunciated. I do not say that that is the correct way of "enunciating it, but I think it may be fairly enough put in those "words for this purpose. I think, having regard both to the "reason of the thing and the decisions, we must take 'not "'being heard of' in a certain sense. There was seldom or never "a man who had reached the age of forty with regard to whom "it would not be easy to call scores of people to say, 'I was at "'school with him, I knew him perfectly well, and I have not "'heard of him for the last seven years.' But that would not "be enough to raise a presumption that he was dead, because, "if ever so much alive, those people might not have heard of "him. My Lords, it appears from the case of *Doe* v. *Andrews* [13] "that it is necessary, in order to raise the presumption, that "there should have been an inquiry and search for the man "amongst those who, if he was alive, would be likely to hear of "him." Then, after giving an analogy, he continued: "In like "manner, in order to raise a presumption that a man is dead "from his not having been heard of for seven years, you must "inquire amongst those who, if he was alive, would be likely to "hear of him, and see whether or no there had been such an "absence of hearing of him as would raise the presumption that "he was dead."

Therefore, the criticism that really can be raised against the plaintiff's evidence is that no really adequate search has been made. She has not made any inquiries so far as we know. When the brothers of the first husband were alive, who are now said to be dead, she did not ask them. On the other hand, she is the wife, or was the wife, and the nearest relations are the two sons. There was a father and there was a sister, and none of those people has ever heard of this man since 1922, and in my judgment a jury would be entitled at this distance of time to infer that the man was dead by 1948, or to presume that. It would be, I think, a sorry state of things if for criminal purposes a jury might assume that a man was dead, and for the purposes of the Divorce Division a similar presumption might be made, but in the

[10] Ibid. 760.
[11] (1877) 2 App.Cas. 487, 508.
[12] (1850) 15 Q.B. 756.
[13] Ibid.

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Chancery Division no such presumption could be made. In my judgment, she was entitled by 1948 to assume that she was free to marry and describe herself as a widow, and the presumption is that that was right. Consequently, I think she is a dependant of the testator and entitled to take these proceedings.

If that is so, what is the result? He has left her an annuity of £2 a week in a will made a few days after he married her in 1948. They only lived together as man and wife for two years, so far as I know. She came to the house in 1946 as his housekeeper. The whole of the family allege, and they are a very united family and very hostile to this woman, that she forced her way into the house more or less and planted herself on the testator; and it appears that they made their very best efforts to stop it happening. It is also said that she was rather high-handed with him, though it is not suggested that she did not look after him properly when they were married.

That is the situation. There is no doubt that she came in in 1946 as the housekeeper, and married him after two years, and that he died three years later. She had not very long acted as his wife; she had not given up her life to him. Until 1946, anyhow, she was subsisting by her own exertions, because she said that her first husband never provided for her. Is it right that she should have only £2 a week? Under the Act jurisdiction is founded, and must be founded, on the proposition that the court is of opinion that the will does not make reasonable provision for the maintenance of a dependant. Is £2 a reasonable provision? In my judgment it is not. Under whatever circumstances this man married the plaintiff, he made her his wife and made himself morally responsible for her, and, if his family are right in saying that she bullied him into it, so be it; it does not make any difference to the fact that she had a position which gives her moral rights, and I think legal rights, under this Act against her former husband.

£2 a week is not a living subsistence for a woman, more especially where the husband was a man in comfortable circumstances, as I am told he was. There is an estate of £15,000, and the beneficiaries are his brother and sisters, all persons of substance, and not therefore in absolute need of his bounty. The parties are content that I should take £15,000 as the amount of this estate and 4 per cent. as the proper rate of interest, because the estate has in fact never been realised, and the farm is still being carried on. If that were so, I could give her up to, I think, about £5 or so a week; but I do not think it is a case for the maximum. The marriage, as I say, was only for a few years, but I think that it is a case where she should be able to live the rest of her years in decency, and I propose to bring that about so far

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as I can by doubling the annuity with which she is provided by the will. She ought to have £4 a week, in my opinion, and that is what I propose to order her to be provided with by the executors as from the date of the death.

*Order accordingly.*

Solicitors: *Gibson & Weldon for Everett & Tomlin, Pontypool; Drury, Hopgood & Co. for Gabb, Price and Fisher, Abergavenny.*

J. L. D.

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[CHANCERY DIVISION.]

1953
*Oct.* 14, 15.

Danckwerts J.

* BOARLAND (INSPECTOR OF TAXES) *v.* KRAMAT PULAI LD.

*Revenue — Income tax — Profits — Expenses — Deduction—Company—Political propaganda in chairman's report—Cost of printing and publishing—Whether expenses wholly and exclusively for purposes of trade—Fact or law—Whether expenses capable of falling within rule—Income Tax Act,* 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. D, Cases I and II, r.* 3 (*a*).

One of three British companies carrying on tin mining activities in Malaya claimed that, in the computation of their income tax, they were entitled to deduct as expenses under rule 3 (*a*) of Cases I and II of Sch. D to the Income Tax Act, 1918, their share of expenses incurred in printing, publishing and circulating a pamphlet containing the "supplementary remarks" of their chairman to the report at the annual general meetings of the three companies on December 15, 1949. The pamphlet contained throughout an attack on the acts and policy of the Socialist Government, and urged that they should not be re-elected at the next general election. The General Commissioners decided in favour of the company, and the Crown appealed from that decision:—

*Held*, reversing the decision of the commissioners, that as it was a question of law whether the pamphlet was capable of being wholly and exclusively for the purposes of advancing the company's trade, and as a perusal of the pamphlet showed that that purpose was not its sole object, the expenditure incurred in its production did not fall within the exempting provisions of rule 3 (*a*).

Principles in *Morgan* v. *Tate & Lyle Ld.* [1953] Ch. 601; [1953] 3 W.L.R. 1; [1953] 2 All E.R. 162 applied.

*Smith* v. *Incorporated Council of Law Reporting for England and Wales* [1914] 3 K.B. 674; 30 T.L.R. 588 considered.

APPEAL by case stated from a decision of the Commissioners for the General Purposes of the Income Tax Acts for the City of London.

The respondent company, Kramat Pulai Ld., with two other companies, Southern Malayan Tin Dredging Ld. and Malayan Tin Dredging Ld., constituted a group of three companies, registered in London, and carrying on tin mining activities in Malaya, the group being known collectively as "Malayan."

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The respondents claimed that in the computation of their income tax, they were entitled to deduct under rule 3 (*a*) of Cases I and II of Sch. D to the Income Tax Act, 1918,[1] their share of expenses incurred in printing, publishing and circulating a pamphlet containing the supplementary remarks addressed by the then chairman of the three companies at the annual general meetings of the companies on December 15, 1949.

The pamphlet was directed against the acts and policy of the Socialist Government, which, the chairman said, had had an extremely adverse effect on the tin industry. [The relevant passages are cited in the judgment.] The pamphlet was circulated to the members of both Houses of Parliament as well as to members of the three companies, and it was published in the "Times" and "The Financial Times" newspapers. The expenses incurred in respect of the pamphlet by the three companies was some £2,550, the respondent company's share being agreed at £193.

The commissioners held that this sum was deductible under rule 3 (*a*), and the Crown appealed from that decision.

*Sir Reginald Manningham-Buller S.-G.* and *Sir Reginald Hills* for the Crown.

*Roy Borneman Q.C.* and *C. N. Beattie* for the respondent company.

Cases referred to in argument: *Bentleys, Stokes & Lowless* v. *Beeson*[2]; *British Insulated and Helsby Cables Ld.* v. *Atherton*[3]; *Foulds* v. *Clayton (Inspector of Taxes)*[4]; *Inland Revenue Commissioners* v. *Dowdall O'Mahoney & Co. Ld.*[5]; *Mitchell* v. *B. W. Noble Ld.*[6]; *Morgan* v. *Tate & Lyle Ld.*[7]; *Rushden Heel Co.* v. *Keene*[8]; *Smith* v. *Incorporated Council of Law Reporting for England and Wales*[9]; *Smith's Potato Estates Ld.* v. *Bolland*[10]; *Strong & Co. of Romsey Ld.* v. *Woodifield*[11]; *Usher's Wiltshire Brewery Ld.* v. *Bruce*.[12]

DANCKWERTS J. [having stated the facts]: The relevant statutory provision laying down what expenses may be deducted for the purposes of assessing income tax upon profits of the

[1] Income Tax Act, 1918, Sch. D, Cases I and II, r. 3: "In computing "the amount of the profits or gains "to be charged, no sum shall be "deducted in respect of—(*a*) any dis- "bursements or expenses, not being "money wholly and exclusively laid "out or expended for the purposes of "the trade, profession, employment, "or vocation: . . ."

[2] [1952] W.N. 280; [1952] 1 T.L.R. 1529; [1952] 2 All E.R. 82.

[3] [1926] A.C. 205; 42 T.L.R. 187.

[4] [1953] T.R. 203; T.C. Leaflet, No. 1649.

[5] [1952] A.C. 401; [1952] 1 T.L.R. 560; [1952] 1 All E.R. 531.

[6] [1927] 1 K.B. 719; 43 T.L.R. 245.

[7] [1953] Ch. 601; [1953] 3 W.L.R. 1; [1953] 2 All E.R. 162.

[8] [1948] 2 All E.R. 378; 30 T.C. 298.

[9] [1914] 3 K.B. 674; 30 T.L.R. 588.

[10] [1948] A.C. 508; 64 T.L.R. 430; [1948] 2 All E.R. 367.

[11] [1906] A.C. 448; 22 T.L.R. 754.

[12] [1915] A.C. 433; 31 T.L.R. 104.

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taxpayer—in this case the respondent company—is to be found in rule 3 of the rules for Cases I and II of Sch. D to the Income Tax Act, 1918. [His Lordship read rule 3 (*a*).] The rule is expressed in a curious negative manner, but the result is that, in order for any expenses to be deducted, they must be wholly and exclusively laid out or expended for the purposes of the trade of the company.

That phrase in rule 3 (*a*) has received judicial interpretation in a large number of cases, and the law is very conveniently summarized, after a full examination of the cases, by Jenkins L.J. in *Morgan* v. *Tate & Lyle Ld.*,[1] where, after examining the cases on the subject very fully, he reached the following conclusions[2]: "The principles which emerge seem to be these: (1) The prohi- "bition against the deduction of disbursements or expenses not "being money wholly and exclusively laid out or expended for the "purposes of the trade means that, in order to be deductible, "a disbursement or expense must be laid out or expended wholly "and exclusively for the purpose of enabling the trader con- "cerned to carry on and earn profits in the trade (Lord Davey "in *Strong & Co. of Romsey* v. *Woodifield*).[3] But (2) notwith- "standing Lord Davey's additional observation to the effect that "the disbursement must be made 'for the purpose of earning "'the profits,' Lord Loreburn's observation in the same case "to the effect that disbursements to be deductible must be "'really incidental to, the trade itself,' and Rowlatt J.'s refer- "ence in *Union Cold Storage Co. Ld.* v. *Jones*[4] to 'bringing "'grist to the mill,' it is clear that disbursements to be deduct- "ible need not be directly or immediately productive of profit. "'A sum of money expended . . . voluntarily and on the "'grounds of commercial expediency, and in order indirectly to "'facilitate the carrying on of the business, may yet be expended "'wholly and exclusively for the purposes of the trade' (*per* "Lord Cave L.C. in *Atherton's* case[5]). (3) Payments made for "the purpose of preserving the assets or goodwill of a business, "and thereby safeguarding its earning capacity, and payments "for protecting the trader from losses in his trade or from being "deprived of the means of carrying it on, may be wholly and "exclusively laid out for the purposes of the trade, just as much "as payments made for the immediate purpose of producing or "increasing profits. (Compare the fire insurance premiums in "*Usher's Wiltshire Brewery Ld.* v. *Bruce*,[6] the payment to "the retiring director in *Mitchell* v. *B. W. Noble Ld.*,[7] the legal "expenses in *Southern* v. *Borax Consolidated Ld.*,[8] and the "discharge of the liabilities of the predecessor in business in

[1] [1953] Ch. 601; [1953] 3 W.L.R. 1; [1953] 2 All E.R. 162.
[2] [1953] Ch. 639.
[3] [1906] A.C. 448, 453; 22 T.L.R. 754.
[4] (1923) 8 T.C. 725, 736.
[5] [1926] A.C. 205; 42 T.L.R. 187.
[6] [1915] A.C. 433; 31 T.L.R. 104.
[7] [1927] 1 K.B. 719; 43 T.L.R. 245.
[8] [1941] 1 K.B. 111; [1940] 4 All E.R. 412.

" *Cooke* v. *Quick Shoe Repair Service*.[9]) " Then there is another case which is mentioned, which does not affect the present case, but I will read it to complete the paragraph: " But (4) payments " made out of profits when earned (such as the Irish tax in " *Inland Revenue Commissioners* v. *Dowdall O'Mahoney & Co. Ld.*[10]), or in relation to the determination of a liability to tax " on those profits (as in *Smith's Potato Estates Ld.* v. *Bolland* [11]), or (by parity of reasoning) payments made with a view " to preventing the transfer from one person or class of persons " to another of the right to receive, through the trader, the " profits when earned, are not made for the purposes of the " trade within the meaning of the statutory prohibition."

In *Morgan* v. *Tate & Lyle Ld.*[12] the question with which the Court of Appeal were concerned was whether it was permissible to deduct the expenses incurred by a sugar refining company in launching a political campaign for the purpose of endeavouring if possible to prevent the nationalization of the sugar industry. It was held that such an expense fell within the terms of the rule, and was therefore deductible from the profits of the company for the purposes of tax. As it will appear presently, that decision is a long way from the facts of the present case, but the principles which were there considered by the Court of Appeal are material to the point which I have to decide. The decision of the Court of Appeal is under appeal to the House of Lords, but of course for the purpose of my judgment I must take the law as being correctly laid down by the majority of the Court of Appeal in *Tate & Lyle's* case,[12] although Singleton L.J. dissented from the rest of the court.

In the present case, the expenses which I have to consider are a share amounting to £193, in the case of the respondent company, of printing, publishing and circulating the chairman's supplementary remarks at the annual general meeting on December 15, 1949. I do not propose to read the whole of this pamphlet, but it is in effect an attack throughout the whole of it on the policy and acts of the Socialist Government which was in office after 1945, and was still in office at the date of the meeting in question. The author of the remarks does not state that he is addressing the shareholders of the companies as chairman of the companies in question, but in these words: " I " therefore address the following supplementary remarks to you, " not as a politician, but as an independent Englishman, who, " like yourselves, has the interests of our Country, Common- " wealth and Empire, including Malaya, very much at heart." He then proceeds to discuss a number of things which he considers to be mistaken or foolish acts of policy on the part of the Socialist Government, and it is only incidental, as it seems

[9] (1949) 30 T.C. 460.

[10] [1952] A.C. 401; [1952] 1 T.L.R. 560; [1952] 1 All E.R. 531.

[11] [1948] A.C. 508; 64 T.L.R. 430; [1948] 2 All E.R. 367.

[12] [1953] Ch. 601.

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to me, that he discusses at all the effects of Socialist policy upon the operations of the tin companies concerned.

The writer of the pamphlet, after quoting an article in "The "Recorder" and the quotation "Socialist propaganda preached "class hatred and disunity," says: "'These are not pretty "'words,' says 'Brutus,' 'but they are true.' Well, of course "they are, and they should be rammed home to the younger "generation, so that they can be informed about these synthetic "patriots, before they record their votes at the coming general "election." A speech of that kind cannot, on its face, possibly fall within the limits of a rule, which requires the expenditure in question to be made wholly and exclusively for the purpose of the trade or the company. But it is suggested that however unreasonable I may think the conclusion reached by the General Commissioners, the question which is in issue is a question of fact, and I am bound by their decision and may not give effect to the conclusion which I would have reached myself on the evidence which was given before the general commissioners, unless it can be said that there is no evidence upon which the general commissioners could have reached the conclusion which they did reach.

In answer to that, the Solicitor-General has referred me to the observations of Lord Reid in *Inland Revenue Commissioners* v. *Dowdall O'Mahoney & Co. Ld.*,[13] a decision of the House of Lords, where Lord Reid said: "It was argued for the respon- "dents that this is a question of fact, and that therefore the "decision of the Commissioners on this matter is final in their "favour. I cannot accept this argument. If certain payments "made by a taxpayer are of such a kind that they are capable "in law of being regarded as coming within the exception in "rule 3 (*a*), then no doubt it is for the Commissioners to deter- "mine whether the circumstances of the case are such that in "fact they do come within that exception. But it is in my "judgment a question of law whether particular payments are "of a nature capable of coming within the exception, and that "is the issue here."

In answer to that quotation Mr. Borneman says that he accepts the principles laid down completely but if it is possible for the expenses in question to come within the rule, then it is a question of fact whether they do come within the rule, as indeed is said by Lord Reid; and he says that, once having come to the conclusion that the expenses may come within the rule, the judgment of the commissioners on the evidence before them is binding and cannot be upset by me if there was any evidence at all on which they could come to that conclusion. In support of that, he referred me to a decision of Scrutton J. in *J. W. Smith* v. *The Incorporated Council of Law Reporting for England and Wales.*[14] The point in that case was very different from

[13] [1952] 1 T.L.R. 560, 565.

[14] [1914] 3 K.B. 674; 30 T.L.R. 588.

that in the present case, being concerned with a payment made to one of the law reporters on his retirement. Though the reporter was in no way entitled to a retiring gratuity, such payments had been habitually made by the Council of Law Reporting because such payments improved the efficiency of their reporting service by, no doubt, inducing a better class of lawyer to undertake service for the purposes of their business.

In the passage to which Mr. Borneman referred, Scrutton J. said this [15]: "It seems to me that the question whether money "is wholly and exclusively laid out or expended for the purposes "of a trade is a question of fact. Judges of the High Court "may know, by the accident of their previous training, some-"thing about a particular trade. To take a personal instance, "I may be assumed to know something about shipping, but there "are many trades about which I know absolutely nothing, and "there are equally many trades about which any of my learned "brethren would know nothing except what they were told by the "Commissioners. In many cases the question whether the "money was wholly or exclusively laid out or expended for the "purposes of the trade must depend upon a knowledge of the facts "of the trade, of the way in which it is carried on, of the effect of "payments made in that trade, all of which are questions of "fact. There may be cases where it is clear even to a judge "who knows nothing about the trade, that a particular payment "could not be wholly or exclusively laid out for the purposes of "the trade. I do not desire to go into politics, but I take "examples which seem to me fairly clear. Payments for "political purposes might conceivably be for the purposes of "trade. It might be that a payment by a company to the Tariff "Reform League might be of great advantage to its trade. It "might be that a payment by a company to a political party "which was supposed to be identified with the interests of a "particular trade might be to the advantage of the trade; but "one can easily imagine cases, such as a payment by a company "to the National Service League, where it would be impossible "to conceive that anybody could find that such money was "wholly or exclusively laid out or expended for the purposes "of the trade. There may be cases in which the Court would "have to say there is no evidence on which any tribunal could "find that this sum was laid out or expended for the purposes "of such trade, but in most cases it appears to me that it "depends on the facts of the trade of which the Court has no "knowledge, and for which it must depend on the findings of "the Commissioners." It is said that those remarks should be applied to the present case on the following lines; and that it is plain from what Scrutton J. said, and perhaps also from the decision of the Court of Appeal in *Morgan* v. *Tate & Lyle Ld.*,[16] that payments made for a political purpose may be for the

[15] [1914] 3 K.B. 684.

[16] [1953] Ch. 601.

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purposes of advancing the trade of the company and enabling it to protect its assets and earn profits; and if, therefore, it is possible that payments for political purposes of that kind may be for advancing the trade of the company, it is then a question of fact to be decided by the commissioners, whose decision is binding, whether in fact on the evidence before them the payments were made for that purpose. It is argued that the evidence in the present case shows that the expenditure for the purpose of circulating this pamphlet was in fact incurred by the directors of the company for the purpose of advancing the trade of the company and its interests as a trader.

That brings me to the case stated, and before I decide anything, I will refer to the evidence which was given before the commissioners. The material passages in the case stated are: "The directors of the 'Malayan Group' Companies, while "recognizing the necessity for the report and accounts presented "at annual general meetings to be accompanied by a chairman's "address to the members of each company relating to its "individual activities and finances for the particular year under "review, had nevertheless for some years been of the opinion "that the vital political and economic factors which had a "predominant bearing on the success or failure of tin mining "operations in Malaya should, in the interests of the company, "be published to shareholders and to other persons. The "winning of tin ore in Malaya has since the last war been vitally "affected by the economic, financial and political policies of the "United Kingdom and Malayan Governments in so far as they "affect Malayan affairs."

Then reasons are given why the method of circulating the supplementary remarks separately from the annual report was adopted, in order to bring the matter more directly home to the shareholders and to other persons. Then it is said: "The post-war period immediately preceding the meetings "on December 15, 1949, had been one of anxiety and concern "to the directors of the Malayan Group. This was due (inter "alia) to their profound disagreement with, and apprehension "as to, the policy of the Socialist Government to which they "attributed most of the difficulties under which their companies "were operating." Then the difficulties are summarised under a number of heads: "(a) Communist activities in Malaya"; "(b) Labour conditions in Malaya"; "(c) The price of tin"; "(d) War damage compensation and rehabilitation"; and "(e) Inflation," of which it is fair to say that there is practically no discussion at all in the pamphlet in question issued by the company.

Later it is stated: "The chairman of the companies of the "'Malayan Group' gave evidence on behalf of the company, "(which evidence we accepted) to the following effect," and I should say that the author of the pamphlet did not give evidence because he was ill and therefore the chairman gave, no

doubt, the evidence which he might otherwise have given. His evidence was stated by the commissioners as follows: "His "boards, with a view to the protection of these companies' "businesses and interests, had consistently regarded it as being "to the advantage of these companies to see that public "opinion should be stirred up and that the shareholders (and "as many people as could be persuaded to read the 'Supple-"'mentary Remarks') should appreciate the harm that the "policies of the governments were thought by the directors to "be doing to their business. He stated that the complaint of "the company's directors was against the policies as a whole of "the Labour Party and one of these complaints was the high "taxation proposed by the Labour Government. The 'Supple-"'mentary Remarks' had been prepared by the then chairman ". . . who submitted a draft to the board for their comments. "He did not think the directors had in mind at all when the "'Supplementary Remarks' were written that there was a "general election forthcoming. Had he thought that this docu-"ment was in the nature of a political pamphlet for the purpose "of influencing the election he personally would have had "nothing to do with it."

In view of a passage of the pamphlet which I read a little earlier, it seems to me that either those statements by the witness were untrue or he had not read the "Supplementary "Remarks" with any care, and I cannot help thinking that the commissioners were unduly credulous in accepting that statement as being true in fact. Then his evidence apparently continued in this way: "He regarded it as a booklet for the protection "of the company's business. They had gone into these politics "particularly as relating to Malaya. He agreed that the trading "results of the three companies at the relevant time were "satisfactory up to a point. . . ." He then affirmed the facts set out in the earlier paragraphs. From that last statement I must conclude that evidence was given on the lines of the earlier paragraphs which I have read and that such evidence was accepted by the commissioners.

The argument is that it was open to the directors of the respondent company to think that by reason of the past conduct of affairs by the Labour Government, their continuance in office was bound to be damaging to the interests of the company and obstructive of their attempts to earn profits and carry on their trade, and that therefore it was a justifiable activity on the part of the company to subsidize the circulation of a speech which was nothing but an attack upon the policies of the Labour Government and an inducement to the voters to turn them out of office at the earliest possible opportunity. It is contended that that is a possible way of advancing the interests of the company's business, and that if it is a possible way of advancing the interests of the company's business I am bound by the conclusion of the

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commissioners that the evidence did support that that was the fact.

I do not take that view. It seems to me that it is a question of law on the authorities whether a pamphlet in this particular form is capable of being wholly and exclusively for the purpose of advancing the trade of the company; and it is a question of law whether the expenditure incurred in printing, publishing and circulating this pamphlet is expenditure which was incurred wholly and exclusively for the purposes of the company's trade. One only has to peruse the pamphlet in question to see that if it had any such object as contended, it was not the sole object of the pamphlet in question. It seems to me, therefore, that I am entitled to hold as a matter of law that this pamphlet is not capable of being solely for that purpose, and the expenditure incurred in printing, producing and circulating it is not wholly and exclusively for the purpose of the company's trade, and therefore does not come within the terms of the rule.

Having reached that conclusion, it is unnecessary for me to consider whether there was, in fact, any evidence capable of supporting the conclusions of the commissioners, and the appeal must be allowed.

*Appeal allowed; case remitted to the commissioners for adjustment.*

Solicitors: *Solicitor of Inland Revenue; Stephenson, Harwood & Tatham.*

I. G. R. M.

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[COURT OF APPEAL.]

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*Oct.* 15, 16.

Somervell, Denning and Romer L.JJ.

## * COWAN *v.* WRAYFORD.

[Plaint J. No. 97.]

*Agriculture—Agricultural holding—Notice to quit for failure to remedy breach of tenancy—Premature—Whether valid as ordinary notice to quit—Landlord and tenant—Notice to quit—Ambiguity—Bad reason—Estoppel—Agricultural Holdings Act*, 1948 (11 & 12 *Geo.* 6, *c.* 63), *s.* 24 (1) (2).

A notice to quit served by a landlord on a tenant expressly under section 24 (2) of the Agricultural Holdings Act, 1948, before the expiration of a previous notice requiring the tenant to remedy certain alleged breaches of the tenancy agreement, is invalid, because at the time when it is served there is no ground which, under subsection (2) (*d*), would entitle the landlord to serve it. Nor can the landlord avail himself of the notice as a notice to quit under subsection (1) of section 24, for the tenant is entitled to a clear and unambiguous notice showing under which subsection the landlord is proceeding.

*Per* Somervell L.J. If a landlord wishes to rely on a notice, in the alternative, as a general common law unqualified notice, should

he fail under section 24 (2), that must appear on the face of it, or two notices can be served.

APPEAL from Judge Pratt, sitting at Newton Abbot County Court.

By a document in writing dated January 12, 1943, the defendant tenant, Mr. S. E. Wrayford, was let certain fields in Devonshire by the predecessors in title of the landlord, Major-General D. Tennant Cowan. On September 29, 1951, the landlord, through his agents, served on the tenant a notice to remedy certain alleged breaches of covenant by December, 1952. On December 22, 1951, the following notice was served on the tenant: "Notice to quit by landlord to tenant stating "reasons under section 24 (2) of the Agricultural Holdings Act, "1948.[1] I, the undersigned, hereby give you notice to quit "and deliver up on the 25th day of December, 1952, possession "of the holding known as. . . . This notice is given for the "following reasons: That you have failed to remedy the breaches "of your tenancy agreement as set out in a notice served on you "on September 29, 1951." The tenant remained in occupation, apparently treating the notice of September 29 as merely a notice to remedy certain defects. He did not serve any counter-notice under subsection (1) of section 24 of the Act of 1948, nor did he claim an arbitration to determine the justification of the landlord's complaints. In February, 1953, the landlord commenced proceedings in the county court, claiming possession of the land, but the judge held that the landlord, having elected to proceed under section 24 (2) could not in the circumstances of the case later

[1] Agricultural Holdings Act, 1948, s. 24 (1): "Where notice to quit an "agricultural holding or part of an "agricultural holding is given to the "tenant thereof, and not later than "one month from the giving of the "notice to quit the tenant serves on "the landlord a counter-notice in "writing requiring that this subsec-"tion shall apply to the notice to quit, "then, subject to the provisions of "the next following subsection, the "notice to quit shall not have effect "unless the Minister consents to the "operation thereof."

Subs. (2): "The foregoing subsec-"tion shall not apply where— . . . "(*d*) at the date of the giving of the "notice to quit the tenant had failed "to comply with a notice in writing "served on him by the landlord . . . "within such reasonable period as "was specified in the notice to remedy "any breach by the tenant that was "capable of being remedied of any "term or condition of his tenancy "which was not inconsistent with the "fulfilment of his responsibilities to "farm in accordance with the rules of "good husbandry, and it is stated in "the notice to quit that it is given by "reason of the matter aforesaid."

S. 34 (1): "Where the tenancy of an "agricultural holding terminates by "reason either—(*a*) of a notice to quit "the holding given by the landlord; "or (*b*) of a counter-notice given by "the tenant under section 32 of this "Act after the giving to him of such "a notice to quit part of the holding "as is mentioned in that section; "and in consequence of the notice or "counter-notice, as the case may be, "the tenant quits the holding, then, "subject to the provisions of this "section, compensation for the dis-"turbance shall be payable by the "landlord to the tenant in accordance "with the provisions of this section: "Provided that compensation shall "not be payable under this subsection "where the operation of subsection (1) "of section 24 of this Act in relation "to the notice to quit the holding or "part, as the case may be, is excluded "by virtue of paragraph . . . (*d*) . . . "of subsection (2) of that section. ". . ."

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proceed under section 21 (1), and that the notice to quit was not a valid one.

The landlord appealed.

*Peter Bristow* for the landlord.

*Anthony Cripps* for the tenant.

The cases cited in the judgments, and also *Gardner* v. *Braddick* [1953] 9 C.L. 2, were referred to in argument.

SOMERVELL L.J., having read section 24 (1) and the material parts of subsection (2) and section 34 of the Agricultural Holdings Act, 1948, continued: There is therefore a difference not only in procedure, but a financial difference affecting both landlord and tenant, according as to whether the landlord is able to establish a right to proceed under section 24 (2) (*d*) or has no case for bringing himself within the words of that sub-paragraph, but serves an ordinary notice and does in fact get the Minister's consent if the counter-notice is served. In one case compensation for disturbance will be payable and in another case it will not.

What happened here was that the landlord or his agents on September 29, 1951, served a notice to remedy certain defects, and according to the notice they were to be remedied by December 21, 1952, that is, some fifteen months after the date of the notice. It is a fair inference that the landlord's agents, or those who served the notice, believed that that notice to remedy was a notice to remedy by December 21, 1951, and not 1952, because on December 22, 1951, they served on the tenant a document. [His Lordship read the notice to quit.] Time went by and the tenant remained in possession. On February 16, 1953, particulars of claim were delivered under which the landlord claimed possession, and this document of December 22, 1951, was relied on as terminating the tenancy.

By paragraph 1 of the defence, the notices are admitted. Paragraph 2 provides: "The said tenancy has not been effectually determined, for while the [tenant] admits receipt of the purported notice to quit (hereinafter called 'the second notice') it alleges failure to comply with the first notice and is expressed to take effect during the period allowed to the [tenant] to carry out the said works required by the first notice, and there was therefore at the time of service of the second notice no ground as required by section 24 (2) (*d*), entitling the [landlord] to serve the same."

The county court judge decided that the notice was not a valid notice to quit. It is not now suggested, and indeed could not be suggested on the part of the landlord once the dates are looked at, that the notice to quit was a notice which was within the terms of section 24 (2) (*d*), because to come within sub-paragraph (*d*) the tenant has to be shown to have failed to comply with a notice requiring him to remedy the breaches. At

the time when the notice to quit in this case was served, in the time specified, what I will call the remedy notice had not elapsed and therefore the conditions laid down in section 24 (2) had not been fulfilled. It therefore, admittedly, cannot operate under that subsection. To succeed the landlord must satisfy us that this was a good notice to quit irrespective of the breaches or alleged breaches referred to in the document which I have read and irrespective of section 24 (2). If it was a good notice irrespective of all those matters, then he submits (and this again is not disputed) that the tenant did not serve a counter-notice requiring that the Minister's consent should be sought, and that the notice should not be operative unless that consent was obtained. In other words, the landlord submits that the court should treat this notice as if there was no reference in it to section 24 (2).

Many points have been regarded as obscure with regard to notices to quit, but one point is plain and that is that a notice to quit, to be good, must be clear and unambiguous. That point will be found laid down and applied by this court in *P. Phipps & Co. (Northampton and Towcester Breweries) Ld.* v. *Rogers.*[2] The first point, therefore as it seems to me is whether this document brought home to the tenant in clear and unambiguous language that the landlord was intending to terminate the tenancy subject to section 24 (1), irrespective of any breaches by the tenant. I do not think it did. We were invited, and I think rightly, to consider this document and the meaning it would convey to a reasonable mind in the light of the Act. If one reads the notice to quit with the Act, in the first place, it is plain that the case is not within section 24 (2) (*d*), because the time for remedy has not elapsed. In those circumstances it might well be regarded as a piece of waste paper, something which is based, as I think it was in fact based, on a misconception as to the time limit in the original notice to remedy. If the tenant went on to assume that the landlord's agents had read the first document, on which this second document was based (perhaps a reasonable assumption) then, I think, he might well have concluded that this was an attempt in advance to bring about a termination if, but only if, he did in fact fail to remedy in the time which the earlier notice had given. It was not suggested that if that was, as I think it was, a natural interpretation it would be a clear, unambiguous and valid notice to quit. It would I think probably fall under the principle which says notices to quit must not be conditional.

We were, however, invited to consider the matter on a rather wider ground, and I think myself that it is right to do so, because this Act does affect a great number of people, and it would be right that we should seek to give what guidance we can on this wider point. If one assumes in the present case that the

[2] [1925] 1 K.B. 14; 40 T.L.R. 849.

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original remedy notice had been limited to expire on December 21, 1951, and then, as happened here on December 22, 1951, a notice to quit in the form of the notice in this case, giving reasons, was served, and then the tenant either by going to arbitration or, as this court held in *Budge* v. *Hicks*,[3] by going to the county court, succeeded in showing that the landlord's claim failed not in form but on the facts, could the landlord maintain that he relied in the alternative on this document as what I would call an unqualified notice to quit not in any way based on section 24 (2), in other words, one to which subsection (1) applies, and then say "As you did not serve your counter-"notice the Minister's consent is not necessary."? I do not think he could have done.

This notice states on the head of it that it is a "Notice to "quit by landlord to tenant stating reasons under section 24 (2) "of the Agricultural Holdings Act." If one seeks and finds the sub-paragraph of section 24 (2) which is relied on, it is sub-paragraph (*d*). When a landlord is proceeding under subsection (2) the Act itself says that "The foregoing subsection"—that is subsection (1) with its provisions as to serving notice—"shall "not apply." I have already referred to the differences, not merely procedural, between the provisions of subsection (1) and subsection (2) as affecting both landlord and tenant. I think therefore that if a landlord wishes to rely on a notice in the alternative as a general common law unqualified notice should he fail under section 24 (2) that must appear on the face of the notice or, as we were told in argument is sometimes done, two notices can, of course, be served. As against that it is said, and said rightly, that section 26 (1) (*a*), which deals with the regulation-making power, contemplates cases where a landlord gives a notice which raises points under section 24 (2), but which thereafter can be relied on as a notice under subsection (1), because it refers particularly to a power to make regulations for extending the period within which a counter-notice may be given by the tenant where arbitration has been required to deal with issues under subsection (2). I do not think there is any inconsistency between that subsection and the conclusion to which I have come, because, as I have said, it is perfectly open to a landlord to make it clear, and as I think, in one document, that he wishes the notice to be treated as an ordinary common law notice which would be within the meaning of subsection (1) should he fail under subsection (2).

The words in section 26 (1) (*a*) would be applicable in cases where obviously the main contention in the first instance would be under subsection (2) to prevent the tenant having to serve a counter-notice under subsection (1) at the time when he first received the notice. Therefore, I do not think there is any real inconsistency there.

[3] [1951] 2 K.B. 335; [1951] 2 All E.R. 245.

I would refer to certain observations I made in *Budge* v. *Hicks*,[4] where a notice had been served and the notice undoubtedly gave reasons. The court held there that the notice was bad because it did not indicate which of the relevant subsections of section 24 the landlord was seeking to rely on. The tenant had in fact served a counter-notice under subsection (1), and the words which I used were obiter in that they were not necessary to the decision, nor in that case was the point with which I am now dealing raised, namely, must notices, which on the face of them fall expressly under subsection (2), always be taken to be good notices under subsection (1) if subsection (2) is inoperative? I said in that case: "What the tenant did when "he received that notice was to serve the counter-notice referred "to in subsection (1). I think that the proper construction of "the notice to quit, on the basis that I am right in holding that "it was not a good one under subsection (2), is that, as the "period of the year laid down by the Act was observed, it should "be regarded as a notice which falls under subsection (1), with "certain words added to explain the reason why it was served, "which does not affect its legal nature."

It is to be noted that in the notice in that case there was no express reference to section 24 (2). It is also to be noted that the tenant in that case had in fact taken it as a notice which might be valid under subsection (1) and had served his counter-notice. In case anybody wishes to quote these words in future I think it would be better if I had put it in this form: "Assuming in the landlord's favour that this notice to quit was "a good notice which required a counter-notice under subsection "(1)," and I then go on to show that he had lost his rights. However, the notice was in a different form, but I do not think those words I used there should be relied on as deciding the point or throwing any real light on the point being decided in the present case. For these reasons I think the judge was right. He held that the notice to quit was not a valid notice, and I agree with him on that point.

He also held that the landlord, having elected to proceed under section 24 (2), could not in the circumstances of this case later proceed under section 24 (1). I hope I have made it clear that I do not put it precisely in that way. I would have said that this notice was not a clear and unambiguous general notice of which the landlord might avail himself in the alternative. He then deals with an issue of estoppel which it is unnecessary to determine. Speaking for myself, I think in the circumstances one might find an estoppel in law, but so far as appears from the judge's notes of the evidence I do not think there was sufficient evidence which would justify a finding on those grounds. For the reasons which I have given I would dismiss this appeal.

[4] [1951] 2 K.B. 339.

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DENNING L.J. If this notice to quit could be considered at common law, without any regard to the statute, I should have thought it was a perfectly good notice to quit. The operative words are clear and unambiguous. All that is wrong is that it states a bad reason. At common law a landlord need give no reason at all. Even if he gives a bad reason, or an inapposite reason, I should not have thought it would invalidate the notice.

But this case cannot be considered at common law apart from the statute. The ancient script of the common law has been over-written by the statute, and the two have to be integrated together. In order that a notice to quit an agricultural holding should be good, it must be clear and unambiguous: and for that purpose it must either be a simple notice without stating reasons at all, in which case it will operate under section 24 (1); or it must be a notice stating reasons as prescribed by subsection (2), in which case it will operate under subsection (2).

The consequences of giving a notice which is intended to operate under subsection (1) are so different from the consequences of a notice under subsection (2) that it is imperative that the landlord should make it clear under which of those two subsections he is proceeding. Just as in *Budge* v. *Hicks*,[5] this court held that under subsection (2) the landlord must make it clear under which sub-paragraph he is proceeding, so also under the whole section 24 he must make it clear whether he is proceeding under subsection (1) or subsection (2). In the present case the notice purported to be given under subsection (2); but considered as such, it was a bad notice because it said the tenant had failed to remedy certain breaches, whereas in fact the period allowed for remedy had not then expired. It being a bad notice under subsection (2), it is not, in my judgment, now permissible for the landlord to pray it in aid as a notice under subsection (1). It certainly was not a clear and unambiguous notice for that purpose. If the landlord had intended to go under subsection (1), he should have made it quite clear.

On the further point as to estoppel I think there was a great deal to be said for the judge's view that the tenant was led to think that if he completed the work by December, 1952, then the landlord would not seek to eject him. Following *Hughes* v. *Metropolitan Railway Co.*,[6] it may well be that if the tenant did the work in the permitted time, the landlord would not be allowed to insist on this notice to quit. It is unnecessary, however, to come to any conclusion on that point. It is sufficient to say the notice to quit was bad and that the appeal fails accordingly.

ROMER L.J. I also agree, and I can state my reasons very shortly. The notice to quit purported quite plainly to be given under section 24 (2) of the Act of 1948. There is no question as

[5] [1951] 2 K.B. 335. [6] (1877) 2 App.Cas. 439.

to that, having regard to the reference to section 24 (2) in the notice itself and to the terms in which the notice was couched. But that it failed to qualify as a good notice under section 24 (2) cannot be disputed. The only question therefore is whether it can be preserved as a valid general notice to quit giving rise to the tenant's rights which are conferred by section 24 (1). Of course, there may be cases where a landlord serves a notice to quit primarily invoking subsection (2), but which may be expressed to be, or which may be fairly regarded as being, in the alternative, a general notice. I think, however, that prima facie if a lessor elects to proceed in a particular way which gives rise to particular rights in the tenant he cannot, if he fails, treat his notice as founded upon a different approach which would have dictated a different course of action by the tenant. Certain it is that an unsuccessful notice under subsection (2) cannot automatically be converted, when it fails, into a general notice to quit, and indeed, if it was, considerable hardship might be inflicted on the landlord, who might be only desirous of getting the tenant out provided he got him out in such circumstances that he would not have to pay compensation. He might not desire to get him out by determining the tenancy by a general or ordinary notice to quit, which would involve the payment of compensation. It is, therefore, impossible to suggest that a notice founded upon subsection (2), if it fail, must be converted of necessity into a notice under subsection (1), and I agree with my brethren that the lessor must indicate under which he elects to go.

In the present case I can see no reason why the landlord should be able to say that, in the alternative, his notice should operate as a general notice. The fact that it expressly referred to section 24 (2) would be calculated to suggest to the tenant that the lessor was nailing his colours to that mast and to nothing else, and that therefore it would be quite inappropriate for him (the tenant) to take action under subsection (1). But at the lowest the document would, I think, give rise in this connexion to ambiguity as to the lessor's intention, and it is well established that notices to quit must be plain and unequivocal. Further, I think the notice to quit offended against the principle of certainty as to its meaning in another way, because it had to be construed in the light of all relevant surrounding circumstances, and one of such circumstances was the service of the notice to remedy and the terms in which that notice had been expressed. That notice gave until December 21, 1952, to do the work which was specified in the notice. There was no reason why the tenant should think a mistake had been made, and indeed it was suggested with some force in argument that having regard to the reference in the notice to remedy, "to clean and properly cultivate "eastern portion of Field 1125," which is a job which can be done in a short space of time, but can be done much more efficiently in a long space of time, the document could fairly be

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taken to mean what it said. That first notice was never cancelled, and a little while afterwards the notice to quit arrived. The tenant might well think, as in fact he did think, that it merely meant that unless he complied with the notice to remedy then he would have to go. Accordingly, I agree that the notice to quit gave rise to an ambiguity in that sense also and cannot be treated as a good and valid notice.

On the final question, whether the particular equity to which Lord Cairns and Lord Selborne referred in *Hughes* v. *Metropolitan Railway Co.*[7] applies, it seems to me that there is a difficulty in relying upon that case here. The point as I understood it, shortly, was this, that the landlord, having acquired certain rights by virtue of the tenant's breach of covenant, elected to exercise one particular right, from which the inference would arise that he released the others and that by serving the notice to remedy he was relinquishing any other rights which might arise from the breach of covenant to which the notice referred. The argument is that having done that, he could not, as he purported to do, serve a notice to quit founded upon exactly the same breaches of covenant a short time afterwards. When I say founded upon the same breaches of covenant, that is, I think, a true statement having regard to the strict terms in which the notice to quit was framed. The reasons given in the notice to quit were not that the tenant had failed to remedy the breaches within the time specified by the notice to remedy, but simply that he had failed to remedy what were exactly the same breaches as the ones to which the first notice referred.

I do not think, as at present advised, that the suggested equity could avail the landlord here, because, first, there was no evidence that any consideration moved from the tenant to the landlord for what would on this view be an entirely voluntary release of legal rights; nor was there any evidence that the tenant altered his position on the faith of some implied promise by the landlord. In the absence of either consideration, or of a change by the tenant of his position, it seems to me that the equity in question does not arise in the present case. I agree with my brethren that this appeal should be dismissed.

*Appeal dismissed.*

Solicitors: *Smith & Hudson for Harold Michelmore & Co., Newton Abbot; Baileys, Shaw & Gillett for Tozers, Newton Abbot.*

A. W. G.

[7] 2 App.Cas. 439.

[CHANCERY DIVISION.]

## *In re* PARKER DAVIES AND HUGHES LD.

1953
*Oct.* 19.

[No. 00685 of 1953.]

Roxburgh J.

*Legal Aid—Certificate—Action by company against assisted person—Petition to wind up—Whether a "proceeding . . . to enforce any "order . . . made in connexion with the said proceedings"—Company—Winding up.*

If the proceedings covered by a legal aid certificate are intended to include a petition to wind up a company it should be so stated in the certificate.

A legal aid certificate was granted "in connexion with the "following proceedings namely to defence and counterclaim in" an action by the company against the assisted person "and to "enforce any order or agreement made in connexion with the said proceedings." The assisted person obtained judgment on the counterclaim, and subsequently presented a petition to wind up the company which was dismissed with costs. The question then arose whether the petition was a proceeding to enforce the judgment and so came within the words "proceedings . . . to enforce any order ". . . made in connexion with the said proceedings":—

*Held*, that, in the petition to wind up, the assisted person was not covered by the legal aid certificate and that, accordingly, he must pay the costs of the petition, to be taxed as between party and party.

*In re A Company* [1915] 1 Ch. 520; 31 T.L.R. 241 followed.

PETITION to wind up.

A legal aid certificate was granted to the defendant in an action by the company "as . . . defendant in the following pro-"ceedings. Namely: to defence and counterclaim in proceedings "which have been instituted against the assisted person . . . for "arrears of rent . . . and to enforce any order or agreement made "in connexion with the said proceedings." Judgment on the counterclaim was given for the assisted person, who subsequently presented this petition to wind up the company, which was dismissed with costs. The question thereupon arose whether the petition was a proceeding "to enforce any order . . . made in "connexion with the said proceedings."

*T. H. M. Whipham* for the petitioner.
*R. G. Woolley* for the company.

ROXBURGH J. I have already said that I must order the petitioner to pay the costs unless he is an assisted person within the meaning of the Legal Aid and Advice Act, 1949, and that depends on the construction of the Legal Aid Certificate which he has obtained and which is before me. It reads as follows: "This is to certify that Albert Arthur Jones," of a certain address, "(hereinafter called 'the assisted person') is entitled "in accordance with the Legal Aid and Advice Act, 1949, and

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"the regulations and scheme made thereunder, to legal aid as "defendant in connexion with the following proceedings." Then it describes certain proceedings in the King's Bench Division, as it then was. Then it goes on, and these are the material words, "and to enforce any order or agreement made in connexion with "the said proceedings." There is no doubt that Albert Arthur Jones obtained judgment in those proceedings for a sum of £313. To that judgment I have already referred in dealing with the other question, but what I now have to determine is whether this petition for the winding-up of the judgment debtor is a proceeding to enforce that order.

I must confess that, but for authority, I should have thought this a difficult question, and it is obviously one of far-reaching importance. Fortunately however I have the authority of the Court of Appeal in *In re A Company*,[1] a case which is indistinguishable and binding on me. In that case the question was whether a winding-up petition was within the following words in the Courts (Emergency Powers) Act, 1914: "From and after "the passing of this Act no person shall (*a*) proceed to execu- "tion on, or otherwise to the enforcement of, any judgment or "order of any court . . . for the payment or recovery of a sum "of money . . . , except after such application to such court "and such notice as may be provided for by rules or directions "under this Act." The Court of Appeal had to consider two questions. The first was whether the winding-up petition was a proceeding to execution on any judgment. That point does not arise here. The second question they had to consider was whether it was a proceeding to the enforcement of a judgment, and that is, as far as I can see, precisely the question which arises here.

In delivering his judgment, Lord Cozens-Hardy M.R. said[2] with reference to the words "otherwise to the enforcement of," the judgment: "There may be other cases,"—he had already indicated one—"but I cannot so construe the section as to extend "it to a winding-up petition which may be presented by a "petitioner who is not a judgment creditor, and which does not "enure for the sole benefit of the judgment creditor, but must "enure for the benefit of all the creditors."

Phillimore L.J., in the course of his judgment, said[3]: "In "the particular case she is a creditor because her damages have "been liquidated by a judgment. But it would be the same if "she were a simple contract creditor whose debt was merged "in a judgment. She is not therefore seeking to enforce her "judgment. She is proceeding to a new alternative mode of "recovering her debt, a mode by which she no longer seeks to "recover for herself alone but for the benefit of all the creditors, "as in a creditor's suit for the administration of the estate of a "deceased debtor or in a bankruptcy."

[1] [1915] 1 Ch. 520; 31 T.L.R. 241.
[2] [1915] 1 Ch. 520, 526.
[3] [1915] 1 Ch. 520, 528.

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It appears to me that the ratio decidendi there is binding on me, and that there is no possible way of distinguishing the present case from that case. In a way I am glad of that, because I think that if these certificates are intended to extend to winding-up proceedings, they should expressly so provide, and that appears to be in accordance with the existing state of the law. Therefore, though with some reluctance on this point, I must confess, so far as this particular petitioner is concerned, I cannot hold that he is covered by a legal aid certificate in these proceedings. Therefore the order must take the usual form and he must be ordered to pay the costs of the petition, to be taxed, of course, as between party and party.

*Order accordingly.*

Solicitors: *Witham & Co. for R. Roberts, Wrexham; T. D. Jones & Co. for Howel V. O. Cook & Co., Wrexham.*

K. R. A. H.

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[COURT OF CRIMINAL APPEAL.]

## *REGINA *v.* POWELL.

C. C. A.

1953 *Oct.* 28.

Lord Goddard C.J., Havers and Glyn-Jones JJ.

*Justices—Practice—Chairman of committing justices sitting as deputy chairman at trial.*

*Criminal Law — Sentence — Preventive detention — When appropriate sentence.*

Although it is not desirable that the chairman of examining justices should subsequently be the chairman of the quarter sessions to which a prisoner was committed, there is no reason in law why this should not happen.

The fact that an offender has three previous convictions and is over 30 years of age should not ipso facto render him liable to be sentenced to preventive detention. Such a sentence should be reserved for those who have shown by their conduct that they cannot be trusted to abstain from crime.

APPLICATION for leave to appeal against sentence.

The applicant, who was 38 years of age and had five previous convictions, pleaded Guilty to larceny and carrying an offensive weapon, and was sentenced to five years' and two months' imprisonment to run concurrently. The ground of his application was that the deputy chairman who sentenced him was also chairman of the examining justices who committed him.

The applicant did not appear and was not represented.

LORD GODDARD C.J. The applicant pleaded Guilty at the Monmouthshire Quarter Sessions to the larceny of a quantity of copper cable, and carrying an offensive weapon contrary to

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section 1 of the Prevention of Crime Act, 1953. He was sentenced to five years for the larceny and two months' imprisonment concurrent for the offence under the Prevention of Crime Act. He now applies for leave to appeal against his sentence on the ground that the deputy chairman who sentenced him was also chairman of the examining magistrates who committed him for trial.

We cannot say that there is any reason in law why the chairman of committing magistrates who happens to be a chairman or deputy chairman of quarter sessions should not sit, though no doubt it is not altogether desirable that that should take place and, as a general rule, if it so happens that a case has been committed by a bench on which either the chairman or the deputy chairman of quarter sessions was sitting, it should be arranged that the prisoner when tried on indictment should be brought before one of the courts in which that chairman is not sitting. But it is not a ground in law on which we could interfere with the sentence, and in the present case there is no question about the conviction because he pleaded Guilty.

There is one other matter which the court thinks it necessary to point out for the guidance of this particular deputy chairman, who apparently does not understand or has not read what the court has said on previous occasions on appeals from him. This was a case in which the sessions appear to have considered that it would have been proper to have passed a sentence of preventive detention. The applicant has a very bad record, and it is just the sort of case for which Parliament has provided preventive detention. The deputy chairman said that the bench would have given preventive detention but for the decisions of this court, which he seems to think prevent him from giving such a sentence. It is perfectly true that soon after the Criminal Justice Act, 1948, came into force this court did in a case [1] in which they were dealing with sentences of preventive detention say that preventive detention should be kept and was intended to be kept for habitual criminals, and it was not every person who had the statutory number of convictions, namely three, that should be sent to preventive detention. The deputy chairman seems to have thought that the court was laying down that unless the prisoner was one who could have been convicted under the Prevention of Crime Act, 1908, as an habitual criminal, it was not right to give a sentence of preventive detention. That was not what the court meant, and I do not think that it was what the court said. I do not know what report the deputy chairman read, but it was not intended by this court to say that a sentence of preventive detention could only be given where the man could have been convicted under the old Act as an habitual criminal. What we meant was that where a man has shown by his conduct that he is a recidivist in crime, that is a case in which preventive detention should be given, but that it was not necessary to give preventive

[1] *Rex* v. *Askew* [1949] W.N. 383; [1949] 2 All E.R. 687.

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detention every time it was brought to the notice of the court that he had three previous convictions. That was pointed out by this court, consisting of Hilbery, Streatfeild and McNair JJ., in *Reg.* v. *Gardner*,[2] an appeal from this deputy chairman in November of last year, and I hope the deputy chairman will now understand that the court is not attempting to put any limit on the provisions Parliament has made save that they have indicated that the mere fact that a man has three previous convictions and is over 30 years of age should not, ipso facto, render him liable to preventive detention. Although the court can give it, preventive detention ought to be kept for men who have shown by their conduct and previous history that they cannot be trusted to abstain from crime, though they may have spells of doing honest work between convictions.

*Application refused.*

J. D. P.

[2] The Times, November 25, 1952.

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[QUEEN'S BENCH DIVISION.]

1953
*Oct.* 12, 13.
Slade J.

## *CHRISTIE, OWEN AND DAVIES LD. *v.* STOCKTON.

[1952 C. 3395.]

*Agency—Estate agent—Commission—Payable if "offer" accepted—"By a person able and willing to enter into a formal contract"—Vendor and purchaser—Contract—Unenforceable—No writing—Law of Property Act*, 1925 (15 *Geo.* 5, *c.* 20), *s.* 40.

An estate agents' commission contract provided: "Should the "owner withdraw after having accepted an offer to purchase by a "person able and willing to enter into a formal contract then [the "agents] shall be paid their commission":—

*Held*, that in the context "offer" meant an offer capable of being turned into a contract by acceptance; "a person able and willing to "enter into a formal contract" meant a person able and willing to enter into a formal contract the terms of which had already been agreed albeit orally; in order to recover their commission the agents had to show that prior to the owner's withdrawal the parties had entered into a contract which although valid was unenforceable since the terms had not been reduced to writing.

*Bennett, Walden & Co.* v. *Wood*, 66 T.L.R. (Pt. 2) 3; [1950] 2 All E.R. 134 and *Graham and Scott (Southgate) Ld.* v. *Oxlade* [1950] 2 K.B. 257; 66 T.L.R. (Pt. 1) 803; [1950] 1 All E.R. 856 applied.

ACTION.

The defendant, Austin Samuel Stockton, was the lessee of premises known as the "Turn of the Way" restaurant for an unexpired period of some 16 years and the owner of the goodwill

[Reported by Miss C. J. ELLIS, Barrister-at-Law.]

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of the restaurant business which he carried on there. By a document dated February 28, 1952, the defendant gave instructions to the plaintiffs, Christie, Owen and Davies Ld., estate agents, valuers and auctioneers, to dispose of the goodwill of his business and the lease of the premises for £3,500.

The defendant gave the plaintiffs detailed particulars of the business, and then signed the document under the words: "Please offer by private treaty the within described premises "and business. I approve and confirm your commission and "terms as printed below." Then, in large letters appeared the words: "Christie & Co.'s Commission & Terms (The rates of "commission accord with those of the several professional insti- "tutes of estate agents). No charge is made for inspections, for "registering particulars or for advertising costs which may be "incurred. Christie & Co.'s commission is payable by the owner "in respect of any completed transaction pertaining to the "within described premises or to such other premises belonging "to the owner which may be subsequently sold to their appli- "cant. Should the owner withdraw after having accepted an "offer to purchase by a person able and willing to enter into a "formal contract then Christie & Co. shall be paid their "commission." There then followed the various rates of commission, but it was agreed that if the plaintiffs succeeded in their action they were entitled to judgment for £140.

The plaintiffs circulated the particulars and about April 24, 1952, introduced to the defendant one J. M. Hannay as a prospective purchaser of the property. On April 24 there was a meeting between the defendant, Hannay and a friend at which it was agreed, subject to contract, that Hannay should purchase the business for £2,800. The words "subject to contract" were not stipulated by either party, but were the mutual agreement of both, making both offer and acceptance subject to contract. Later the same day the defendant telephoned the plaintiffs and told them that he had agreed to sell the property to Hannay. The plaintiffs wrote to the defendant's solicitors saying that as the defendant's agents they had agreed the sale of his business to Hannay for £2,800 plus stock at valuation subject to contract. The plaintiffs also wrote to Hannay saying: "We shall be glad "to receive your cheque for £280 being the customary 10 per cent. "deposit and our receipt will be issued as stakeholders subject "to contract."

On May 6 the defendant's solicitors sent the draft agreement for sale to Hannay's solicitors. On May 17 the defendant's solicitors wrote to Hannay's solicitors and said: ". . . we shall "be pleased to hear if your client is proposing to proceed with "this matter, and if so if we can receive the draft contract "approved. . . ." On May 19 Hannay's solicitors wrote that their client definitely intended to proceed. In the meantime references had been taken up with a view to securing from the landlord the right to assign the lease. Further correspondence

passed between the solicitors and on May 28 the defendant's solicitors wrote to Hannay's solicitors: "We shall advise our "client to accept your revisions to the draft contract." On the same day Hannay's solicitors wrote to the defendant's solicitors noting that: "the terms of the contract are now agreed." On June 5 the defendant's solicitors sent a draft letter which Hannay's solicitors were to send to them when contracts were exchanged. On June 12 the defendant's solicitors wrote to Hannay's solicitors saying: "Our client instructs us he is not proposing to proceed "with the proposed sale to your client" and asking for the return of the documents. In the interval Hannay had signed the engrossment of the contract as it had been agreed between the respective solicitors and paid his own solicitors the deposit. The contracts, however, were never exchanged and the contract signed by Hannay never left his solicitors nor was the money paid to them handed over to the plaintiffs or the defendants.

The plaintiffs claimed that £140 was due and owing to them from the defendant by way of commission.

*Desmond Neligan* for the plaintiffs.
*Harold Lightman* for the defendant.

The following cases were referred to in argument: *E. P. Nelson & Co.* v. *Rolfe*[1]; *Luxor (Eastbourne) Ld.* v. *Cooper*[2]; *Midgeley Estates Ld.* v. *Hand*[3]; *McCallum* v. *Hicks*[4]; *Dennis Reed Ld.* v. *Goody*[5]; *Bennett, Walden & Co.* v. *Wood*[6]; *Graham and Scott (Southgate) Ld.* v. *Oxlade*[7]; *Bennett & Partners* v. *Millett*[8]; *Giddy and Giddy* v. *Horsfall*[9]; *Trinder (John E.) and Partners* v. *Haggis*[10]; *Eccles* v. *Bryant and Pollock*.[11]

SLADE J. stated the facts as set out above and found first, that Hannay was at all material times able to find £2,800 necessary to complete the transaction, secondly, that he was at all material times not only willing but anxious to purchase the restaurant, and thirdly, that it was through no fault of his that the transaction did not mature into a binding contract followed by completion. His Lordship continued: The rights of the parties depend entirely on the language of the agency contract, and the proper interpretation of that language. Counsel on both sides have told me that they have been unable to find any case where the language of an agency contract was substantially the same

[1] [1950] 1 K.B. 139; [1949] 2 All E.R. 584.
[2] [1941] A.C. 108; 57 T.L.R. 213; [1941] 1 All E.R. 33.
[3] [1952] 2 Q.B. 432; [1952] 1 T.L.R. 1452; [1952] 1 All E.R. 1394.
[4] [1950] 2 K.B. 271; 66 T.L.R. (Pt. 1) 747; [1950] 1 All E.R. 864.
[5] [1950] 2 K.B. 277; 66 T.L.R. (Pt. 1) 918; [1950] 1 All E.R. 919.
[6] 66 T.L.R. (Pt. 2) 3; [1950] 2 All E.R. 134.
[7] [1950] 2 K.B. 257; 66 T.L.R. (Pt. 1) 808; [1950] 1 All E.R. 856.
[8] [1949] 1 K.B. 362; 64 T.L.R. 612; [1948] 2 All E.R. 929.
[9] (1947) 63 T.L.R. 160; [1947] 1 All E.R. 460.
[10] [1951] W.N. 416.
[11] [1948] Ch. 93; [1948] 2 All E.R. 865.

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as the language in the present case, and I myself have been equally unsuccessful. Moreover, I do not think it is of very great assistance to look at decisions on other contracts unless the contracts are substantially identical with the terms of the one which I have to construe. The agency contract itself defines the events on the happening of which plaintiffs as agents are to become entitled to commission.

The events are twofold. For convenience during the argument they were called "A" and "B." "A" was: "Commission "is payable by the owner in respect of any completed transaction "pertaining to the . . . premises," and "B" was: "Should the "owner withdraw after having accepted an offer to purchase by a "person able and willing to enter into a formal contract then "Christie & Co. [the plaintiffs] shall be paid their commission." Mr. Neligan for the plaintiffs says, of course, that he relies on "B." However, it is material to look at "A": "Commission is "payable . . . in respect of any completed transaction," because "B" is, I think, clearly used in contradistinction to "A." Although it is not necessary for me to construe "A" I should say that a completed transaction means not only a transaction such as, for example, the sale of freehold premises by conveyance, or, in the case of leasehold premises, by assignment or an underlease, and in each case by an assignment of the goodwill of the business, and so on, but includes also the case where the transaction has been completed in equity, that is to say, when a binding and enforceable contract has been signed by both parties to the transaction, or at least by the party to be charged, and which can in a proper case be enforced by an order for specific performance. Although in the second case completion has not taken place, I think the transaction may well be said to have been a completed transaction, in the sense that the right to the property has passed to the purchaser in equity.

Under "B" first, the plaintiffs must introduce a person who is able and willing to enter into a formal contract; secondly, that person must manifest his willingness to do so by making an offer; thirdly, the owner must accept that offer; and fourthly, having accepted that offer, the owner must withdraw, and when those requirements are fulfilled the agents are expressed to be entitled to their commission, although by reason of the withdrawal the transaction is never completed.

Mr. Lightman for the defendant contends that all that is covered by "B" is that where a prospective vendor and a prospective purchaser, having agreed on the terms of the contract into which they propose to enter, do enter orally into a contract containing those terms, then, as the contract is purely oral and there is no memorandum of it in writing such as is required by section 40 of the Law of Property Act, 1925, although it is a perfectly valid and legal contract it is a contract which the law will not enforce. He says that that construction is clear, first, from the use of the word "offer," secondly, from the use of the

word "accepted," thirdly, from the use of the word "withdrawal," and (one might also add) fourthly, from the use of the words "formal contract."

I confess that I find it difficult to envisage a person who can be said to be able and willing to enter into a formal contract of which no one knows the terms or of which one only knows one of the terms, such as the price. I should have thought that "a person able and willing to enter into a formal contract" means a person able and willing to enter into a formal contract of which the terms have already been agreed, albeit orally. First, Mr. Lightman says the word "offer" means, and can only mean, a firm offer, that is to say, an offer which is capable of being turned into a contract by acceptance; that "acceptance" is the word for the process used by the offeree in turning the offer into a contract; and that the word "withdrawal" means that the contract is unenforceable because one party to a contract cannot withdraw from it if it is enforceable; he can fail to perform it or he can refuse to perform it, but he cannot withdraw from it, because he is legally bound, and indeed in a proper case may be enjoined, to perform it. Mr. Lightman says that the word "offer" used in a contract of this nature has been held by the Court of Appeal to connote a firm offer, that is to say, an offer which is capable of being turned into a contract immediately by unconditional acceptance. That appears to be so from the decision of the Court of Appeal in *Bennett, Walden & Co.* v. *Wood*.[1] The words of the agency contract in that case were that the agents were to be entitled to commission on "securing for you an offer." It was held: "On a proper construction of the words 'securing for you an offer' the word 'offer' meant a firm offer which by acceptance would give rise to a contractual relationship. An offer subject to contract lacked that essential characteristic, for its acceptance did not create a contract, and the plaintiffs were, therefore, not entitled to commission."

Sir Raymond Evershed M.R. said[2]: "The question is solely this: By the phrase in the letter of Oct. 7, 'securing for you an offer,' is it contemplated that something short of what is ordinarily called a firm offer will do? Is it sufficient, in order that the agents shall earn their commission, that they should provide or produce something which, though expressed to be an agreement to purchase on the terms of an offer, is, in truth, no more than a proposal in the negotiations? To my mind, the answer to that question is in the negative." I can see no distinction in principle between the words "an offer to purchase by a person able and willing to enter into a formal contract" and the words "securing for you an offer," so far as the meaning of the word "offer" is concerned. Therefore, quite apart from other considerations, I should hold the word "offer," in the agency contract that I have to consider, to mean "an offer

[1] 66 T.L.R. (Pt. 2) 3; [1950] 2 All E.R. 134.

[2] [1950] 2 All E.R. 134, 136.

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"capable of being turned into a contract by acceptance." Equally, I should regard the words "after having accepted an "offer" as meaning "after that offer had been turned into a "contract by acceptance," albeit (there being no memorandum) an unenforceable contract.

I also derive assistance in arriving at the conclusion to which I have arrived from the decision of the Court of Appeal in *Graham and Scott (Southgate) Ld.* v. *Oxlade*,[3] where the words of the agency contract were: "in the event of our introducing "a person or persons willing and able to purchase." I am not concerned with ability to purchase here—Mr. Hannay always possessed that—but with willingness to purchase, in the light of the words in the contract; I have to construe the words "a "person willing to enter into a formal contract." In *Graham and Scott (Southgate) Ld.* v. *Oxlade*[3] the Court of Appeal held that a mere offer to purchase subject to contract was inconsistent with the view that the person making the offer was a willing purchaser, because all he was prepared to do to manifest his willingness was to enter into an agreement in the colloquial sense, which by the addition of the words "subject to contract" prevented the matter from going beyond the realm of negotiations, and which gave him what Cohen L.J. described as a locus penitentiae to withdraw from the so-called agreement at any stage until the contracts envisaged by the agreement became binding; that is to say, according to the decision of the Court of Appeal in *Eccles* v. *Bryant and Pollock*[4] until not only the parties had signed the contracts, and not only that each party was ready to exchange contracts, but until the exchange of the signed contracts was actually effected.

In *Graham and Scott (Southgate) Ld.* v. *Oxlade*[5] Cohen L.J. said this: "In reaching my conclusion, I am not saying that "the introduction into the preliminary arrangements of the "expression 'subject to contract' would necessarily in all cases "prevent the agent from establishing that the person he intro-"duced was willing to purchase. It clearly would not be fatal "to the agent's claim if it were introduced by the vendor in "accepting an unqualified offer; but, if it were introduced by the "prospective purchaser, the normal inference would be that he "did so with a view to reserving to himself a locus penitentiae—"conduct which seems to me inconsistent with the view that "he is a willing purchaser."

Where you have an agreement made subject to contract there are four possible outcomes of that so-called agreement. The first is a completed transaction; the second is a legally enforceable contract, but one which at the time that the agent issues his writ claiming commission, for example, has not yet actually proceeded to completion; the third one is a contract which is not legally

[3] [1950] 2 K.B. 257; 66 T.L.R. (Pt. 1) 808; [1950] 1 All E.R. 856.

[4] [1948] Ch. 93; [1948] 2 All E.R. 865.

[5] [1950] 2 K.B. 257, 265.

enforceable; and the fourth one is a state of affairs which has never passed beyond the realm of negotiations. Of those four possible outcomes I think the first two, as I have said, are covered by "A" in the agency contract. The third one is the one which (as I construe the phraseology of "B") "B" is designed to cover, because in the third one there is an an offer in the sense of a firm offer; there is an acceptance of the offer; but there is a person who not only has been willing but has in fact shown his willingness to enter into a formal contract, the terms of which are ex hypothesi already agreed, though not then reduced into writing. Accordingly, there is a position in which a person can lawfully withdraw, because the contract, as I have said, is an unenforceable one. With regard to the fourth outcome, where nothing has proceeded beyond the stage of negotiation, it is, of course, open to a principal and agent to arrive at any agreement they choose, and many attempts have been made by highly reputable estate agents like the plaintiffs in the present case to hit on a form of phraseology which will prevent a person who has had the benefit of their services and has gone right up to the point of being about to put his pen to sign a contract, from either caprice or, more likely, because at the last moment he receives a better offer, discarding any moral obligation he may have incurred and merely resiling from the negotiations in order to get more money.

I feel considerable sympathy with any agent who takes steps to secure a contract which will protect him from being deprived of the remuneration which he might reasonably expect to have received for his services by perfectly lawful conduct on the part of his principal of that kind, but if he wants to make a form of contract which will render the principal liable to pay him commission on a transaction which has never got beyond the realm of negotiation, that is to say, on the fourth possible outcome of an agreement subject to contract, he must make it perfectly clear to his principal that that is one of the events on which he is to be entitled to commission. I am not suggesting any form—I can imagine it is a very difficult problem—but it seems to me that the principle which Mr. Neligan has advanced so powerfully does involve my construing what I have called "B" in this way: "Should the owner withdraw after having accepted an offer "subject to contract to purchase by a person able and willing to "enter into a formal contract, of the terms of which he is at the "moment indifferent, then the agents shall be paid their com-"mission." Even then the word "accept," except in the colloquial sense, is inappropriate, because you cannot in the legal sense accept an offer which is expressed to be subject to contract.

I was rightly reminded of the words of Lord Russell in *Luxor (Eastbourne) Ltd.* v. *Cooper*,[6] although I think that even in that case Lord Russell was dealing with offers in the sense of firm

[6] [1941] A.C. 108; 57 T.L.R. 213; [1941] 1 All E.R. 33.

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offers, and not offers subject to contract. Lord Russell said [7]: "It is possible that an owner may be willing to bind himself to "pay a commission for the mere introduction of one who offers "to purchase at the specified or minimum price; but such a "construction of the contract would in my opinion require clear "and unequivocal language." A fortiori, I think it would require clear and unequivocal language to provide that the principal should be liable to the agent for commission in a case where the offer, so-called, is an offer subject to contract; when the acceptance is only a colloquial acceptance of something which is incapable of being turned into a contract; when there is no formal contract at the time of the acceptance, and the terms of any formal contract which may thereafter come into existence have not even been negotiated; and when the word "withdrawal" can only apply to withdrawing from the negotiations because there is nothing else from which to withdraw. If it is to be provided that in those circumstances the agents are entitled to commission it must be so stated in the agency contract in the plainest possible terms. I find it difficult to see how the onus of having withdrawn (because this only applies if the owner withdraws) can be settled on one person rather than on the other when the negotiations fail to reach fruition simply because the parties are unable to agree on the terms of the contract.

For those reasons, in my judgment this action fails. In so saying I should like to say that my sympathies in this case are entirely with the plaintiffs, and it is only right to say that the document which they invited the principal to sign is quite irreproachable in its form. The commissions charged are those charged by the ordinary professional institutes, the document is clear and unmistakable in what it says, is in large print, and, to "make assurance double sure," the context contains a separate piece which is retained by the principal, and which sets out the terms of commission in an equally legible form, so that the principal is at all times fully aware of the terms on which he has availed himself of the agent's services. In a word, throughout this case the plaintiffs have behaved quite irreproachably. Unfortunately, or fortunately, I cannot allow that fact to influence my judgment, and there will accordingly be judgment for the defendant.

*Judgment for the defendant.*

Solicitors: *Underwood & Co.; Raymond Pollard & Co.*

[7] [1941] A.C. 108, 129.

[CHANCERY DIVISION.]

*In re* TIMSON, DECD.
HARPER *v.* TIMSON AND OTHERS.

1953
*Oct.* 29.

Vaisey J.

[1953 T. No. 770.]

*Will—Construction—Codicil—Ineffective—Effect on construction of will—Pecuniary legacies—Whether payable out of real or personal estate—Whether estate indivisible entity.*

A testatrix after giving a number of pecuniary legacies, disposed of her residuary estate in the following terms: "I devise all my "real estate and bequeath the residue of my personal estate unto "my trustees upon trust (after payment thereout of my just debts "funeral and testamentary expenses death and legacy duties) to my "daughter . . ." absolutely.

The testatrix by a codicil recited that clause in her will, and declared that should her daughter predecease her: "I devise my "said real estate and bequeath the residue of my personal estate . . ." on trust for sale and conversion in trust, after payment of expenses identical with those enumerated in the will, for the sons of the daughter.

The daughter survived the testatrix so that the codicil was of no effect. She contended that the pecuniary legacies were payable only out of personalty, which was insufficient to pay them in full:—

*Held*, that the testatrix had, by the codicil and by the general scheme of her will, shown that she regarded her estate as a single indivisible entity, and that the pecuniary legacies were accordingly payable out of the testatrix's real and personal estate.

*In re Rowe* [1941] Ch. 343; 57 T.L.R. 592; [1941] 2 All E.R. 330 distinguished.

ADJOURNED SUMMONS.

By her will, dated May 31, 1949, Mrs. Amy Ellen Timson appointed the plaintiffs as her executors and trustees. She bequeathed certain specific and pecuniary legacies free of duty, including bequests of £50 and £10 to two grand-daughters respectively.

In the final clause of her will the testatrix disposed of her residuary estate in the following terms:

"I devise all my real estate and bequeath the residue of my "personal estate unto my trustees upon trust (after payment "thereout of my just debts funeral and testamentary expenses "death and legacy duties) for my daughter the said Margaret "Amy Lawson Tait for her own absolute use and benefit."

By a codicil dated November 30, 1951, the testatrix recited the final clause of her will and declared that if her daughter Margaret should predecease her then "I devise my said real "estate and bequeath the residue of my personal estate unto "my trustees upon trust to sell call in and convert into money "the same . . . with power to postpone such sale calling in and "conversion . . . and to stand possessed of the net proceeds of "such sale calling in and conversion and of my ready money in

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" trust after payment thereout of my just debts funeral and testa- " mentary expenses death and legacy duties to divide the residue " thereof equally between . . . the sons of my daughter the said " Margaret Amy Lawson Tait as tenants in common."

The testatrix died on July 16, 1952. The daughter, the residuary legatee, survived the testatrix, so that the codicil was of no effect.

After the funeral expenses and debts of the testatrix had been paid and the specific legacies handed over, the assets of the testatrix were insufficient, without resorting to the real estate (consisting of the proceeds of the sale of a house) to pay the pecuniary legacies bequeathed by the will. The plaintiffs were advised that the proceeds of the house should be resorted to for the purpose of paying the legacies. The daughter claimed that the legacies were payable only out of the testatrix's personal estate, and that she was entitled to the real property, and she refused to withdraw her claim.

The question on the summons was whether the pecuniary legacies were payable exclusively out of the personal estate of the testatrix, or whether they were payable also out of the real estate.

*H. F. J. Teague* for the plaintiffs.
*D. A. Shirley* for the pecuniary legatees.
*John W. Mills* for the residuary legatee.

The following cases in addition to those mentioned in the judgment were cited in argument: *In re Salt* [1]; *In re Worthington*.[2]

VAISEY J. having stated the facts: This case raises a question not without difficulty. The difficulty arises chiefly, if not exclusively, from a decision of Farwell J. in *In re Rowe*.[1] The headnote is as follows [1]: " A testator by his will, after bequeath- " ing certain pecuniary legacies, directed as follows: ' I devise " ' all my real estate and bequeath all the residue of my personal " ' estate ' " to two persons " in equal shares." The words there are similar to those in the present case, omitting the direction to pay " thereout," whatever that may mean, the just debts, funeral and testamentary expenses, death and legacy duties of the testatrix. Farwell J. held " that the law in force " before the Administration of Estates Act, 1925, relating to the " payment of pecuniary legacies out of real estate has not been " altered by section 34 and Schedule I, Part II, para. 2, of that " Act, and, accordingly, as the testator had not made the residue " a mixed fund or given the real and personal estate as one mass " to the residuary legatees, so as to bring into operation the rule " in *Greville* v. *Browne*,[2] the pecuniary legacies were payable

[1] [1895] 2 Ch. 203.
[2] [1933] Ch. 771; 49 T.L.R. 444.
[1] [1941] Ch. 343; 57 T.L.R. 592; [1941] 2 All E.R. 330.
[2] (1869) 7 H.L.C. 689.

"only out of the personalty." I am bound to say that at first sight that seemed to me to be so near the present case that I should be very rash in not following it.

As to that decision, far be it for me to say that it is incorrect—and I do not think that it is necessary for me to say that—but it has undoubtedly been criticized and, indeed, doubted. I need not however refer to the doubts or the manner in which they were expressed; it suffices to say that the case is not one which has been universally approved, and the disapproval to which it has given rise is largely due to the unwillingness of those who administer and interpret the law to go back to old history which was thought generally to have been rendered obsolete by the various property Acts of the year 1925.

I need not refer to many of the other cases which were cited to me. The first was *Withers* v. *Kennedy*,[3] where the headnote reads: "A testator, after a specific bequest of part of his personal "estate, devises all his freehold, copyhold, and leasehold estates, "and all the residue of his personal estate and effects, after "payment of his just debts and funeral expenses, to trustees, "their heirs, executors, and administrators, upon certain trusts. "The real estate," it was held, "is charged with the payment of "debts." In his judgment, Sir John Leach based his conclusion largely on the fact that leasehold properties were combined with freeholds. There, that circumstance was regarded as sufficient to charge the debts on the real estate.

The next case was *In re Thompson*,[4] where Clauson J. held that the law in force before the Administration of Estates Act, 1925, as regards the primary fund for payment of legacies as between the personal and real estate has not been altered by the relevant section of the Schedule to that Act, and that the personal estate must be treated as primarily liable, and recourse will not be made to the real estate until the personal estate has been exhausted.

Another case, which was decided recently by Harman J., was *In re Ridley*,[5] where it was held that the will in question showed an intention within the meaning of section 34 (3) of the Administration of Estates Act, 1925, sufficient to vary the order of application of assets laid down in the Schedule, and that accordingly the above-mentioned expenses and death duties did not fall on the realty until the personalty was exhausted. It must always be remembered that section 34 of the Act is always subject to provisions contained in a will, which may displace the order for which the section provides in the normal case.

The decision in *In re Rowe*[6] has given me a good deal of anxiety. At one time I thought that I should be obliged to follow it but, in my view, that case can be distinguished, if to distinguish it is necessary, by this circumstance—that the testatrix, by her

[3] (1833) 2 My. & K. 607.
[4] [1936] Ch. 676; [1936] 2 All E.R. 141.
[5] [1950] Ch. 415; 66 T.L.R. (Pt. 1) 981; [1950] 2 All E.R. 1.
[6] [1941] Ch. 343.

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*In re* TIMSON, DECD. HARPER *v.* TIMSON.

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codicil, has shown that she regarded her estate as a single indivisible entity. She uses, it is true, the same words, " I devise my " real estate and bequeath the residue of my personal estate," but she gives it upon trust for sale and upon trust to divide the proceeds between the beneficiaries who are there named, the two sons of her daughter.

It is in my judgment almost incredible to regard the testatrix as having been careful to keep the real estate in existence as a separate item when she was leaving it to her daughter and to make one fund of the realty and personalty when she was making the substituted provisions in her codicil for the sons of her daughter. I incline to the view that she never contemplated anything of the kind, and never contemplated any differentiation between her realty and personalty when she was considering the payment of these named sums of money to her descendants and other legatees. Whether " thereout " refers only to the residue of the personalty, or whether it refers to the realty and the personalty is very difficult for me to say as a matter of certainty; but I am inclined to think that, after disposing of both types of property, the word " thereout " refers to both the real estate and the personal estate, and not only to the residue of the personal estate.

It may be said that in the list of payments to be made " there- " out "—again, I interpose, whatever " thereout " may mean—she says nothing about legacies. Whether she thought that the residue of her personal estate meant the residue of the personal estate less the pecuniary legacies, I do not know, but I think that the general scheme of this will indicates an intention on the part of the testatrix that the legacies have somehow got to be paid. I do not think that she ever contemplated that the real estate should go intact to the daughter, and the advice which the plaintiffs were given as to the proper way of administering this estate, although they may not have realized that it was a matter of great doubt and difficulty, was, after all, correct.

There will be a declaration that the pecuniary legacies bequeathed by the will are payable out of the whole estate, both real and personal, of the testatrix, along with the other expenses of administration, including the costs and expenses of the plaintiffs; an expression which will cover all their proper charges, and the costs of the defendants to be taxed as between solicitor and client.

*Declaration accordingly.*

Solicitors: *Peachey & Co. for Darnell & Price, Northampton; Jaques & Co.*

I. G. R. M.

[CHANCERY DIVISION.]

1953
*Oct.* 27.

## * PRACTICE DIRECTION (TRUSTEE'S COSTS).

*Costs—Trustees—Indemnity as to costs—Form of order—Not as between solicitor and client—Trustee Act,* 1925 (15 *Geo.* 5, *c.* 19), *s.* 60.

In cases in which trustees are parties in their capacity as such, and in which it is appropriate that they should be indemnified as to their proper costs and expenses of the proceedings, the order as to the costs of the trustees should direct taxation of their "costs and expenses of and incident to this action [application] "[matter]" without the addition of the words "as between "solicitor and client." On such a direction all costs and expenses properly incurred by the trustees will be allowed by the taxing master. Compare Trustee Act, 1925, s. 60.

The costs of other parties to the proceedings will, as hitherto, be ordered either (a) "to be taxed" (i.e., as between party and party) or (b) "to be taxed as between solicitor and client."

By direction of the judges of the Chancery Division.

W. S. JONES,
Chief Registrar,
Chancery Division.

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[PROBATE, ETC., DIVISION.]

## * BEAL *v.* BEAL (READE CITED).

1953
*Oct.* 13.

Mr. Commr. William Latey Q.C.

*Husband and Wife — Divorce — Trial — Submission of no case by co-respondent or party cited—Election—Matrimonial Causes Act,* 1950 (14 *Geo.* 6, *c.* 25), *s.* 5.

Prima facie, the provisions of section 5 of the Matrimonial Causes Act, 1950, allow a submission of no case to answer to be made on behalf of a co-respondent or party cited without counsel being put to his election whether he will call evidence. It would, however, be wrong to hold in principle that the section, which appears to be obsolete and might well be repealed, counteracts the authority of *Alexander* v. *Rayson* [1936] 1 K.B. 165, as applied to matrimonial causes in *Yuill* v. *Yuill* [1945] P. 15; 61 T.L.R. 176; [1945] 1 All E.R. 183.

DEFENDED PETITION for divorce.

At the close of the cases for the petitioner and respondent in a divorce suit in which it was alleged that the petitioner and party cited had committed adultery, it was submitted on behalf of the

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party cited that there was insufficient evidence of adultery against him. It was further submitted that in view of the wording of section 5 of the Matrimonial Causes Act, 1950,[1] counsel was not bound to be put to his election. The court allowed the submission to be made without asking counsel to make his election; and, having heard arguments, held that there was in fact a serious case against the party cited to answer, and allowed the evidence of the party cited to be called. Having heard such evidence, the court found adultery proved. The judgment is confined to a consideration of the question of the submission made and to the historical background to the section.

*A. B. Hollis* for the petitioner.
*C. D. Aarvold* for the respondent.
*N. H. Curtis-Raleigh* for the party cited.

The cases referred to in argument are included in the judgment.

MR. COMMISSIONER WILLIAM LATEY Q.C. Before I review the evidence, I have to deal with a point of procedure which arose in the course of the case. It was a submission made to me by Mr. Curtis-Raleigh, counsel for the party cited, after the cases for the petitioner and the respondent had been closed. He submitted that by virtue of section 5 of the Matrimonial Causes Act, 1950, he was entitled to ask the court to dismiss the party cited from the suit because there was insufficient evidence against him. He submitted that, in view of the express words of this section, he was not bound to be put to his election in making this submission according to the rule of convenience laid down in the common law case of *Alexander* v. *Rayson*.[1] In that case the Court of Appeal decided (and their decision was confirmed by the same tribunal in later cases) that if a submission of no case to answer fails, no evidence may be called on behalf of the party making that submission. [The commissioner read section 5 of the Act of 1950, and continued:] This section has been the law since 1858; and its ordinary meaning would seem to be that, after the close of the case for the petitioner, or, in this case, after the close of the case for the husband alleging adultery against a man with the husband's wife, the court may dismiss him from the suit because there is insufficient evidence against the alleged adulterer. In the present case, so far as the charges of adultery are concerned, the respondent

[1] Matrimonial Causes Act, 1950, s. 5: "In any case in which, on the petition of a husband for divorce on the ground of adultery, the alleged adulterer is made a co-respondent or in which, on the petition of a wife for divorce on the ground of adultery, the person with whom the husband is alleged to have committed adultery is made a respondent, the court may, after the close of the evidence on the part of the petitioner, direct the co-respondent or the respondent, as the case may be, to be dismissed from the proceedings if the court is of opinion that there is not sufficient evidence against him or her."

[1] [1936] 1 K.B. 165.

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BEAL v. BEAL (READE CITED).

Mr. Commr. William Latey Q.C.

stands in the position of petitioner, and the party cited in the position of co-respondent. That follows from section 6 of the Matrimonial Causes Act, 1950.

The jurisdiction and practice of the divorce court has some marked differences from those of the common law courts, and up to the decision in *Alexander* v. *Rayson*[1] in 1935 it was customary for a long line of divorce judges to hear a submission of no case to answer in regard to any accused party, whether respondent, petitioner, co-respondent or party cited, and if that submission failed, to allow evidence to be called on behalf of the party making the submission. My attention was drawn by Mr. Curtis-Raleigh to the pronouncement of Lord Greene M.R. in *Yuill* v. *Yuill.*[2] This was an appeal from the rejection of a husband's petition for divorce based on adultery. During the trial, when the petitioner's case was closed, counsel for the wife respondent submitted, in effect, that there was no case to answer. The trial judge did not put him to his election, because his Lordship did not appreciate that counsel was actually making this submission. In the Court of Appeal Lord Greene M.R. said[3]: "The "practice"—that is to say, the practice in regard to a submission of no case in a civil suit—" is discussed in *Alexander* v. *Rayson*,[4] "*Parry* v. *Aluminium Corporation Ltd.*,[5] and *Laurie* v. *Raglan* "*Building Co.*,[6] and I will assume that it is a proper practice "to follow in the Divorce Division. It does not mean that "counsel by submitting no case ipso facto loses his right to call "evidence if his submission fails. He only loses that right if he "definitely elects to call no evidence. He may make this "election expressly or (as in *Laurie* v. *Raglan Building Co.*[6]) "impliedly. The practice which has been laid down amounts to "no more than a direction to the judge to put counsel who desires "to make a submission of no case to his election, and to refuse to "rule unless counsel elects to call no evidence. Where counsel "has so elected he is, of course, bound: but if for any reason, "be it through oversight or (as here) through a misapprehension "as to the nature of counsel's argument, the judge does not put "counsel to his election, and no election in fact takes place, "counsel is entitled to call his evidence just as if he had never "made the submission."

During the arguments in the Court of Appeal and in the court below in *Yuill* v. *Yuill*[7] no reference was made to the section now invoked in this case. At that date it was section 179 of the Supreme Court of Judicature (Consolidation) Act, 1925, which has now been repealed and re-enacted in the Act of 1950. It was submitted in the present case by counsel for the party cited that section 5 of the Act of 1950 took the matter before me out of the rule of convenience laid down in the common law cases which

[1] [1936] 1 K.B. 165.
[2] [1945] P. 15; 61 T.L.R. 176; [1945] 1 All E.R. 183.
[3] [1945] P. 15, 18.
[4] [1936] 1 K.B. 169.
[5] [1940] W.N. 44.
[6] [1942] 1 K.B. 152.
[7] [1945] P. 15.

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I have cited, notwithstanding the perfectly accurate statement by Lord Greene M.R. in *Yuill* v. *Yuill*,[7] that the practice had been adopted in the Divorce Division of calling on the respondent's counsel to elect whether to call evidence or to proceed with his submission. Here Mr. Curtis-Raleigh urged that the section enabled him to call on the court to say that there was not sufficient evidence to justify the court in proceeding with the case against the party cited, and, therefore, that he did not have to submit that there was no case, or make his election not to call evidence. Although when analysed the argument seemed paradoxical, I felt, prima facie, that the section allowed me to hear his submission without asking him to make his election. Of course, neither in *Alexander* v. *Rayson*[8] nor in *Yuill* v. *Yuill*[9] could section 5 have been applicable, because one must bear in mind that it applies only to the case of a co-respondent or a party cited, who is in the same position as the co-respondent, or to a woman named who becomes intervener. Having heard the arguments from counsel for the husband and for the party cited, I decided that there was a serious case against the party cited on the evidence and, therefore, Mr. Curtis-Raleigh proceeded to call the evidence of the party cited and witnesses in support. In this case, therefore, the point raised under section 5 is only of academic interest.

But as due deference must always be given to decisions on principle of the Court of Appeal, I considered it necessary to make some research into the genesis of section 5 for the purpose of discovering its scope and intent. Its genesis is to be found in the well-known decision in 1858 of *Robinson* v. *Robinson & Lane*,[10] one of the earliest cases decided in the Divorce Courts. Almost the only evidence in that case of adultery by the wife, apart from evidence of association, was contained in extracts from her diaries. At that time, owing to certain statutory enactments which led to forensic inconvenience and hardship, a co-respondent was not a competent or compellable witness; and, incidentally, at that time neither husband nor wife, if a party, was competent or compellable to give evidence in proceedings instituted in consequence of adultery. The somewhat complicated course of matrimonial and evidence Acts which terminated this state of things is lucidly reviewed in the judgment of Denning L.J. in *Tilley* v. *Tilley*.[11] The full court in *Robinson* v. *Robinson & Lane*[12] found itself bound to hold that, as the co-respondent while still a co-respondent was not a competent witness, he could not be called as a witness in favour of the wife respondent; nor could he be dismissed from the suit before final judgment, as the law then stood. But Cockburn C.J.

[7] [1945] P. 15.
[8] [1936] 1 K.B. 165, 169.
[9] [1945] P. 15.
[10] (1859) 1 Sw. & Tr. 362.
[11] [1949] P. 240; 65 T.L.R. 211; [1948] 2 All E.R. 1113.
[12] 1 Sw. & Tr. 362.

announced [13] that a section was being introduced into the pending Divorce Act (Amendment) Bill to overcome the difficulty which had arisen. Thus section 11 of the Matrimonial Causes Act, 1858, came into existence. That Act became law on August 2, 1858.

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Nevertheless, despite the competence now, and for many years past, of any party to give evidence in proceedings which are instituted on the ground of adultery, and despite the general duty of this court, laid down by section 4 of the Matrimonial Causes Act, 1950, re-enacting similar provisions in the previous Matrimonial Causes Acts, to dismiss a petition if not satisfied that the adultery has been committed, this section 5 still remains on the Statute Book. Either it means what it says, or it is obsolete. As regards the rule laid down in *Alexander* v. *Rayson*,[14] and its application to divorce proceedings as explained by Lord Greene M.R. in *Yuill* v. *Yuill*,[15] Goddard L.J. in another case in the Court of Appeal, *Parry* v. *Aluminium Corporation*,[16] suggested, in asserting that the rule should be followed in negligence cases, that it might not be the right course in every action, as, for example, in defamation and slander cases.

Having investigated the origin of this section, I have now come to the conclusion that the section is really obsolete and might well be repealed, but that it would be wrong to hold in principle that it counteracts the authority of *Alexander* v. *Rayson*.[17] Therefore, the course I took in this case must not be treated as a precedent. No harm was done thereby to any party, because, to echo the words of Wallington J.[18] in that same case of *Yuill* v. *Yuill*, " I think it might have involved a grave injustice " if I had attempted to dispose of this case without hearing the " evidence on both sides."

Solicitors: *Kinch & Richardson; Haslewood, Hare, Shirley Woolmer & Co.; Graham Hooper & Betteridge, Brighton.*

[13] July 3, 1858. See pp. 387–8 of report.
[14] [1936] 1 K.B. 169.
[15] [1945] P. 15.
[16] [1940] W.N. 44.
[17] [1936] 1 K.B. 169.
[18] Unreported.

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[COURT OF APPEAL.]

## *DIXON *v.* CITY VENEERING MILLS LD.

C. A.

1953 *Oct.* 23.

Evershed M.R., Jenkins and Morris L.JJ.

## PRACTICE NOTE.

*Practice and Procedure—Appeals—Transcript of evidence—Selection of necessary material—Costs.*

At the conclusion of his judgment in this case, which does not call for report, EVERSHED M.R. said: I wish to take this opportunity once more to draw the attention of parties to an appeal to the

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need for care in deciding whether it is necessary to copy the whole of the evidence. As the appellant has failed, no point here arises, but obviously much more of the transcript was copied than was required. I know that it is not always easy to decide what evidence and documents will be required on the appeal, but I think that sometimes insufficient attempts are made to conclude whether it would not be enough for part only of the evidence to be transcribed. The copying, as a matter of course, of all the evidence and documents which were before the court below wastes costs, and, on occasion, this court has asked the taxing master to consider whether some of the costs of such copying should not be disallowed. I take this opportunity of pointing out that the court may have occasion to say hereafter more of a general nature on this matter, but I hope that what I have said may penetrate a little further than just among those present at the moment.

B. A. B.

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[QUEEN'S BENCH DIVISION.]

1953
*Nov.* 6.
BARRY J.

## ** BROWN *v.* MINISTER OF HOUSING AND LOCAL GOVERNMENT AND OTHERS. FORD *v.* SAME.

*Compulsory Purchase—Compulsory purchase order—Notice—Whether statutory tenant under Rent Acts entitled to receive notice—"Occupier"—Acquisition of Land (Authorization Procedure) Act*, 1946 (9 & 10 *Geo.* 6, *c.* 49), *Sch. I, art.* 3 (1) (*b*).

A person in possession of premises by virtue of the protection afforded by the Rent Acts is an "occupier" within the meaning of article 3 (1) (*b*) of the First Schedule to the Acquisition of Land (Authorization Procedure) Act, 1946, and, as such, is entitled to receive a notice of a compulsory purchase order affecting his premises.

APPLICATIONS to quash a compulsory purchase order.

The applicants, Mrs. Paulette Austin Brown and Miss Beatrix Rosalie Elizabeth Ford, were in possession of flats at 83, West Hill, Putney, solely by reason of the protection afforded them by the Rent Restrictions Acts.

On November 20, 1951, the second respondents, the Wandsworth Borough Council, by virtue of their powers under the Housing Acts, 1936 to 1949, made a compulsory purchase order entitled the Metropolitan Borough of Wandsworth (Sutherland Grove) Compulsory Purchase Order, 1951, which order included 81, 83, 85 and 87 West Hill, Putney. The council duly advertised in two local newspapers the fact that the order had been made, but did not serve on the applicants a notice stating the effect of the order. The order having been submitted to the Minister of

Housing and Local Government for confirmation the Minister caused a public inquiry to be held on October 20, 1952, and the order was confirmed on May 1, 1953. Neither of the applicants were aware that the inquiry was to be held and neither attended to object to the confirmation of the order. The applicants claimed that the council had failed to comply with the requirements of the Acquisition of Land (Authorization Procedure) Act, 1946,[1] in

[1] Acquisition of Land (Authorisation Procedure) Act, 1946, s. 1 (1): "The authorisation of any compulsory "purchase of land—(*a*) by a local "authority where, apart from this "Act, power to authorise the authority "to purchase land compulsorily is conferred by or under any enactment "contained in a public general Act "and in force immediately before the "commencement of this Act, other "than any enactment specified in subsection (4) of this section . . . shall ". . . be conferred by an order (in "this Act referred to as a 'compulsory purchase order') in accordance with the provisions of the First "Schedule to this Act. . . ."

Sch. I, art. 1: "A compulsory "purchase order authorising a compulsory purchase by a local authority "(hereafter in this schedule referred "to as the 'acquiring authority') in a "case falling within subsection (1) of "section one of this Act shall be made "by the local authority and submitted "to and confirmed by the authority "having power under the enactment "in question to authorise the purchase "(hereafter in this schedule referred "to as the 'confirming authority') in "accordance with the following provisions of this schedule."

Art. 2. "The compulsory purchase "order shall be in the prescribed form "and shall describe by reference to a "map the land to which it applies."

Art. 3. "(1) Before submitting the "order to the confirming authority the "acquiring authority shall—(*a*) in two "successive weeks publish in one or "more local newspapers . . . a notice "in the prescribed form stating that the "order has been made. . . . (*b*) except "in so far as the confirming authority "directs that this provision shall not "have effect in any particular case, "serve on every owner, lessee and "occupier (except tenants for a month "or any period less than a month) of "any land comprised in the order a "notice in the prescribed form stating "the effect of the order and that it is "about to be submitted for confirmation, and specifying the time (not "being less than twenty-one days "from the service of the notice) within "which and the manner in which "objections thereto can be made."

Art 4. "(1) If no objection is duly "made by any such owner, lessee or "occupier as aforesaid or if all objections so made are withdrawn, the "confirming authority, upon being "satisfied that the proper notices "have been published and served, "may, if the authority thinks fit, "confirm the order with or without "modifications. (2) If any objection "duly made as aforesaid is not withdrawn, the confirming authority "shall, before confirming the order, "either cause a public local inquiry "to be held or afford to any person "by whom any objection has been "duly made as aforesaid and not "withdrawn an opportunity of appearing before and being heard by a "person appointed by the confirming "authority for the purpose, and, after "considering the objection and the "report of the person who held the "inquiry or the person appointed as "aforesaid, may confirm the order "either with or without modifications. "(3) If any person by whom an objection has been made avails himself "of the opportunity of being heard, "the confirming authority shall afford "to the acquiring authority, and to "any other persons to whom it "appears to the confirming authority "expedient to afford it, an opportunity of being heard on the same "occasion."

Art. 15. "(1) If any person "aggrieved by a compulsory purchase "order desires to question the validity "thereof, or of any provision contained therein, on the ground that ". . . any requirement of this Act or "of any regulation made thereunder "has not been complied with in relation to the order or certificate, he "may, within six weeks from the date "on which notice of the confirmation "or making of the order or of the "giving of the certificate is first published in accordance with the provisions of this schedule in that behalf, "make an application to the High "Court, and on any such application "the court . . . (*b*) if satisfied that "the authorisation granted by the

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that it had failed to serve on the applicants the notice prescribed by article 3 (1) (*b*) of the First Schedule to that Act, and that they had been substantially prejudiced thereby.

It was conceded by the respondents that, if the applicants were entitled to receive individual notices of the making of the order, and of its submission for confirmation to the Minister, they were substantially prejudiced by the failure of the council to serve a notice on them, but they contended that the applicants were not of the class of person referred to in article 3 (1) (*b*) and, therefore, were not entitled to receive a notice.

*L. G. Scarman* for the applicants.

*J. P. Ashworth* for the Minister and the Wandsworth Borough Council.

The following cases were referred to in argument: *Remon* v. *City of London Real Property Co. Ld.*[2]; *Keeves* v. *Dean*[3]; *Roe* v. *Russell*[4]; *Abbey* v. *Barnstyn*[5]; *Baker* v. *Turner*[6]; *Wigley* v. *Leigh*[7]; *Robinson* v. *Taylor*[8]; *Pegler* v. *Craven*[9]; *Baldwin* v. *Gurnsey*[10]; *Inland Revenue Commissioners* v. *John Dow Stuart Ld.*[11]; *West Derby Union* v. *Metropolitan Life Assurance Society*[12]; *Dudley and District Benefit Building Society* v. *Emerson.*[13]

BARRY J. stated the facts and continued: The sole question for the court is whether the applicants, who were both statutory tenants of premises falling within the Rent Restrictions Acts, were either owners, lessees or occupiers (except tenants for a month or any period less than a month) of any land comprised in the order. The question is not an easy one to answer, and I do not pretend to answer it with any great confidence. It is common ground between the parties that the applicants, whatever else they were, were not the owners of these properties. It is also common ground that they could not properly be described as the lessees of the properties, nor can it be said that they were

" compulsory purchase order is not " empowered to be granted as afore- " said, or that the interests of the " applicant have been substantially " prejudiced by any requirement of " this schedule or of any regulation " made thereunder not having been " complied with, may quash the com- " pulsory purchase order or any pro- " vision contained therein, or the " certificate, either generally or in so " far as it affects any property of the " applicant."

[2] [1921] 1 K.B. 49; 36 T.L.R. 869.

[3] [1924] 1 K.B. 685; 40 T.L.R. 211.

[4] [1928] 2 K.B. 117; 44 T.L.R. 278.

[5] [1930] 1 K.B. 660; 46 T.L.R. 293.

[6] [1950] A.C. 401; 66 T.L.R. (Pt. 1) 780; [1950] 1 All E.R. 834.

[7] [1950] 2 K.B. 305; [1950] 1 All E.R. 73.

[8] [1948] 1 K.B. 562; 64 T.L.R. 116; [1948] 1 All E.R. 291.

[9] [1952] 2 Q.B. 69; [1952] 1 T.L.R. 618; [1952] 1 All E.R. 685.

[10] [1949] 1 K.B. 102; 64 T.L.R. 465; [1948] 2 All E.R. 165.

[11] [1950] A.C. 149; [1950] 1 All E.R. 1.

[12] [1897] A.C. 647; 13 T.L.R. 536, H.L.

[13] [1949] Ch. 707; 65 T.L.R. 444; [1949] 2 All E.R. 252.

tenants for a month or any period less than a month so as to fall within the exception in paragraph (*b*). The whole difference between the parties is now focussed on the proper construction of the word " occupier," in article 3 (1) (*b*) of the schedule.

Mr. Scarman, on behalf of the applicants, drew my attention to a large number of authorities which related to the true legal position of a statutory tenant under the Rent Restrictions Acts. He referred to those cases primarily in support of his submission that the applicants were not tenants in the true sense at all, and therefore that they could not in any proper construction of the words be regarded as tenants for a month or any period less than a month. However, the cases are of some importance as indicating what the real status of a statutory tenant, so called, should be taken to be. The conditions of statutory tenancy are described in section 15 (1) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. That section provides: " A " tenant who by virtue of the provisions of this Act retains " possession of any dwelling-house to which this Act applies " shall, so long as he retains possession, observe and be entitled " to the benefit of all the terms and conditions of the original " contract of tenancy, so far as the same are consistent with " the provisions of this Act, and shall be entitled to give up " possession of the dwelling-house only on giving such notice as " would have been required under the original contract of " tenancy, or, if no notice would have been so required, on " giving not less than three months' notice."

Since the year 1920, the courts on numerous occasions have been occupied by arguments as to the true status of a person who was at one time a contractual tenant, and continues in possession of premises by virtue of the protection afforded to him against ejectment by the various Rent Restrictions Acts. I do not think that it would be of assistance to the parties if I reviewed those cases in detail. It is clear that a statutory tenant is not a tenant at all in any true sense of that term. That has been pointed out on several occasions by the Court of Appeal. Bankes L.J. in *Keeves* v. *Dean*,[1] used these words[2]: " These " two appeals from the Divisional Court raise a very important " question under the Increase of Rent, etc., Act, 1920—namely, " whether a person who has been a tenant of a dwelling-house, " whose tenancy has been determined by notice to quit, but who " has remained in possession against the will of his landlord, can " assign his statutory position to another person. The person " who so seeks to assign has come to be known as a ' statutory " ' tenant,' and I think it is a pity that that expression was ever " introduced. It is really a misnomer, for he is not a tenant at " all; although he cannot be turned out of possession so long as " he complies with the provisions of the statute, he has no estate " or interest in the premises such as a tenant has. His right is

[1] [1924] 1 K.B. 685. [2] Ibid. 690.

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" a purely personal one, and as such, unless the statute expressly " authorizes him to pass it on to another person, must cease the " moment he parts with the possession or dies."

Greer L.J. in *Abbey* v. *Barnstyn*,[3] said [4]: " . . . the term " 'statutory tenant' was in the main used to describe a person " enjoying the rights of an occupier [who had been a contractual " tenant, whose tenancy had been determined but who was " entitled to remain in possession because no court could make " an order for his ejectment] . . . The Act of 1920 consolidated " and amended the earlier Acts and made certain amendments " which are not material. It is with this Act and the Act of " 1923, which provides that in certain cases the Act shall no " longer apply to certain houses, that we are concerned in this " appeal. In the margin to section 15 of the consolidating Act " of 1920 the words 'statutory tenancy' appear as applying to " the relationship between the ex-landlord and the ex-tenant, " where the latter is protected from ejectment. The section " itself does not use the term. It provides that so long as the " tenant retaining possession by virtue of the provisions of that " Act retains possession he must observe and shall be entitled " to the benefit of all the terms and conditions of the original " tenancy. The term 'statutory tenant' has been frequently " criticised, but it does not seem to me to be inapt to describe " the occupier, who by statute is entitled to remain in occupa- " tion after his contractual tenancy has been determined, but " must remain in occupation subject to the obligations and " benefits of the original contract of tenancy. The use of the " word 'tenant' for such an occupier does however create some " difficulty when we have to interpret the word 'tenant' when " used in other parts of the Act, and in the decontrolling section " of the Act of 1923."

The House of Lords have approved of the general sense of the construction of the Act of 1920 which was indicated in the judgments of the Court of Appeal and other judgments to which I have not referred. In *Baker* v. *Turner*,[5] Lord Reid said [6]: " It has long been settled that the Rent Acts do not prevent " an owner from terminating the tenancy of his tenant in the " ordinary way: what they do is to give to a person who has " been tenant a right to remain in possession after the tenancy " has gone. A person with such a right is commonly called a " statutory tenant, but that name, though convenient, is " inaccurate. The true position of such a person was stated as " long ago as 1923 by Bankes L.J. in *Keeves* v. *Dean*.[7] "

One of the most recent pronouncements on this subject was made by the Court of Appeal in *Dudley and District Benefit*

[3] [1930] 1 K.B. 660; 46 T.L.R. 293.
[4] [1930] 1 K.B. 669.
[5] [1950] A.C. 401; 66 T.L.R. (Pt.1) 780; [1950] 1 All E.R. 834.
[6] [1950] A.C. 436.
[7] [1924] 1 K.B. 685, 690.

*Building Society* v. *Emerson*.[8] In that case Evershed M.R. said[9]: "Furthermore, as I have already intimated, and as is, "of course, well known, in certain circumstances (when, for "example, an effective notice to quit has been given) the con- "tractual tenancy between A and B may come to an end, and "there then is created what is known as a statutory tenancy, B "remaining in possession as a 'statutory tenant' of A. It has "been said in these courts that a statutory tenancy, as the "phrase is commonly used, is a somewhat inapposite expression, "for it confers on the so-called statutory tenant no estate or "interest in the land. He cannot part with it or dispose of it, "and in certain circumstances the right to possession, which is "its principal feature, may pass to persons who would be quite "different from the persons who would get the benefit of a "contractual tenancy when a tenant dies."

On that state of the authorities as to the true position of a statutory tenant, Mr. Scarman argued that a person living in premises as the statutory tenant of those premises was the occupier of the premises, and as such under the clear wording of article 3 (1) (*b*) of the Schedule, entitled to service of the notice in the form prescribed by that subsection.

Mr. Ashworth submitted that in the circumstances of these two cases the applicants could not properly describe themselves as occupiers of these flats. He submitted that to establish occupation within the meaning of paragraph (*b*), an applicant must show first, that he or she was in actual physical occupation of the premises. He conceded that in both the present cases the applicants were in physical occupation, but, he said, they must also show that their occupation was of a type which brought them within the true meaning of paragraph (*b*). He submitted that in the context in which that word was found in the paragraph, "occupier" must mean some person who had some estate or interest in the property. He supported that view by pointing out that the word was to be found intimately associated with the words "owner" and "lessee," and also immediately followed by the words "except tenants for a month or any period less "than a month." He said that there the statute was referring in descending order of importance to the various classes of persons who might be interested in land or houses, first the owner, then the lessee and lastly the occupier. That occupier, said Mr. Ashworth, must be someone who had some legal interest in the land which he occupied. He also supported his argument in favour of this somewhat narrow construction of the word "occupier" by reference to the closing words of article 15 (1) (*b*) of the schedule where the court was given power to "quash a compulsory order or any provision contained therein, "or the certificate, either generally or insofar as it affects any "property of the applicant."

[8] [1949] Ch. 707; 65 T.L.R. 44; [1949] 2 All E.R. 252.

[9] [1949] Ch. 717.

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In view of the authorities to which I have already referred, Mr. Ashworth argues that neither of the applicants have any property properly so called in any of the land or buildings comprised in this compulsory purchase order. They have nothing more, he says, than a mere physical right to remain in possession of parts of those properties until ordered to leave by an order of the court, which can only be made under certain conditions and certain circumstances provided by the Rent Restrictions Acts. He says that the word " occupier " must have some restriction placed on its interpretation, otherwise it might cover any person who was on the premises for a short period, no matter in what capacity. Mr. Ashworth pointed out that the word was used in different senses in a number of enactments, including those relating to rent restrictions, rating, leasehold property (the Leasehold Property (Temporary Provisions) Act, 1951), and again under the Defence Regulations, regulation 68CB (1). It being susceptible of these various shades of meaning, Mr. Ashworth invited me to deal with that word as though it was an ambiguous word in the sense described by Lord Reid in the *Inland Revenue Commissioners* v. *John Dow Stuart Ltd.*[10] He also relied on the principle enunciated by Lord Herschell in *West Derby Union* v. *Metropolitan Life Assurance Society.*[11] By virtue of the principles there enunciated, he submitted that the court was entitled to look at the proviso to the words used, and to construe the words if they were capable of more than one meaning in the light of the proviso. Here he says that the proviso excludes tenants for a month or any period less than a month, and that being so, he submits that the word " occupier," which immediately precedes that proviso or exception, should be read as including only persons holding such an interest in land as is in fact held by a tenant.

Again, relying upon the general scope of the Act as a whole, Mr. Ashworth submitted that it was clear that the legislature could not have intended that a local authority minded to make and have confirmed a compulsory purchase order, should be required to serve notice on a vast floating population of controlled tenants, any one of whom, if an occupier within the meaning of the schedule, would be entitled to insist on a public inquiry.

Forceful though those arguments may be, I do not think on the whole that I should accept them. To my mind, it is placing a most artificial limitation on the ordinary meaning of the word " occupier " to exclude from its scope persons in the position of statutory tenants under the Rent Restrictions Acts. Again and again in his judgment in *Abbey* v. *Barnstyn*,[12] Greer L.J. used the word " occupier " to describe the position of a statutory tenant. Whatever criticism he and the other Lord Justices in that case and many others may have had of the word " tenant," no one has suggested, so far as I am aware that persons living

[10] [1950] A.C. 149, 182.
[11] [1897] A.C. 647, 655.
[12] [1930] 1 K.B. 660.

in premises and clearly occupying them in that sense by virtue of the provisions of the Rent Restrictions Acts are not occupiers of those premises in the ordinary and reasonable sense of that term. It seems to me that if the legislature had desired to exclude statutory tenants from the province of article 3 (1) (*b*) of the schedule, that they would have done so in clear terms.

As Mr. Scarman has pointed out, the word " occupier " is used in conjunction with and immediately following the words " owner " and " lessee." " Occupier " no doubt in this context includes persons occupying the premises, perhaps under agreements for leases or under short tenancies created verbally or in writing, but not under a lease. I do not think, however, that it would be right for me to construe the word " occupier " as solely referring to tenants other than lessees in the strict sense of that term, because it does appear to me that the Act makes a marked differentiation between the meaning of the word " occupier " and the meaning of the word " tenant " by the exception of tenants from a month or any period less than a month from the right to obtain a notice. It seems to me that it would have been quite simple if " occupiers " were to be used synonymously with the word " tenant " for the Act to have read " serve on any owner lessee or tenant (except tenants for " a month or any period less than a month)." However, the Act uses the two distinct separate words " occupier " and " tenant " and I am satisfied in those circumstances that " occupier " means something more or wider than a tenant, though it includes tenants within its scope.

I asked Mr. Ashworth what class of person other than tenants could be covered by the word " occupier," if that word, as he suggested, meant in this context someone who had some estate or interest in the property. With all his ingenuity, Mr. Ashworth was unable to provide an answer to that question. He quite rightly said that an answer could not be found that did not necessarily mean that the word must be given the wider interpretation contended for by Mr. Scarman. I do, however, think it somewhat curious that the word " occupier " should be used in this sense if it cannot include within its meaning anything other than someone who holds an actual estate or interest in the property.

On any reasonable construction of the word " occupier," the meaning of that term must include persons occupying premises by virtue of the rights conferred on them by the Rent Restrictions Acts. I was for some time impressed by Mr. Ashworth's argument based on the use of the words " property of the " applicant " in article 15 (1) (*b*) of Part IV of the First Schedule. I think on the whole, and again not without some hesitation, that Mr. Scarman has provided the true solution to that difficulty. First, he says that one must not allow a sentence of that kind, situated in a quite different part of the schedule, to influence one in the construction of what I think he rightly says is a word

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of the plainest possible meaning, that is to say, the word "occupier." He says that the words "any property" in article 15 (1) (*b*) are not used in the sense of any interest in land, but are apt to describe the form of property which a statutory tenant possesses. It is not a form of property known to the common law, but is a creature of statute, it does not create any estate in the land or premises occupied by the statutory tenant, but nonetheless I think that it would be a very unreal view to take if I were to hold that in no sense of that term can a statutory tenant be regarded as having a right of property conferred on him by the Rent Restrictions Acts.

I think on the whole that I should not affect what I think otherwise is the clear construction of the word "occupier" by taking any narrow view as to the meaning of the term "any "property" in the latter part of the schedule. It is true that "occupier," as Mr. Scarman concedes, may have to be qualified in some sense so as to exclude a servant, a trespasser or a squatter, or some person who has no interest, to use that word in its widest sense, in the land. I think, using the word in its widest sense, that the Rent Restrictions Acts do confer on a protected or statutory tenant some interest in the premises which he occupies. It is a personal interest, and in some sense a negative interest, being a right not to be removed from the premises, but nonetheless, using it in its proper sense, it is an interest which can properly be referred to as "any property of "the applicant" in the sense in which that phrase is used in article 15 (1) (*b*). I do not for a moment venture to inquire whether, when this Act was being drafted, Parliament had this particular problem in mind—they may have had or they may not. It is my duty to construe statutes in the ordinary and natural sense of the words which are used. Adopting that canon of construction, and not regarding this as a penal or confiscatory statute, I am satisfied that the applicants in both these cases were occupiers of these two flats at 83 West Hill, Putney, and that as such occupiers they should have had notices served upon them in accordance with the provisions of paragraph 3 (1) (*b*) of the First Schedule to the Act of 1946. The requirements of that article have not been complied with; there being admittedly substantial prejudice to the applicants, I think that I have no option but to accede to the applicants' request to quash the two orders in question.

*Orders quashed in so far as affecting the applicants' rights as statutory tenants to possession.*

Solicitors: *Murray, Hutchins & Co.; Solicitor, Ministry of Health.*

J. D. P.

[QUEEN'S BENCH DIVISION.]

# *S.A. MARITIME ET COMMERCIALE OF GENEVA v. ANGLO-IRANIAN OIL CO. LD.

1953 Nov. 5.

Devlin J.

*Shipping—Charterparty — Time — Right to substitute ships—Clause—"At any time"—Alternative modes of performance—Election—Contract—Construction—Commercial document—Close analysis of word inappropriate.*

By a charterparty shipowners agreed to provide the charterers with a named vessel for a series of voyages over a period. Clause 38 of the charterparty provided: "Owners have liberty of substituting "a coiled vessel of similar size and position at any time before or "during the charterparty and owners undertake to give charterers "reasonable notice of such intention." Before the first voyage the owners notified the charterers of their intention to substitute an identical vessel for the named vessel. Thereafter the substituted vessel fulfilled the charterparty until compelled to go into dry dock for repairs. The owners thereupon informed the charterers that they proposed to substitute the named vessel for the remainder of the charter. The charterers refused to accept this substitution on the ground that the owners had the right to only one substitution under clause 38:—

*Held*, that the commercial object of clause 38 was to ensure that a mere accident to one ship would not bring the charterparty to an end if the owners had another identical ship which could do the work as well; accordingly, the clause did not put the owners to their election, but gave them liberty to substitute ships from time to time during the course of the charterparty: the clause was of the same type as those in *Brightman & Co.* v. *Bunge y Born Limitaba Sociedad* [1924] 2 K.B. 619 and *Fitzgerald* v. *"Lona" S.S. Owners* (1932) 49 T.L.R. 77; 44 Ll.L.R. 212.

SPECIAL CASE stated by an umpire.

By a charterparty dated March 27, 1951, between S.A. Maritime et Commerciale of Geneva (the shipowners) and Anglo-Iranian Oil Co. Ld. (the charterers) the shipowners' tank motor vessel *Driade* was chartered to carry oil from the Persian Gulf to the United Kingdom by a series of voyages over a period between September, 1951, and September, 1952.

Clause 38 of the charterparty provided: "Owners have the "liberty of substituting a coiled vessel of similar size and position "at any time before or during this charterparty and owners "undertake to give charterers reasonable notice of such "intention."

On August 7, 1951, the owners informed the charterers that their tank motor vessel *Nayade*, which was identical to the *Driade*, would be performing the charterparty. The *Nayade* thereafter fulfilled the charterparty until August, 1952, when it proceeded to dry dock for repairs. The owners thereupon advised the charterers that they proposed substituting the *Driade* under clause 38 for the remainder of the charter. The charterers declined to accept this substitution on the ground that the owners

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had already exercised their liberty of substitution before the commencement of the charterparty under the terms of clause 38 by nominating the *Nayade* for the *Driade*.

In view of the charterers' refusal of the *Driade* the owners found alternative employment for the vessel and claimed £20,109 15s. 5d. damages for breach of charter.

The umpire held that the owners were not entitled to any part of their claim against the charterers.

The question for the decision of the court was whether on the facts and on the true construction of the charterparty the substitution of the *Nayade* for the *Driade* by the notice on August 7, 1951, constituted a final exercise of the option conferred on the owners by clause 38.

*Sir Robert Aske Q.C.* and *B. B. Goodden*, for the shipowners.
*John Megaw Q.C.* and *Michael Kerr* for the charterers.

The following cases were cited in argument: *Brightman & Co.* v. *Bunge y Born Limitaba Sociedad*[1]; *Fitzgerald* v. *"Lona" SS. Owners*[2]; *Burton* v. *English*.[3]

DEVLIN J. stated the facts and continued:—The point of construction in this case is whether clause 38 gives a liberty which can be exercised only once—if so, then the owners exercised it at the very beginning of the charterparty—or does it give a liberty which they can exercise from time to time during the course of the charterparty? I do not think that the language of the clause gives any indication, on the surface of it, of its meaning one way or the other and, therefore, I think it is right to begin, as Sir Robert Aske began, by inquiring what is the object of a clause of this sort.

Sir Robert Aske for the owners concedes that if this was a clause which provided for an election, in the strict sense of the word, then his argument must fail because the law is that where a man has made his election he cannot approbate or reprobate. He cannot go back on it and decide that after all he would rather have made his choice the other way. But there is a distinction between that type of clause, Sir Robert argues, and the type of clause which provides for the alternative modes of performance. One might get a party permitted by the contract to perform it in a number of ways, and he can make his choice as he wants. Having made his choice one way on one day he is not in any way prohibited from making a different choice on the next day. Sir Robert submits that this clause falls into that category, and I think that it does. He cited two cases on the way in which that sort of clause can operate in contracts of this type. One

[1] [1924] 2 K.B. 619.
[2] (1932) 49 T.L.R. 77; 44 Ll.L.R. 212.
[3] (1883) 12 Q.B.D. 218.

was *Brightman & Co.* v. *Bunge y Born Limitaba Sociedad*,[1] where a charterer had an option of loading wheat or maize or rye. There it was held that he had not got to make his election in advance and when he had made his election it was not in any sense binding on him. Indeed, in that case the decision went against the charterer because there was a prohibition on the export of wheat and he contended that having chosen to load wheat the prohibition excused him from performing his contract. But the court held that on the prohibition coming into force the charterer was under an obligation to load maize or rye. Similarly, in *Fitzgerald* v. *"Lona" S.S. Owners*,[2] where there was a right on the option of a consignee to select one out of a number of different methods of discharge, Roche J. held that the fact that he had chosen a method that had become impossible or difficult to perform did not mean that he could not switch to another.

Those cases are decided on their own facts, but they are useful illustrations of the type of clause within which Sir Robert argues the present clause falls and they show the way in which such a clause works in practice. An example that Sir Robert took was of a garage proprietor who undertook to drive a client in a certain make of car on so many days of the week within a certain period, and the proprietor having a right under the contract to substitute another car of similar size and make. No one would contend that because he used another car of the same sort on Tuesday the proprietor would be obliged to continue using that car for the remainder of the contract period. What makes a psychological approach to a clause of this sort a little different is that whereas anybody who was undertaking to provide a car would probably undertake to provide one of a particular type out of a fleet which he had, it is customary and convenient to enter into charterparties by providing for a named ship and giving a liberty to substitute. But when one examines the essence of the thing I do not think that it need necessarily be different from a contract which requires the owner to provide one of a fleet of cars. The fundamental question is, from the commercial point of view, and looking at the object of the clause, does it matter which ship is used? If it does, then one immediately gets some sound commercial reason for reading in a restriction; but if it does not one asks oneself: "What is the "commercial reason which could have been operating on the "parties' minds for restricting the exercise of the choice to one "occasion only?"

In the present case the proposed substitution would not have inflicted any inconvenience on the charterers, but freights had fallen with the result that they could get another ship more cheaply. When one looks at the commercial object of the clause one must go back to the time when the contract was made and assume that both parties wanted the contract fulfilled. The

[1] [1924] 2 K.B. 619.

[2] 49 T.L.R. 77; 44 Ll.L.R. 212.

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object of the charterparty, therefore, is to provide for a ship that will, at the agreed rate, perform the voyages which the charterers want performed. The object in putting in liberty to substitute is, I should have thought, to make sure that a mere accident to one particular ship is not necessarily going to bring the charterparty to an end if the owners have at their disposal another identical ship which can do the work just as well. In form, being a liberty to the owners, it might be said to be something for the benefit of the owners. It is difficult to see how it would benefit them, except in the sense that it is to their benefit, just as it is to the charterers' benefit, to get the charterparty going. Apart from that, one would not have thought that they could get any benefit by taking out one ship and substituting another which was identical. The clause, of course, has to be put in the form of a liberty to them because one could not, commercially speaking, give the charterers the right to investigate the arrangements of the owners. It may, for all that, be something which would benefit the charterers, as was shown by the two cases cited, where the person who had the right to select found himself in a situation which he did not want because of that right to select. If the *Driade* alone had been named and the *Driade* had been sunk, the charterparty would, of course, come to an end; but in the present case it might well be that the charterers could say, if they so desired, that the owners having an option to perform the charterparty in some other way could not excuse themselves from further performance of the charterparty merely by saying that the named ship has been sunk. They must show also that they have no other ship available with which to perform the charterparty. That might well be so. It is not necessary that I should decide that point one way or the other.

What I have said is, I think, enough to explain my view why I think that this clause is fundamentally one which intends the charterparty to be kept going in the event of an accident happening to one particular vessel out of a series of identical vessels. I think also it must be within the commercial object of the clause that a ship should be substituted for a comparatively short period. It will limit the right of the owners very much if, let us say, at the very beginning of the charterparty, or after one voyage, something were to happen to the named ship and they were not at liberty to substitute some other ship that happened to be free at the moment for the next voyage until the named ship was repaired. But, on Mr. Megaw's argument they cannot do that. They must make up their minds that the ship they are going to substitute is a ship that would be free for the whole of the rest of the charterparty period. I can see no commercial reasons for giving that sort of construction to the clause, and one comes back in the end, if one has a clause which gives a right to elect, to the question: Does the other party mind which way you are going to decide? It may be he has to make his own arrangements

according to the way in which you elect. In the ordinary case of an election to buy shares by a certain date he must know where he is so that if you do not buy them he can put the shares on the market. He cannot have constant changes of mind. However, there is no such reason here that could persuade the court to put this clause into the election type of clause rather than into the method of performance. There is no commercial reason why the charterers should mind what sort of vessel they have for any particular voyage. It might be said that in that case there is no reason why the clause should provide for the giving of reasonable notice, and I notice in the cases which Sir Robert cited to me that there was no provision in either of those cases for notifying the other side of the way in which the charterer or consignee had made up his mind. I think that point, if taken by itself, might certainly be one which would point to the clause coming in the election type of clause rather than the other type. It might be said that if the charterer does not mind, if it is a matter of indifference to him which vessel is used, he need not be told and given reasonable notice of what is going to be done. That provision as to reasonable notice would operate both ways, and whether there is a right to substitute once or twenty times the argument is still, why should he require to have reasonable notice? The answer is that it may not make any difference to the charterer what vessel is going to be substituted, or how many times it is going to be substituted, so long as he knows whether they are going to exercise their right or not. If, for example, in the present case the *Driade* became inefficient, the charterers cannot know whether the *Nayade* is going to be available or vice versa or whether the owners have some other ship which may or may not be available. The charterers may, for all they know, be met with the answer that the *Driade* has gone out of action and that there is no other ship available so that the charterparty is at an end. The provision as to reasonable notice protects him in that he knows whether there is going to be a substitution or not. The owners cannot delay indefinitely. They must notify—as they did here, when the *Nayade* went out of action—whether they are going to seek to make a substitution or not.

Mr. Megaw, for the charterers, was disposed to stress the language of the words of the clause themselves. He pointed out, first, that where the clause said: "Owners have the liberty "of substituting a coiled vessel of similar size," the substitution must be a substitution for the named vessel. If the parties had it in mind, and if they were drafting the thing with a lawyer's care and if they had wanted to achieve the end which Sir Robert contends they have achieved, they could have put in "substituting for the named vessel or for any vessel that is "substituted there for," but that is the sort of thing that commercial men do not do. It is a sound point of construction provided

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one can accept the view that people who draft these clauses approach them with that sort of point in mind. I do not think that they do.

Similarly, I do not think that one can lay very much stress on, or derive very much advantage from an analysis of, the phrase "at any time before or during this charterparty." Mr. Megaw rightly stresses the word "or" and says that it must mean at any time before or at any time during, and that if there was meant to be more than one time they would have said "and/or" or words to that effect. Similarly, they would have said "at any time or times." I do not think these points, which are sometimes of great value when one is construing a statute, are of so much value when one is construing a commercial document. As Mr. Megaw pointed out, the phrase is a quite inaccurate one from the lawyer's point of view. To say that they had the right to do something before the charterparty is legally quite inaccurate. The charterparty came into effect at once. What is obviously meant is "before the first voyage under the charterparty"; but I think that that shows that it is not of much value trying to give a meticulous analysis of the words which the parties have used in a clause of this sort. Looking at it broadly, it seems to me the phrase "at any time," in so far as it gives an indication one way or the other, is the sort of phrase that one uses when one wants to indicate that it can be done either once or twice, at any time which one chooses. A commercial man does not put in "at "any time or times."

For these reasons, therefore, I think that the approach to the clause which Sir Robert has presented is the right one and that it should be construed in the light of those considerations. Thus construed, I find no difficulty in holding that it is intended to allow a substitution, in effect, as often as the owners desire a substitution. Of course, it is limited because the vessel has to be in a similar condition, but it is not intended to be a clause providing for an election which once made is completely exhausted. Accordingly, I would answer the question which is addressed to me in the negative and uphold the alternative award.

*Judgment for the shipowners.*

Solicitors: *Stokes & Mitcalfe; William A. Crump & Son.*

J. D. P.

[CHANCERY DIVISION.]

1953
*Oct.* 16

Danckwerts J.

# *BRAMFORD'S ROAD TRANSPORT LD. *v.* EVANS (INSPECTOR OF TAXES).

[1953 No. 18.]

*Revenue—Income tax—Balancing charge—Road haulage—Nationalization—Not a sale—Succession by Transport Commission—Succession before permanent discontinuance of business—Income Tax Act,* 1945 (8 *&* 9 *Geo.* 6, *c.* 32), *ss.* 17, 60.

By section 17 (1) of the Income Tax Act, 1945, a balancing charge is raised where machinery or plant, in respect of which an initial allowance or a deduction under rule 6 of the rules applicable to Cases I and II of Schedule D has been made to a person carrying on a trade, "is sold, whether while still in use or not," and the sale "occurs before the trade is permanently discontinued . . ."

By section 60 (1), where "a person succeeds to any trade . . . "which until that time was carried on by another person and, by "virtue of . . . Rule 11 of the Rules applicable to Cases I and II of "Schedule D, the trade, . . . is to be treated as discontinued, any "property which, immediately before the succession takes place, was "in use for the purposes of the discontinued trade . . . and, without "being sold, is, immediately after the succession takes place, in use "for the purposes of the new trade . . . shall, for the purposes "of this Act, be treated as if it had been sold to the successor when "the succession takes place. . . ."

The appellant company was the owner of a road haulage business which was taken over by the Transport Commission as from May 9, 1949. The appellants' undertaking was carried on by the Commission after it was transferred to them with the same staff as hitherto, and for a time as a single unit, but the undertaking was later merged with another unit.

The appellants were assessed to a balancing charge under section 17 of the Income Tax Act, 1945, on the sale of their plant, consisting of motor-vehicles, to the Commission.

The Special Commissioners affirmed the assessment, and the appellants appealed from that decision:—

*Held,* (i) That the transfer of the plant did not constitute a sale.

*John Hudson & Co. Ld.* v. *Kirkness* [1953] 1 W.L.R. 749; [1953] 2 All E.R. 64 followed.

(ii) That there was a succession by the Transport Commission to the appellants' business.

*Bell* v. *National Provincial Bank of England Ld.* [1904] 1 K.B. 149; 20 T.L.R. 97 followed.

(iii) That having regard to section 60 of the Income Tax Act, 1945, the succession by the Transport Commission should be treated as a sale for the purpose of a balancing charge under section 17, and that the succession had occurred before the business was permanently discontinued within the meaning of section 17 (1), and accordingly a balancing charge was properly leviable.

*Boarland* v. *Madras Electric Supply Corporation* [1953] 1 W.L.R. 920; [1953] 2 All E.R. 467 followed; *Inland Revenue Commissioners* v. *Reid* (1950) 31 T.C. 402 and *Inland Revenue Commissioners* v. *Barr* (1953) 32 A.T.C. 93 not followed.

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APPEAL from the Commissioners for the Special Purposes of the Income Tax Acts.

The case stated, so far as relevant, provided: Before May 9, 1949, the appellant company (referred to as "Bramford") "carried on, from headquarters in Leicester, a trade or business "of regular service carriers between Leicestershire, Northampton- "shire, Staffordshire and intermediate counties. Bramford "carried goods, known in the trade as 'smalls,' i.e., consign- "ments up to three hundredweights, and 'large smalls,' i.e., "consignments from three hundredweights, up to one ton "between four main services, viz., Leicester to Stafford; "Leicester to Stoke-on-Trent; Leicester to Wolverhampton; "and Leicester to Northampton. Bramford was a small private "company, using only one type of transport vehicle, and con- "tracted for the maintenance of those vehicles with one service "motor engineering firm. It offered its services to all customers "within the area of its operation, provided the consignment of "goods for carriage was of the particular type above-mentioned, "but its business was, in practice, mainly confined to specialized "customers. It operated a 'door to door', twenty-four hours' "service and was equipped to accept exceptional traffic.

"On May 9, 1949, the whole undertaking of Bramford was "compulsorily taken over by the Transport Commission (herein- "after called 'the Commission') under the provisions of the "Transport Act, 1947, and on the same date Bramford ceased to "carry on any trade of road haulage, or any other trade. The "provisions of the Transport Act, under which this transaction "was effected are sections 39, 40, 44 and 45. The requisite notice "of acquisition was given by the Commission and, under "section 45, ownership of the trade vehicles, previously the pro- "perty of Bramford, vested in the Commission on May 9, 1949. "The general duty of the Commission as defined by section 3 "of the Transport Act, was 'to secure or promote the provision "'of an efficient, adequate, economical and properly integrated "'system of public inland transport'.

"Accordingly, on and after May 9, 1949, the undertaking "previously carried on by Bramford continued for a time very "much as before. The Road Haulage Executive, in addition to "acquiring Bramford's vehicles, took over its stores and all its "other assets," with certain minor exceptions. "The under- "taking previously carried on by Bramford continued as a unit for "a few months until September 30, 1949, and the following entry "appeared in the Road Haulage Executive Gazetteer, viz.: 'Unit "'E. 93. Bramford's "Smalls" Leicester/Staffordshire, "Northamptonshire.' The address in the Gazetteer, 36, Nanson "Road, and the telephone number were those of the original "Bramford's property, but from the vesting date, May 9, 1949, "vehicles other than Bramford's former lorries were supplied with "fuel oil at that address, which was not the case when the "business was privately operated. To officials of the Transport

" Commission Executive, the undertaking was known as ' Unit " ' E. 93 ' after the vesting date, but the Commission purchased " for £1 the name ' Bramfords ' from the company, though it " never used the full name ' Bramford's Road Transport.' The " name ' Bramfords ' was retained for purposes of identification, " for domestic purposes and for external use and to prevent the " name being used by others. The ' unit ' system was for the " purposes of the Commission's internal accounting because there " was no other framework in the early stages, although the inten- " tion from the outset was . . . to integrate the units into a group " structure. The name ' Bramfords ' was not used by the Com- " mission on stationery and the Road Haulage Executive's name " was substituted for Bramford's Road Transport on the vehicles. " All the employees of Bramford went over to the service of the " Commission on May 9, 1949, Mr. Charles William Bramford " being engaged as unit manager in a supervisory capacity, as " well as carrying out duties as traffic assistant with the Leicester- " Northants office of the Road Haulage Executive. As from " September 1, 1949, the undertaking previously carried on by " Bramford and known, from May 9, 1949, as Unit E. 93, was " merged with another concern, Bland's, which together formed a " new unit, E. 94. . . . Maintenance of the lorries ceased to be " looked after by private contract, but was done for the Commis- " sion at group or depot engineering establishments.

" The provisional valuation made by the Road Transport Exe- " cutive of the goods vehicles and trailers of Bramford as at " May 9, 1949, shows a figure of £13,104 (£12,750 written down " value under section 47 (1) (*a*) (*b*), Transport Act, 1947, plus " £354 for ' better condition ' under subsection (1) (*c*)). This " figure appears in the ' Final Ascertainment ' . . . and was an " agreed figure between the Commission and Bramford and " arrived at vehicle by vehicle. The separate figures for each " vehicle . . . were arrived at on the basis prescribed by section 47 " of the Transport Act, 1947. The final figure of compensation " under the Act for cessation of Bramford's business was £7,459 " and the total lump sum payment due by the Commission to " Bramford for everything taken over, including such compensa- " tion, was settled by negotiation at a sum of £20,000. " Bramford's were assessed to a balancing charge in the sum of " £6,330, which was based on an aggregate figure representing " the excess of the said aggregate figure of £13,104 over the " expenditure on such plant still unallowed as at May 9, 1949, " under the provisions of section 17 (3), Income Tax Act, 1945."

The commissioners came to the conclusion that there had been a succession for the purpose of the Income Tax Act, 1945, and confirmed the assessment for 1949–50 in the sum of £6,330, less £197 capital allowances, being the figure agreed between the parties following the decision of the commissioners in principle. The question for the opinion of the court was whether on the evidence, and on the true construction of section 17 of the Income

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Tax Act, 1945,[1] a balancing charge arose on the "sale" by the appellant company to the Commission of the plant, which consisted of the company's motor-vehicles.

*F. Heyworth Talbot Q.C.* and *H. Major Allen* for the appellants.

[1] Income Tax Act, 1945, s. 17: "Subject to the provisions of this "section, where, on or after the "appointed day, any of the following "events occurs in the case of any "machinery or plant in respect of "which an initial allowance or a "deduction under Rule 6 of the Rules "applicable to Cases I and II of "Schedule D has been made or "allowed for any year of assessment "to a person carrying on a trade, that "is to say, either—(*a*) the machinery "or plant is sold, whether while still "in use or not . . . and the event in "question occurs before the trade is "permanently discontinued, an allow-"ance or charge (in this Part "of this Act referred to as 'a "'balancing allowance' or 'a balan-"'cing charge') shall, in the circum-"stances mentioned in this section, "be made to, or, as the case may be, "on, that person for the year of "assessment in his basis period for "which that event occurs. . . . Any "reference in this subsection to the "permanent discontinuance of a trade "does not include a reference to the "happening of any event which, by "virtue of any of the provisions of "Rule 11 of the Rules applicable to "Cases I and II of Schedule D, is to "treated as equivalent to the discon-"tinuance of the trade."

S. 60 (1): "Where, on or after the "appointed day, a person succeeds to "any trade . . . which until that "time was carried on by another per-"son and, by virtue of any of the "provisions of Rule 11 of the Rules "applicable to Cases I and II of "Schedule D, the trade . . . is to be "treated as discontinued, any pro-"perty which, immediately before the "succession takes place, was in use "for the purposes of the discontinued "trade . . . and, without being sold, "is, immediately after the succession "takes place, in use for the purposes "of the new trade . . . shall, for the "purposes of this Act, be treated as "if it had been sold to the successor "when the succession takes place, "and as if the net proceeds of that "sale had been the price which that "property would have fetched if sold "in the open market: Provided that "no initial allowance shall be made "under any of the provisions of this "Act by virtue of the provisions of "this subsection."

S. 68 (4): "Any reference in this "Act to the setting up or permanent "discontinuance of a trade includes, "except where the contrary is ex-"pressly provided, a reference to the "occurring of any event which, under "any of the provisions of the Income "Tax Acts, is to be treated as equiva-"lent to the setting up or permanent "discontinuance of a trade."

Rule 11 of the rules applicable to Cases I and II of Schedule D to the Income Tax Act, 1918 (as amended by the Finance Act, 1926 (16 & 17 Geo. 5, c. 22), s. 32): "If at any time after "the fifth day of April, nineteen "hundred and twenty-eight, a change "occurs in a partnership of persons "engaged in any trade, . . . by reason "of retirement or death, or the disso-"lution of the partnership as to one or "more of the partners, or the admis-"sion of a new partner, in such cir-"cumstances that one or more of the "persons who until that time were "engaged in the trade . . . continue to "be engaged therein, or a person who "until that time was engaged in "any trade . . . on his own account "continues to be engaged in it, but "as a partner in a partnership, the "tax payable by the person or "persons who carry on the trade, ". . . after that time shall, notwith-"standing the change, be computed "according to the profits or gains "of the trade . . . during the period "prescribed by the Income Tax Acts. ". . ." (2) "If at any time after "the said fifth day of April any "person succeeds to any trade . . . "which until that time was carried "on by another person and the case "is not one to which paragraph (1) "of this rule applies, the tax payable "for all years of assessment by the "person succeeding as aforesaid shall "be computed as if he had set up or "commenced the trade . . . at that "time, and the tax payable for all "the years of assessment by the per-"son who until that time carried on "the trade . . . shall be computed as "if it had then been discontinued."

*Sir Reginald Manningham-Buller S.-G., Q.C.* and *Sir Reginald Hills* for the Crown.

The cases cited in argument are set out in the judgment.

DANCKWERTS J., having stated the facts: The first question which I have to consider is whether for the purposes of subsection (1) of section 17 of the Income Tax Act, 1945, there has been a sale. The provisions of the Transport Act, 1947, were considered by Upjohn J. in *John Hudson & Co. Ld.* v. *Kirkness.*[1] In that case Upjohn J. was not concerned with the same provisions in the Transport Act, 1947, as those with which I am here concerned. He was not concerned with the group of sections relating to the transport of goods by road, but with the acquisition of railway wagons, and for the purposes of comparison the sections in the Transport Act relating to railway wagons are precisely parallel to the provisions relating to the acquisition of vehicles used for the transport of goods by road. In each case the effect of the Transport Act, 1947, may be stated shortly as amounting to this; there is a provision in the Act vesting the property to be transferred in the Transport Commission, and there are subsequent provisions providing for the assessment and payment of compensation to the previous owner.

Upjohn J. had to consider in that case the question whether such provisions in the case of railway wagons amounted to a sale, and he held that the transfer did not constitute a sale for the purpose of section 17 of the Income Tax Act, 1945, so as to render the company liable to a balancing charge under that section. That decision is one which I am bound to follow, and accordingly the first conclusion which I reach is that there has not been a sale according to the terms of section 17 (1) (*a*) of the Income Tax Act, 1945, that is to say, it is not a case where machinery or plant has been sold.

That, however, is not an end of the matter, because there is another statutory provision to which I must refer, that is section 60 of the Income Tax Act, 1945. [His Lordship read section 60 (1) and continued:] That section has the result that if I come to the conclusion that there has been a succession by the Transport Commission to the trade of Bramfords, the provisions relating to the result of a sale in section 17 become relevant again so that a balancing charge may be payable.

It is necessary, therefore, first to consider whether there has in this case been any succession. The provisions of the Income Tax Rules to which I have been referred have resulted in a large number of decisions in the courts, and I was referred by Mr. Heyworth Talbot to a number of those cases, including *James Shipstone & Sons Ltd.* v. *Morris*[2]; *Reynolds, Sons & Co. Ld.* v.

[1] [1953] 1 W.L.R. 749; [1953] 2 All E.R. 64.

[2] (1929) 14 T.C. 413.

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*Ogston*[3]; *Laycock* v. *Freeman, Hardy and Willis Ld.*[4] and *Briton Ferry Steel Co. Ld.* v. *Barry.*[5] The circumstances in those cases were not very similar to the facts of the present case, but there were certain discussions of the principles involved, which it was suggested, must in the present case bring one to the conclusion that because the business of Bramfords was no longer identifiable in the hands of the Transport Commission and had become merged in the general undertaking of the Transport Commission, there was not a succession for the purposes of the material statutory provision.

Mr. Heyworth Talbot relied, for that argument, on section 3 (4) of the Transport Act, 1947, which provides: " All the business " carried on by the Commission, whether or not arising from " undertakings . . . vested in them . . . under any provision of " this Act, shall form one undertaking, and the Commission shall " so conduct that undertaking and, subject to the provisions of " this Act, levy such fares, rates, tolls, dues and other charges, " as to secure that the revenue of the Commission is not less " than sufficient for making provision for the meeting of charges " properly chargeable to revenue, . . ."

It seems to me, however, that the observations of the Court of Appeal and others in the cases to which I have referred did not lead to the conclusion that there was any ground in the present case for saying that there had not been a succession and that the Transport Commission had not succeeded to the trade of Bramfords. In the first place, perusal of the Act shows that it is not referring to the trade in the sense that it is the trade of Bramfords, and that when Bramfords go out of business that is an end of the matter, although the same business may be carried on by another. It seems to me that rule 11 (2) of the rules applicable to Cases I and II clearly show that the words " succeeds " and " succession " as used in the Income Tax Acts envisage the idea that though one person may go completely out of business, the trade in question continues if it is carried on by some other persons, and the trade is carried on in the sense which the legislature had in mind, and the mere fact that Bramfords or some previous owner of the business in question may have ceased to carry it on and gone out of business does not provide any ground for saying that there had not been a succession.

The question is, in my judgment, covered by the decision of the Court of Appeal in *Bell* v. *National Provincial Bank of England Ld.*[6] In that case the National Provincial Bank, a bank with a large capital, purchased in 1899 the business and premises and other assets of a small bank, the County of Stafford Bank, which carried on business only at Wolverhampton. The

[3] (1930) 15 T.C. 502.

[4] [1939] 2 K.B. 1; 55 T.L.R. 218; [1938] 4 All E.R. 609.

[5] [1940] 1 K.B. 463; 56 T.L.R. 248; [1939] 4 All E.R. 541.

[6] [1904] 1 K.B. 149; 20 T.L.R. 97.

National Provincial Bank then opened for the first time a branch at that place upon the premises so purchased " . . . and there " carried on business with the manager and staff previously " employed by the County of Stafford Bank. The profits and " expenses of the business so carried on at Wolverhampton by " the respondents were merged in those of their concern as a " whole, and there were no means of ascertaining whether there " were any profits, or the proportion of increase or decrease, if " any, in the profits of the respondents' bank, which had arisen " from the business purchased as aforesaid. In the three years " respectively subsequent to 1899, the respondents, in computing " the average of their profits under the First Rule of the First " Case in s. 100, Sched. D, of the Income Tax Act, 1842, did " not include any profits earned by the County of Stafford " Bank. Additional assessments were made upon them so as to " include such profits, on the ground that there had been a " succession by them to the business of the County of Stafford " Bank within the meaning of the Fourth Rule applicable to the " First and Second Cases in Schedule D:— . . ." It was held in the Court of Appeal " . . . that there had been such a " succession, and therefore the additional assessments were " rightly made."

That case is not far from the situation here, and the decision of the Court of Appeal is one which I should apply in the present case. The words of Mathew L.J. put the matter as clearly as possible. He said [7]: " The respondents purchased the whole " concern of the County of Stafford Bank, its premises, the " goodwill of its business, and its assets; and they continued " to carry on the business on the same premises and with the " same staff and customers as before. It seems to me that such " a case is within the terms of the rule. A difficulty was raised " on the ground that it is impossible now to ascertain what are " the profits of the Wolverhampton business taken separately. " There was no difficulty in ascertaining those profits while the " County of Stafford Bank still continued to exist, and I cannot " see why there need be any difficulty now. It does not follow " that, because the respondents have chosen to treat that business " as merged in their business as a whole in the manner stated " in the case, that merger can prevent the respondents from " being liable under the fourth rule to additional assessments. " The question raised by the case appears to me to be whether " there was, upon the facts as stated by the Commissioners, a " succession to a business within the meaning of the fourth " rule." It was held that there was such a succession.

That case also disposes of the point which was raised by Mr. Heyworth Talbot on section 3 (4) of the Transport Act, 1947. The point made, as I understand it, was that because the section required all the business carried on by the Commission to form

[7] [1904] 1 K.B. 149, 163.

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one undertaking, it was impossible for any individual business taken over by the Commission to be identifiable any longer, and that it must be merged in the undertaking of the Commission so that the Commission could no longer be a successor in respect of the business in question. That argument is disposed of by this decision, because it is quite plain that in the *National Provincial Bank* case [8] the business of the County of Stafford Bank which had been purchased by the National Provincial Bank was merged in the undertaking of the National Provincial Bank and yet it was held that there was a succession. Because the method of dealing with the matter was made compulsory by the Transport Act, 1947, does not alter the situation in any way. It seems to me, therefore, that in the present case there was a succession and that the Transport Commission succeeded to the business of Bramfords.

The last point to be discussed in this case arises in regard to section 17 (1) of the Income Tax Act, 1945, which requires, as one of the conditions for the section to apply, that the event in question—that is the succession in this case—should occur before the trade is permanently discontinued. It was argued by Mr. Heyworth Talbot that in the present case the discontinuance of the trade by Bramfords was coincident with the succession or the sale, whatever it might be, and that consequently the terms of the section are not fulfilled. On this point certain decisions of the Scottish Court of Session have to be considered.

The first of these is the case of the fishing boat *Girl Eileen*, one of the cases considered in *Inland Revenue Commissioners* v. *Reid*.[9] There there had been a sale of this boat, and on the sale the *Girl Eileen* had been removed from Fraserburgh where she had been previously used, and employed in fishing from the Point of Lerwick. It was held in that case by the Court of Session that there had been a simultaneous permanent discontinuance of the trade—simultaneous, that is to say, with the sale of the vessel. Lord Keith in that case said [10]: "I have no "doubt that there was here a true sale of plant within the "meaning of the Income Tax Act, 1945. It may be said that "each of the respondents sold his respective shares in the vessel "and it is contended that this brings the case into the same "category as the sale in the 'Mistress Isa' by one of several "co-owners of his individual shares. But the position is clearly "different. The result of all the share owners combining at one "time in the sale was to transfer the whole vessel to separate "ownership and so far the statute, in my opinion, applies. But "the nature of the transaction raises another point under the "statute. By section 17 of the Income Tax Act, 1945, a "balancing charge only arises if the sale occurs before the trade "is permanently discontinued. The contention for the Revenue

[8] [1904] 1 K.B. 149.
[9] (1950) 31 T.C. 402.
[10] Ibid. 420.

" is that the trade has not been permanently discontinued " because the vessel sold is still engaged in trade. But it is " clear in my opinion that section 17 is looking not to the con- " tinuance of the machinery or plant in trade but to the " continuance of the owner of the machinery or plant in trade. " The section shows that a balancing charge or balancing payment " is intended to provide a readjustment of initial allowances or " wear and tear allowances made ' to a person carrying on a " ' trade ' and when reference is made to ' the trade ' being " permanently discontinued I have no doubt that the trade is the " trade of the person to whom the other allowances had previously " been made. The respondents' trade with the *Girl Eileen* has " been permanently discontinued and it is not suggested that " they are continuing to trade with any other ships. A different " case might arise in the case of co-owners trading with a fleet " of ships and selling one of the fleet. But that case does not " arise. . . ."

On the facts, that case is different from the present one, but those observations might have some application in the present case. In *Inland Revenue Commissioners* v. *John Barr*,[11] the facts were very similar to those of the present case: " The " respondent carried on the business of an ironfounder under " the name of Henry & Galt. He sold the business as a going " concern, which continued to be carried on by the new owner. " Included in the assets of the business was certain machinery " and plant. The Inland Revenue contended that there had " been a sale of machinery and plant, and that in the circum- " stances a balancing charge arose. It was contended for the " respondent that the sale of the machinery and plant had not " taken place before the permanent discontinuance of the " business, as is required by section 17 of the Income Tax Act, " 1945, but had taken place simultaneously with the notional " discontinuance of the business. Held, that the respondent's " contention was correct, and that no balancing charge could be " imposed." The judgment was extremely short, and it is rather unsatisfactory in that it seems to have been accepted that the previous decision of the Court of Session was necessarily one to be applied to the facts in this case. Lord Carmont said: " In " this case, in which the Commissioners of Inland Revenue are " the appellants, the question is raised as to liability to a " balancing charge under section 17 of the Income Tax Act, " 1945, and whether it arose on the sale by the respondent of the " plant and machinery of a firm called Henry & Galt. I need " only refer to the fact that the business was sold as a going " concern to one, Thomas Reid, and that a new firm acquired " the concern and is running it. The General Commissioners " who heard the appeal had before them the case of *Inland* " *Revenue Commissioners* v. *West*,[12] which was decided by this

[11] (1953) 32 A.T.C. 93, 94. [12] 31 T.C. 402.

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" court in 1950. It was held in that case that no balancing " charge was exigible in circumstances which the appellant, in " opening his appeal before us, said he could not distinguish " from the facts in the present case. Accordingly as the case " cannot be argued on the footing that *West* [12] is distinguishable, " the judgment of the court in that case applies in such circum- " stances as we have now before us, and there is no alternative " open to us but to answer the question put in the negative, and " I so move your lordships."

This matter was considered by Upjohn J. in *Boarland* v. *Madras Electric Supply Corporation.*[13] He pointed out that apparently the concluding words of subsection (1) of section 17 of the Income Tax Act, 1945, had never been brought to the attention of the Court of Session in the two cases to which I have referred. He therefore felt to be at liberty to decide the matter according to his own judgment, and did not feel bound to follow the decisions of the Court of Session. It was unfortunate, perhaps, that apparently the question whether the concluding words would alter the result was not argued at all strenuously on behalf of the taxpayer in that case, and not in the way in which Mr. Heyworth Talbot has argued the matter in the present case; but it seems to me that I should apply the decision of Upjohn J. in the present case, particularly as I consider that the conclusion reached by him was the right conclusion, and that the conclusion of the Court of Session is one with which I could not agree and which I would not wish to apply unless I was bound to follow those cases.

Accordingly I propose to apply the decision of Upjohn J. on this final point. I hold that the trade in question does not mean simply the trade of Bramfords which would come to an end when they went out of business, but means the trade which was carried on by them and which was acquired by the Transport Commission. The " event " referred to in the concluding words of subsection (1) of section 17—that is the acquisition by the Transport Commission—did occur before the trade was permanently discontinued, and accordingly this is a case in which the provisions of the statute apply, and the Commissioners reached a proper conclusion. The appeal must be dismissed.

*Appeal dismissed.*

Solicitors: *Mawby, Barrie & Letts; Solicitor of Inland Revenue.*

I. G. R. M.

[12] 31 T.C. 402.

[13] [1953] 1 W.L.R. 920; [1953] 2 All E.R. 467.

[PROBATE, ETC., DIVISION.]

## * PRACTICE DIRECTION (CLERK'S RECEIPT).

1953
*Nov.* 9.

*Practice — Probate registry — Receipt — Certificate—Solicitors' Clerk's signature.*

THE Registrars of the Probate and Divorce Registry have decided that a receipt or certificate given on behalf of a firm of solicitors by a clerk authorized to do so should be signed by him personally for the firm (e.g., J. Jones for Smith & Smith & Brown).

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[PROBATE, ETC., DIVISION.]

## * STRETTON *v.* STRETTON.

1953
*Oct.* 22.

Lord Merriman P. and Collingwood J.

PRACTICE NOTE.

*Husband and Wife — Justices — Appeal — Provision of exhibits for Divisional Court.*

**Documents produced and handed to a court of summary jurisdiction should be made exhibits on appeal.**

LORD MERRIMAN P., in the course of his judgment, said: Attached to the notice of appeal in this case there is a reply from the clerk to the justices stating, in response to the usual inquiry about exhibits from the officer in the registry who deals with these appeals, that no exhibits were handed in to the court. That is quite wrong. The notes show that there were several documents which were produced and handed to the court which were not made exhibits, as they should have been, and sent to us as such. As it happens, some of them are extremely important documents. One is the school report of the elder child, a girl, whose educational future is very much one of the matters to be taken into account in considering the paramount question, the welfare of the children. The others concern the relations, whatever they may be, of the husband with a German woman, said by him to be a domestic servant in the house. There is a bundle of letters which, though they were not all read, were, we are told, produced at the hearing. One of them is a fervent love-letter, dated May 7, 1948, and beginning "My own Darling, my beloved Lawrence," expressing the hope that he is still taking the greatest care of his "sweet lovely self for me, my love," and, without reading any more of it, ending "Your so truly and passionately loving and "most faithful Margaret," with a line of kisses, and a postscript

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Lord Merriman P.

"And many many more of soft kisses and all my love." It is a letter, therefore, which affords some confirmation of the wife's statement that the husband's association with this young woman was responsible for the break-up of the marriage in 1948. Having said that, I do not think that it is necessary to look at any of the others, which it is admitted are in the same sense. But that is not all. There was another exhibit about which the husband was cross-examined, and that was correspondence between himself and the Home Office, which shows conclusively that he was representing to the Home Office that he wished a passport to be granted to this young woman on the basis that she was his fiancee and that they were about to get married as soon as possible.

[His Lordship then considered the merits of the appeal.]

COLLINGWOOD J. concurred.

*J. P. Stimson* for the appellant husband.
*R. M. Havers* for the respondent wife.

Solicitors: *Gregory, Rowcliffe & Co. for A. Denham Foxon, Leicester; Ford, Michelmore, Rose & Binning for Greenland Houchen & Co., Norfolk.*

J. B. G.

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[PROBATE, ETC., DIVISION.]

1953
*Oct.* 30.

* STARKIE *v.* STARKIE.

Lord Merriman P., and Collingwood J.

*Husband and Wife—Justices—Appeal to Divisional Court—Provision of reasons.*

Justices are bound to give to the Divisional Court, in the event of an appeal, a proper and sufficient statement of the reasons upon which their decision was based.

*Sullivan* v. *Sullivan* [1947] P. 50 applied.

The clerk to certain justices, on receiving a request for the reasons for a finding of wilful neglect to maintain, stated: "I "hereby certify that the reason given by the magistrates for their "decision in this matter was that the respondent had neglected to "maintain the complainant and child":—

*Held*, that the appeal could not be decided until proper reasons were furnished, that the matter must be referred back for such reasons, and that when the matter came before the Divisional Court again the justices would be given an opportunity of being heard by counsel on the question what, if any, order the court had power to make regarding the waste of costs in a case in which both parties were assisted persons.

*Buckley Sneade* for the appellant husband.
*D. R. Ellison* for the respondent wife.

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STARKIE v. STARKIE.

LORD MERRIMAN P. In this case the justices for the Cockermouth petty sessional division of Cumberland had before them on August 10, 1953, two complaints by the wife, of desertion on July 20, 1953, and of wilful neglect to provide reasonable maintenance on that same day and from that date to the date of the summons, four days later.

They have dismissed the charge of desertion. They have held the charge of wilful neglect to provide reasonable maintenance for the wife and the infant child whom the husband is legally liable to maintain to be proved. They were in due course asked to give the reasons for their decision, and to that the clerk to the justices for the Cockermouth Division has sent the following statement: "I hereby certify that the reason given by the magistrates for "their decision in this matter on August 10, 1953, was that the "respondent had neglected to maintain the complainant and "child." This is merely tantamount to saying "We find wilful "neglect to provide reasonable maintenance for the wife and "child proved because we find that he has wilfully neglected "them."

This forces me to speak plainly, I regret to say not for the first time during the present sittings of this court, though this is by far the most glaring instance. I refer the justices of Cockermouth and their clerk to the decision of this court in *Sullivan* v. *Sullivan*.[1] I do not propose to read the whole of the judgment. Suffice it to say that while justices are entitled to make an order, or to decline to make an order, without giving any reasons at the time, "they are bound to give this court, "in the event of an appeal, a proper and sufficient statement "of the reasons upon which their decision was based." I went on to say, in what I hope were unmistakable terms, that the failure to do so was a defiance of this court and a dereliction of duty. I am also reported to have used the following words[2];— "I wish to say quite plainly that if this court is treated in this "way again after this warning, it may be necessary for us to "consider what powers we have to ensure that the parties are "not put to unnecessary expense owing to dereliction of duty on the part of justices' clerks."

I will now set out the questions to which we require a full answer before we decide this appeal. They are as follows:— (a) In respect of the first parting (from about August 31, 1952, to July 11, 1953) did the justices accept the evidence of the husband in cross-examination by the wife's solicitor that he agreed to pay maintenance, and, if so, at what rate per week if the wife was (i) working or (ii) not working, respectively? (b) Did the justices accept the evidence of both the husband and the wife that the husband paid maintenance at the rate of £4 10s. 0d. per

[1] [1947] P. 50, 51. See also *Bevens* v. *Bevens* [1948] W.N. 90; 64 T.L.R. 126; *Darrall* v. *Darrall* (1948) 92 S.J. 284; *Practice Note* [1952] W.N. 462; sub nom. *Ormsby* v. *Ormsby* [1952] 2 All E.R. 1005.

[2] [1947] P. 50, 52.

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Lord Merriman P.,

week between the resumption of cohabitation on July 11, 1953, and July 20, 1953, the date of the final parting? (c) On what grounds was the wife's complaint of desertion in respect of the present separation dismissed? (1) What did the justices find was the nature of this parting and on what evidence did they base their finding? (2) If the justices found that the parting was consensual did they find that there was any agreement (i) expressed, or (ii) implied, that the husband should pay maintenance for the support of the wife and/or the child, and (3) If so, how much? Note (which applies to the whole question):—A full statement of the grounds for this answer is required. (d) After the parting on July 20, 1953, did the husband pay the wife any maintenance in respect of herself and/or the child, and, if so, how much respectively? (e) On what grounds was the wife's complaint on July 24, 1953, that on and after July 20, 1953, the husband had been guilty of wilful neglect to provide reasonable maintenance for her and her infant child held to be proved? Note:—Repeat the note to question (c).

From these questions it will be understood that the combination of (a) the dismissal of the complaint of desertion with (b) a finding of wilful neglect to provide reasonable maintenance raises issues which require very careful consideration. We have no reason at present to believe that they have received any consideration at all.

From the fact that both sides in this appeal were assisted it follows that a certain unnecessary expenditure of public money has resulted owing to the defiance of this court by the justices and their clerk in the respects that I have mentioned. On the return of the answers to these questions the justices will be given the opportunity to be heard, if they wish to be heard, by counsel, on the question what, if any, order we have power to make regarding this waste of costs.

COLLINGWOOD J. I agree.

Solicitors: *Beachcroft & Co. for Curwen & Co., Workington; Speechly, Mumford and Craig for G. Paisley Falcon and Highet, Workington.*

J. B. G.

[QUEEN'S BENCH DIVISION.]

## * COMPANIA DE NAVIGACION ZITA, S.A. *v.* LOUIS DREYFUS & COMPAGNIE.

1953
*Oct.* 29, 30;
*Nov.* 9.

Devlin J.

*Shipping—Charterparty—Demurrage—Lay time—Calculation—Cargo to be loaded at rate of* 150 *tons "per available workable hatch per weather working day."*

By a clause in a charterparty it was provided: "Cargo to be "loaded and stowed free of expense to owners at an average rate of "not less than 150 metric tons per available workable hatch per "weather working day (Sundays and holidays excepted) provided "vessel can receive at this rate."

The vessel in question had five holds differing in size. On the question as to how the lay time should be calculated:—

*Held* that, the object of the clause being to penalize the charterers for wasting time and reward them for saving it, the lay time was to be calculated, not by reference to the number of available and workable hatches on any particular day, but by dividing by 150 the largest quantity of cargo loaded into any one of the holds, subject to any adjustment necessary because any hatch may not have been available.

Dictum of Hill J. in *The Sandgate* [1930] P. 30; 46 T.L.R. 116; 35 Com.Cas. 221, 228 applied.

SPECIAL CASE stated by an umpire.

By a charterparty dated June 25, 1952, it was agreed between the owners of the steamer *Corfu Island* and the charterers, Louis Dreyfus & Co. that the vessel should proceed to one or two safe ports in Algeria and there load a full and complete cargo of barley in bulk and proceed to the United Kingdom and there deliver the cargo.

By clause 5 of the charterparty: "Cargo to be loaded and "stowed free of expense to owners at an average rate of not "less than 150 metric tons per available workable hatch per "weather working day (Sundays and holidays excepted), provided "vessel can receive at this rate."

By clause 22 despatch money was payable to the charterers at the rate of £125 per day for all lay time saved at loading and discharging ports.

Between July 19 and August 5, 1952, the vessel loaded 9,450 metric tons of barley at Philippeville and Bougie. It was agreed that the lay time used at the loading ports was 11 days 20 hours and 20 minutes. There was no interruption by weather.

The charterers deducted from the freight due to the owners £515 8s. 11d. in respect of despatch money due to them for lay time saved at the loading ports. The owners contended that the charterers were only entitled to £344 1s. 11d. by way of despatch money and they claimed £171 7s. as freight due and owing to them by the charterers. Before the umpire the dispute between the parties was limited to the question of the correct

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method of calculating the total lay time permitted by the charterparty for loading.

There were five cargo holds in the vessel and each was served by one hatch. During the whole of the course of loading at Philippeville each of the five hatches was available and workable and was utilized. During the loading of the first 900 out of 1,500 tons loaded at Bougie only three hatches were available and workable, since loading into Nos. 3 & 5 holds had been completed at Philippeville and all three hatches were utilized. During the loading of the last 600 tons at Bougie only two hatches were available and workable, No 1 hold having been completed during the loading of the 900 tons, and both hatches were utilized. The largest quantity of barley loaded into any one of the holds was 2,361·768 metric tons.

The charterers contended that lay time for loading should be calculated by dividing by 150 the largest quantity of cargo loaded into any one of the holds, namely 2361·768 metric tons, thus giving a total permitted lay time of 15 days 17 hours and 53 minutes. On this basis 3 days 21 hours and 33 minutes of permitted lay time were saved in loading and the charterers would be entitled to £487 2s. 8d. by way of despatch money. The difference of £28 6s. 3d. between this sum and £515 8s. 11d. that had been deducted from freight was due to small differences in calculating the lay time and the charterers admitted that the owners were entitled to this difference.

The owners contended that lay time should be calculated by reference to the number of available and workable hatches in the vessel. As long as there were five available workable hatches, loading should have proceeded at the average rate of 750 metric tons a day. When there were three available hatches loading should have proceeded at the rate of 450 tons, and with two available hatches loading should have been 300 tons. Accordingly they calculated that the permitted lay time for loading was 14 days 14 hours and 24 minutes arrived at as follows:

| | |
|---|---|
| 7,950 tons loaded by 5 hatches at 150 tons per hatch per day ... ... | 10 days 14 hrs. 24 mins. |
| 900 tons loaded by 3 hatches at 150 tons per hatch per day ... ... | 2 days. |
| 600 tons loaded by 2 hatches at 150 tons per hatch per day ... ... | 2 days. |
| | 14 days 14 hrs. 24 mins. |

On this basis 2 days 18 hours and 4 minutes of permitted lay time were saved and the charterers would be entitled to £344 1s. 11d. only by way of despatch money.

The umpire awarded that the charterers should pay the owners the sum of £171 7s., but if the court should decide that the

charterers' method of calculation was correct then he awarded that the charterers should pay the owners £28 6s. 3d.

*Eustace Roskill Q.C.* and *T. G. Roche* for the charterers.
*Michael Kerr* for the owners.

The following cases were referred to in argument: *Van Liewen* v. *Hollis Brothers & Co. Ld.*[1]; *Love & Stewart Ld.* v. *Rowtor S.S. Co. Ld.*[2]; *Maccoy* v. *West & Penrose*[3]; *The Sandgate*[4]; *Branckelow S.S. Co.* v. *Lamport & Holt.*[5]

*Cur. adv. vult.*

November 9. DEVLIN J. read the following judgment. The charterparty in this case provides, by clause 5, for the calculation of the lay days in the following terms: "Cargo to be loaded and "stowed free of expense to owners at an average rate of not less "than 150 metric tons per available workable hatch per weather "working day (Sundays and holidays excepted), provided vessel "can receive at this rate." Other clauses provide in the usual way for the payment of demurrage for time lost and despatch money for time saved. The question for determination is how, under clause 5, the lay time should be calculated.

The other material facts are as follows. The vessel is described as carrying about 9,450 metric tons of deadweight cargo. The obligation of the charterers is to load a full and complete cargo of 9,000 metric tons of barley in bulk, 5 per cent. more or less in master's option, the charterers to supply sufficient quantity of cargo in bags for safe stowage as required by the master, but not exceeding 5 per cent. of the entire cargo, such quantity to be declared by the master before commencement to load. The vessel has five holds differing in size, the largest having a capacity of 2,361 tons.

It is well settled that, unless the charterparty otherwise provides, the charterer's obligation to load is that he must do so within a reasonable time. If the charterparty provides for loading within a fixed time, that is, within a specified number of days, it must do so in plain and unambiguous terms: *Van Liewen* v. *Hollis Brothers & Co. Ld.*[1] The charterparty need not specify the number of lay days so long as it specifies the means by which the number can be calculated; thus a charterparty which specifies a rate at which the loading is to be done is to be treated as a fixed lay day charter: *Love & Stewart Ld.* v. *Rowtor Steamship Co. Ld.*[2]

The shipowner's desire is to achieve a quick turn-round; time is money for him. The object of fixing lay days and providing

[1] [1920] A.C. 239; 36 T.L.R. 148.
[2] [1916] 2 A.C. 527.
[3] (1898) 15 T.L.R. 84.
[4] [1930] P. 30; 46 T.L.R. 116; 35 Com.Cas. 221.
[5] [1897] 1 Q.B. 570.
[1] [1920] A.C. 239.
[2] [1916] 2 A.C. 527, 535.

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for demurrage and despatch money is to penalize dilatoriness in loading and to reward promptitude. When a number of lay days is specified, it is no doubt calculated upon some estimate of the period within which the charterers, working diligently, should be able to load a known quantity of cargo. But it is common enough to find that, although a full and complete cargo is required, the quantity to be loaded cannot be known until it is seen how the stowage is working out; in the present case the weight of cargo may vary by at least as much as 10 per cent. according to stowage factors which are in the discretion of the master.

A fairer and more accurate method of fixing the lay time is, therefore, to fix a daily rate of loading. The clause in the present case introduces a further refinement. Instead of providing simply for a rate per day, it provides for a rate per hatch per day. If all the holds were of equal capacity this refinement would be unnecessary. If they were loaded at the same working rate they would then all be finished simultaneously, and with five holds one might just as well say 750 tons per day as 150 tons per day per hold. But if they are not of the same capacity one hold will be finished before the others. If when, say, half the holds are filled, the charterer had to carry on at the same daily rate, he would have to double the rate on each of the unfilled holds, and that would be unreasonable, if not impossible; thus the necessity for the rate per " workable hatch."

It is common ground that the word " workable " is intended to describe the state of a hatch that can still be worked because its hold is not yet full: see *The Sandgate*.[3] By this means the daily rate is reduced by 150 as each hold is filled. It follows, however, that if all goes smoothly and all the hatches are " available "—that is, there is nothing to prevent their being used—the time taken to load the ship will be the time taken to load the largest hold. So the charterers say that the calculation required by clause 5 can be conveniently expressed by saying that one gets the lay time by dividing by 150 the largest quantity of cargo loaded in any one hold. For this they have the authority of Hill J. in *The Sandgate*,[4] where he says: " I suppose, worked " out most accurately, you would take those several quantities " —that is, the quantity in each hold—" and start with 500 and " go on reducing to 375 "—the rate in that case was 125 tons per working hatch per day—" reducing to 250, and finally 125, but " you get exactly the same result, and the shipowner would have " no difficulty in doing the arithmetic, if he took the quantity " in the hold which contains the largest quantity and divided that " by 125, then that would give you the period in which the " discharge had to be carried out, and you would then deduct " Sundays and holidays."

Mr. Kerr, for the owners, objects that Hill J.'s simplification—or at any rate the application of it to the clause in this case—is

[3] (1929) 35 Com.Cas. 221. [4] Ibid. 228.

incorrect. It is based, he says, upon two assumptions, neither of which is justified by the terms of the clause. It assumes, first, that all the holds are always available, and secondly, that they will all be being loaded at the same rate at the same time.

In the course of his excellent argument Mr. Kerr produced a set of figures to illustrate what would happen if either of these assumptions was vitiated. These hypothetical figures are conveniently arranged in multiples of 150. They show a far greater discrepancy between the capacities of the different holds than would be likely in practice, but the magnification helps to clarify the point. The figures assume a total capacity of 3,000 tons divided as follows: No. 1, 300; No. 2, 450; No. 3, 600; No. 4, 750; and No. 5, 900. On these figures it would take six days to load the largest hold, and on the charterers' construction that would be the lay time. But if No. 5 hold was not available for, say, the first five days, the ship could not be loaded under 11 days; nevertheless, on the charterers' formula they would have to pay demurrage for all days over six. The accuracy of the formula depends, therefore, Mr. Kerr says, upon an unwarrantable assumption of availability.

The other assumption which Mr. Kerr says is unwarranted is that the loading of all the holds will be started simultaneously and continued uninterruptedly until they are filled. There may be sound commercial reasons why the charterers should concentrate at first upon one or two holds, and there is nothing in clause 5 to prohibit their doing so. If they were to load each day at the contract rate—that is, at 750 a day, reducing by 150 as each hold was filled—and take the holds in order from No. 1 upwards, it would be five days before they reached No. 5, so that the result would be the same as if No. 5 were unavailable for the first five days, namely, 11 days. Of course, that is an extreme example. But, says Mr. Kerr, it is inevitable in ordinary working that there will not be exactly simultaneous loading; therefore one must not assume that the holds will be loaded evenly, but must ascertain how, upon any given occasion, they are in fact loaded, and make one's calculation in accordance with what actually happens and not with an impracticable assumption of what may happen. The owners' calculation on the facts of this case is set out in the special case.

There is, I think, an overwhelming objection to the owners' construction of the clause. It is that on that construction the number of lay days depends upon the way in which the charterers choose to load the vessel. There may possibly be good reasons why they should load one hold after the other, but there may also be bad ones; and on the owners' construction there is no way of distinguishing between excusable delay and wanton delay. The charterers may adopt the method of loading hold by hold through defective organization or indolence, or for no better reason than that they want to irritate the owners by delaying the ship, and they may thereby detain her unnecessarily for a substantial period

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without being liable for demurrage. That is to defeat the whole object of the clause.

Mr. Kerr conceded that under his construction the charterers could be lacking in diligence without being made to pay for it (Mr. Roskill put forward a number of examples to illustrate this) but says that, as that is the only meaning of the words the parties have adopted, there is an end of the argument. I do not accept that. The paramount object of the clause is to penalize the charterers for wasting time and reward them for saving it, and, if the literal construction of the words permits them to waste time with impunity, I should be tempted to hold that the clause could not satisfy the test of plainness and unambiguity which the authorities lay down.

But I am not driven to that conclusion for I think that Mr. Kerr's criticisms of the charterers' construction are misconceived. The fundamental error in them is that they treat clause 5 as if it were laying down a method of loading. If it were, it would be appropriate to suggest that it should not be construed as requiring the charterers to load each hold each day at exactly the same rate and for exactly the same time. Clause 5, in my opinion, is not prescribing a method but setting a standard; it is drawing a notional line above which there will be a bonus and below a penalty. It is as irrelevant to try to verify the standard by reference to actual experience as it would be to search for physical objects to verify the line of the equator. There is nothing in the language of clause 5 to require the charterers to load all the hatches together any more than there is to require them to load each hold individually, or to prohibit them from taking either course. But it is reasonable to think that the standard set will be one which assumes that as far as possible work will go on simultaneously on all the holds, because that is the way that is most economical of the ship's time. It is unreasonable to think that the standard set would allow the charterers to load in any way they chose, because it would then give no incentive to them to choose a time-saving method. Of course, in practice there will be hitches and an even flow will never be attained, but that is not really saying any more than that lay days are never exactly filled and the voyage has yet to be made in which the charterer neither earns any despatch money nor pays any demurrage.

The criticism that the formula does not take into account the possibility that a hold will not be available is met by Mr. Roskill's answer that it is not meant to. The formula produces a number of days and hours based on the quantity of cargo actually loaded: it takes the place of a number fixed in advance on the quantity of the cargo estimated to be loaded. Both figures are arrived at on the assumption of good weather and are equally at the mercy of such events as bad weather or the unavailability of hatches. Unavailability is therefore outside the formula and a matter for a separate calculation. One takes the formula figure just as one would take a specified number of lay days and makes

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the appropriate deductions, where necessary, for Sundays and holidays and bad weather and unavailability of hatches. It is not irrelevant to observe that the unavailability must be something that matters, that is, it must interfere with the work. If, for example, a hatch broke down after a hold had been completely loaded, it clearly would not matter. If, on Mr. Kerr's figures, No. 1 hatch broke down at the beginning for, say, four days, equally it would not matter, for it would not be long enough to prevent the loading of the hold within the standard time.

Mr. Kerr's final objection is that if the lay time is the time it takes to fill the largest hold at the rate of 150 tons a day it would be simple to say so: Why does not the clause confine itself to that hold? I can certainly think of ways—particularly in relation to the effect of the non-availability provision—in which the clause might have been expressed more clearly. I do not think, however, that it could be done simply by a reference to the largest hold. If any other hold is initially unavailable, the loading of that hold and not of the largest hold may become the determining factor. It is not, therefore, a case of a simple statement being inexplicably avoided, and the fact that the charterers' meaning could have been more artistically expressed is not, in a charterparty, an argument against it. It is, as expressed, a difficult clause, as Scrutton L.J. said in *The Sandgate* [5]; but it has remained in use for over twenty years since then, and the charterers' construction gives effect to it in the terms stated by Hill J. and in terms which, for the reasons given, I think are consistent with the nature and language of the clause.

*Judgment for the charterers.*

Solicitors: *Richards, Butler & Co.; Holman, Fenwick & Willan.*

J. D. P.

[5] (1929) 35 Com.Cas. 221, 228.

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[COURT OF APPEAL.]

* *In re* WHITTLE (AN INFANT).

C. A.

1953 *Oct.* 28.

PRACTICE NOTE.

[1953 W. 1664.]

Jenkins and Morris L.JJ.

*Practice and Procedure—Court of Appeal—Jurisdiction—Appeal on custody order—Interlocutory matter—Guardianship of Infants Acts,* 1886 *to* 1925 (49 *&* 50 *Vict. c.* 27) *and* (15 *&* 16 *Geo.* 5, *c.* 45).

This was an appeal from an order of Roxburgh J. dismissing an appeal from an order made by justices as to the custody of an infant. The appeal was heard in camera, and is reported, by direction of the court, on the points of practice decided.

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*In re* WHITTLE.

*James Comyn* for the appellant.
*Anthony Abrahams* for the respondent.

In the course of his judgment JENKINS L.J. said:—In opening the case Mr. Comyn very properly raised the question whether this court had jurisdiction to entertain an appeal in proceedings of this sort—that is to say, proceedings under the Guardianship of Infants Acts initiated in a court of summary jurisdiction. He, very properly, did that because his researches have not disclosed any previous case in which there had been such an appeal. He referred us to the relevant provisions of the Guardianship of Infants Act, 1925, and the Supreme Court of Judicature Act of the same year, and to the relevant provisions in the Rules of the Supreme Court. The effect of those provisions taken together is such as to leave no doubt whatever in my mind that an appeal to this court does lie in such cases; and I was fortified in this conclusion by the Chief Registrar, who was able to produce an order in which a similar appeal had in fact been entertained by this court, and he also assured me that within his recollection there was at least one other instance of that being done.

It was not disputed on the respondent's side that this court did have jurisdiction, and it seems to me abundantly plain that it has. Accordingly, I pass from that question; and in the circumstances I have not thought it necessary to refer in detail to the sections, for I think that the matter, though properly raised by Mr. Comyn, is one which really admits of no doubt.

Another preliminary point raised by Mr. Comyn was whether this case was rightly treated as an interlocutory appeal. That, again, I think admits of no doubt, as appears from the judgment of Bucknill L.J. in *Chinchen* v. *Chinchen*.[1] In that judgment Bucknill L.J. said that "at the outset of the appeal a point had "arisen whether the order for custody, against which the appeal "was brought, was an interlocutory order and, that being so, "the appeal was properly in the interlocutory list." He went on to express the opinion that "orders for custody were inter-"locutory orders and appeals from them were properly in the "interlocutory list"; and he referred to sections 31 and 68 (2) of the Supreme Court of Judicature (Consolidation) Act, 1925, and the note to R.S.C. ord. 58, r. 3, concluding thus: "A custody "order did not finally dispose of the rights concerned." So that leaves no room for doubt that this is an interlocutory appeal.

MORRIS L.J. agreed.

Solicitors: *Haslewood, Hare, Shirley Woolmer & Co. for E. J. Watson, Cox & Counsell, Bristol; Henry B. Sissmore & Co. for Lawrence Williams & Co., Bristol.*

E. D.

[1] [1950] W.N. 22.

[LIVERPOOL ASSIZES.]

## * GILL & DUFFUS (LIVERPOOL) LD. *v.* SCRUTTONS LD.

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*April* 14, 15, 16;
*June* 11.

Glyn-Jones J.

*Shipping — Bill of lading — Consignments intermixed — Commixtio — Delivery — Port of Liverpool — Master-porter — Duty to apportion rateably between consignees—Tenants in common—Goods—Bailment —Right of one tenant to demand all.*

The regulations of a harbour board required cargo discharged at the port to be received, in the first instance, by a licensed master-porter, whose duty it was to deliver the goods, when unloaded, to the consignees. Several consignments carried in the same hold of a ship became intermixed, due to the bursting of the bags in which the goods were packed, and there was an overall shortage:—

*Held*, that it was the duty of the master-porter to apportion the loss fairly between the consignees—in proportion to the difference between the total weight of bags recognizable as part of each consignment and the bill of lading weight thereof.

ACTION.

The following statement of the facts is taken from the judgment: On Thursday, November 20, 1947, the motor vessel *Ravenspoint* berthed in the port of Liverpool with a mixed cargo, including a quantity of chestnuts in marked bags which were consigned to three consignees—Woodalls, Sloans, and the plaintiffs. The regulations of the Mersey Docks and Harbour Board required that all cargo discharged from a vessel in the port should be received by a licensed master-porter, who would be responsible for the delivery thereof to the consignees.

The defendants, who carried on business as stevedores, were licensed by the harbour board as a master-porter, and were employed as stevedores to unload the cargo from the *Ravenspoint* and as a master-porter to receive the cargo notionally at the ship's rail. In their capacity as master-porter the defendants employed one Roberts as clerk-in-charge or "counter off."

When the hatches were taken off the *Ravenspoint* on Friday, November 21, it was seen that the bags had become damp and stained so that in some cases the marks were difficult to decipher and many of the bags, some from each consignment though not an equal proportion in each, had burst so that there was in the hold a quantity of loose chestnuts.

The usual practice in the port of Liverpool when such an event occurred had been for each consignee to supply suitable bags to the master-porter or pay for bags procured by him, and the master-porter at the expense of the consignees would then re-bag the "mixed-loose," as it was called, and apportion it rateably between the consignees.

The plaintiffs, on being informed of the state of the chestnuts in the hold, informed their insurers, asking them to send a

[Reported by NIUL HOGG, Esq., Barrister-at-Law.]

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surveyor as soon as possible, but the insurers said that the earliest time at which a surveyor could attend was the following Monday, November 24. On Friday, November 21, Roberts requested all three consignees to tell him whether or not they agreed to his having the "mixed-loose" chestnuts re-bagged by his men and if so to supply or agree to pay for the necessary bags and labour. The plaintiffs said that they could not give any answer until after the surveyor had inspected the damage. Meanwhile the representatives of the other two consignees, Woodalls and Sloans, who had either managed to get the chestnuts surveyed at once or had dispensed with inspection by a surveyor, were pressing Roberts to be allowed to take delivery of their respective shares of the chestnuts. Each of them decided to bring bags and employ their own labour to re-bag their proportion of the loose chestnuts.

During the Friday and the Saturday the work of discharging the cargo from the hold went on. Any bags bearing decipherable marks and in apparently sound condition were stacked or piled on the quay according to marks, and the "mixed-loose" was piled separately. A good many bags burst while being handled and their contents or some of their contents became part of the "mixed-loose" in one or more piles on the quay. By mid-day on the Saturday the respective consignees had taken delivery of all the bags in sound condition. These bags were not weighed, but the total weight of the quantities so delivered was assessed on the assumption that each bag was of the average weight obtained by dividing the total weight of each consignment by the number of bags in each. During the Saturday afternoon and the Sunday workmen employed by Woodalls and by Sloans were given access to the remaining chestnuts, which consisted in part of bags recognizable as belonging to a particular consignment, but damaged, from many or perhaps most of which some of the contents had escaped, and in part of the "mixed-loose" chestnuts; and these men during those two days on behalf of their respective employers re-packed into fresh bags the contents of any damaged or unsound but identifiable bags and also quantities of the "mixed-loose." On the Monday Woodalls and Sloans began to take delivery of re-packed bags of chestnuts and these bags were weighed by the defendants on the instructions of the shipowners' agents.

Roberts kept a note of these weights and added them to the assessed weights of the sound bags previously delivered, and when on this reckoning there had been delivered to Woodalls and Sloans chestnuts amounting to about 450 lb. less in each case than the total bill of lading weight of the consignment to each, he stopped each of them from re-bagging or taking delivery of any more. The delivery of re-bagged chestnuts to Sloans was completed by Monday, November 24, and to Woodalls by Tuesday, November 25. Meantime, on the morning of Monday, the 24th, the surveyor to the plaintiffs' insurers, having seen the chestnuts,

authorized the plaintiffs to have their share re-bagged and to take delivery of them. Thereupon the plaintiffs told a representative of the defendant that they would supply bags and that they wanted their chestnuts re-bagged.

On the Tuesday the work of re-bagging the chestnuts for the plaintiffs began, but as it went on it became apparent that the difference between the total weight of chestnuts received by the plaintiffs and the consignment weight in the relevant bill of lading would be far greater than the difference—about 450 lbs. each—between the weights of the chestnuts delivered to the other two consignees and their respective bill of lading consignment weights. The total gross weight received by the plaintiffs fell short of the consignment weight by 9,300 lbs. The chestnuts which the plaintiffs received included most of those which had been the worst damaged by sweat and contamination. The plaintiffs accordingly brought this action claiming some £290 damages from the defendants as master-porter.

*Edward Wooll Q.C.* and *G. W. G. Jones* for the plaintiffs.
*H. I. Nelson Q.C.* and *R. S. Nicklin* for the defendants.

The following cases were cited in argument: *Spence* v. *Union Marine Insurance Co. Ld.*[1]; *Smurthwaite* v. *Hannay*[2]; *Grange & Co.* v. *Taylor*[3]; *Peninsular and Oriental Steam Navigation Co. Ld.* v. *Leetham (H.) & Sons and Keighley, Maxsted & Co.*[4]; *Sandeman & Sons* v. *Tyzack and Branfoot S.S. Co. Ld.*[5]; and *Buckley* v. *Gross.*[6]

*Cur. adv. vult.*

June 11. GLYN-JONES J., after having stated the facts: I think that it will be convenient to deal at once with the contention that if the plaintiffs have suffered any loss the blame rests solely on the plaintiffs themselves by reason of their failure to give instructions soon enough as to what was to be done with the chestnuts. Either the defendants owed a duty to the plaintiffs to see that they received a due proportion of the chestnuts and "mixed-loose" chestnuts landed or they did not. If they did owe such a duty and have not performed it I am of the opinion that the plaintiffs, by failing to give instructions until the morning of November 24 as to what was to be done with their chestnuts, did not forfeit their rights to the performance by the defendants of their duty. It was not unreasonable of the plaintiffs to wait until the insurers had surveyed the damage before giving instructions as to the disposal of the goods. The delay from Friday until Monday was not unreasonable in the circumstances and I cannot find that the plaintiffs were guilty of any breach of duty owed to the defendants such as could or would discharge them from

[1] (1868) L.R. 3 C.P. 427.
[2] [1894] A.C. 494; 10 T.L.R. 649.
[3] (1904) 20 T.L.R. 386.
[4] (1915) 32 T.L.R. 153.
[5] [1913] A.C. 680; 29 T.L.R. 694.
[6] (1863) 3 B. & S. 566.

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performance or further performance of any duty owed by them to the plaintiffs.

The next question I consider is what was the defendants' duty as master-porter? It is clear, I think, that the "mixed-loose" must have included some chestnuts from each of the consignments. Counsel agreed that the consignees became tenants in common of that "mixed-loose." I think I may properly accept that pleading without myself discussing in this judgment the principle of commixtio or all the learning which is to be found in the arguments and judgments or speeches in such cases as *Spence* v. *Union Marine Insurance Co.*[1] or *Sandeman & Sons* v. *Tyzack and Branfoot S.S. Co. Ld.*[2] and others.

The defendants then were in possession of an unidentifiable mass of "mixed-loose" of which the three consignees were tenants in common. Mr. Wooll argues that in such circumstances the master-porter is in the position of a trustee of the "mixed-loose" for each of the consignees to the extent of his respective proportion thereof, and that he must equitably apportion the "mixed-loose" between all the consignees doing to the best of his power equal justice to each as would be done by a court of equity. Mr. Wooll made reference to the proof upon which an average adjuster would distribute a loss between the various parties, and he referred me to Halsbury's Laws of England, vol. 13, p. 84.

Mr. Nelson's contention, on the other hand, is that the master-porter is a bailee and that the bailee of goods for tenants in common has in law neither the right nor the duty to apportion the goods between the tenants in common, and that should one of the tenants in common demand of the bailee the delivery up of the whole of the goods the bailee would be compelled in law to deliver them up, leaving the other tenants in common to pursue whatever remedy they might have against him who had taken the whole of the goods. This principle, said Mr. Nelson, applies by operation of law as soon as a bailment is established, and any party seeking to impose by implications of law any additional obligation on the bailee must fail unless he proves that the implication is necessary to give business efficacy to the bailment.

I am not sure that I agree with Mr. Nelson that there is any such universal rule as that for which he contends. In my view the obligations of a bailee depend upon all the circumstances of the bailment, and, while it may be true in many, or even most, cases of a bailment by tenants in common that any one of the joint bailors may demand delivery up to himself alone of the whole of the goods bailed, it is not necessarily true in all cases where a bailee is found in possession of goods belonging to tenants in common.

Mr. Nelson's contention is, I think, that the obligations of the master-porter are the same as they would have been if the

[1] (1868) L.R. 3 C.P. 427. [2] [1913] A.C. 680.

three tenants in common had voluntarily joined in delivering the "mixed-loose" to the master-porter as bailee for all three. There is a form of contract of bailment between the three of them jointly on the one hand and the master-porter on the other. Assuming Mr. Nelson to be right in saying that thereupon in the absence of an express term in the contract to the contrary any of the joint bailors could lawfully have required the bailee to deliver up the whole of the goods to himself, it does not follow in my opinion that the same rule applies where the bailment—if, indeed, this can accurately be called a bailment—does not arise from contract at all, but is imposed upon the parties by operation of law.

In the port of Liverpool the consignee has no choice as to whether a master-porter is to be employed or not, nor usually any right to choose which master-porter shall be employed, nor can he exercise any control over the master-porter's duties or charges which are prescribed by the board's regulations. It is theoretically conceivable that a consignee might arrive at the docks expecting to take delivery of goods from the shipowner at the ship's rail only to find his goods in the hands of a master-porter of whom he had never heard. There can be no contract without agreement, express or implied, and I see no ground for basing the relations between master-porter and consignee upon any agreement between them. The master-porter's services are imposed upon the consignee by the statutes creating the Mersey Docks and Harbour Board and by the board's regulations. On this footing Mr. Nelson next contends that since the language of the relevant statutes or by-laws does not provide expressly that the master-porter's duty includes the apportioning of the "mixed-" loose" it is impossible to imply words in the statutes creating such an obligation.

On the other hand, Mr. Wooll says the fact that the relationship between the master-porter and the consignee is created by statute does not prevent the court from implying into that relationship an obligation upon the master-porter to deal fairly between the consignees whose goods have come into his hands. It seems to me that if the statute compels the shipowner to deliver the cargo to the master-porter rather than to the consignee direct then, in respect of the goods which actually come into his hands, the master-porter ought to be under an obligation to distribute them among the consignees in the same way as it would have been the shipowner's duty to do if he himself had made the delivery. In this case upon the authorities I think it would have been the shipowner's duty to apportion the "mixed-" loose" rateably between the consignees, or, at any rate between those consignees who had elected to treat themselves as tenants in common, and for them to receive their rateable proportion, whatever it was, of the "mixed-loose."

In these circumstances I am of opinion that the law does impose upon the master-porter a duty to act fairly between all

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the consignees whose goods come into his hands and in particular that it was in this case the defendants' duty to apportion the " mixed-loose " chestnuts between the three consignees. I think the duty may be said to be a statutory duty or may be said to arise quasi ex contractu so as to be comparable, in a sense, to the duty to pay over money had and received to the use of another. If the master-porter is not under such a duty it appears to follow that the first consignee to reach the quayside could collect the whole of the " mixed-loose " even though the quantity exceeded his total consignment, and if all arrived simultaneously it would presumably be the duty of the master-porter to keep the ring while the consignees scrambled for the chestnuts on the quay like Westminster boys for the pancake on Shrove Tuesday.

I observe in passing that practically every witness, including those called to prove the contrary, conceded that he thought it was the duty of the master-porter to apportion. In my opinion all this evidence falls short of establishing a custom of the port, but it does show that the obligation to apportion which I think the law imposes upon the master-porter appears reasonable to those with knowledge of the trade giving evidence before me. Roberts says that if the consignees had agreed to pay the cost of re-bagging he would have taken it upon himself to apportion. I so understand the evidence he gave, although at one stage he did say that he would not have taken it upon himself to apportion unless the consignees had agreed to his doing so, but I do not think that he maintained that position throughout his evidence.

The difficulty in this case has arisen because the three consignees failed for once to agree that the master-porter should re-bag the loose chestnuts. This created an unusual situation in which Roberts, who was, I thought, a most admirable witness, did his best to apportion the chestnuts by stopping Woodalls and Sloans when he thought they had had enough, although he thinks now he knows the facts that they had too much. In difficult circumstances I do not blame Mr. Roberts for having misjudged the weight of scattered piles of loose chestnuts, but I think that the duty on the master-porter is to make a fair apportionment—fair in the sense hereinafter defined—and if the apportionment is in fact unfair the master-porter must, I think, take the responsibility.

That leads me to the question of what would be a fair apportionment. Mr. Nelson contended that the master-porter was not and could not be possessed of sufficient information to enable him to say what would be a fair apportionment. He pointed out that the whole of the loss or most of it might have arisen because the weight of chestnuts originally loaded fell below the consignment weights and that, if so, it may have been the plaintiffs' consignment alone which was of short weight, or that since the bags in the plaintiffs' consignment were the most damaged the

greater loss had rightly fallen on the plaintiffs, and that on the evidence the plaintiffs had not discharged the burden of proving that they had not received their fair share.

These and similar difficulties are not new. They are referred to in Scrutton on Charterparties, 15th ed., p. 331. Lord Moulton in his speech in *Sandeman's* case,[3] which I have already cited, says: "I do not think it a matter of difficulty to define "the legal consequences of the goods of 'A' becoming indis- "tinguishably and inseparably mixed with the goods of 'B.' If "the mixing has arisen from the fault of 'B', 'A' can claim "the goods. He is guilty of no wrongful act, and therefore the "possession by him of his own goods cannot be interfered with, "and if by the wrongful act of 'B' that possession necessarily "implies the possession of the intruding goods of 'B,' he is "entitled to it (2 Kent's Commentaries, 10th ed., 465). But if "the mixing has taken place by accident or other cause for which "neither of the owners is responsible, a different state of things "arises. Neither owner has done anything to forfeit his right "to the possession of his own property, and if neither party is "willing to abandon that right the only equitable solution of the "difficulty, and the one accepted by the law, is that 'A' and "'B' become owners in common of the mixed property. "Farther than this I do not think that it is safe to go. That the "whole matter is far from being within the domain of settled "law is shown by the divergence of opinions as to the relative "shares of the participating parties in the case of an accidental "commixtio. Blackburn J. in *Buckley* v. *Gross*[4] (following "Kent's Commentaries) considers that they would be tenants in "common in equal shares. In *Spence* v. *Union Marine Insur- "ance Co.*[5] they were judged to possess the mixed mass in pro- "portion to the probable amounts of their contributions to it. "The fact is that the conclusions of the courts in such cases, "though influenced by certain fundamental principles, have been "little more than instances of cutting the Gordian knot— "reasonable adjustments of the rights of parties in cases where "complete justice was impracticable of attainment. I doubt "whether even the fundamental principles enunciated above "would be strictly adhered to in extreme cases where they would "lead to substantial injustice."

I think that it follows that a formula must be devised which so far as possible takes into account the circumstances of the particular case. I am far from saying that in every case or in this case there is only one formula which is fair. The assessment can be made only within fairly wide limits and in my opinion the master-porter does not finally determine the rights of the parties, for presumably it would still be open to a consignee who could prove that he had not received the goods consigned to him to

[3] [1913] A.C. 680, 694.
[4] (1863) 3 B. & S. 566, 575.
[5] L.R. 3 C.P. 427.

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bring an action in an appropriate case against the other consignee or consignees, or it may be against the shipowner, or possibly against the consignor, but if the master-porter had adopted a reasonable formula I do not think any court would have held him guilty of a breach of duty even though of opinion that some other formula would have produced a more fair or more accurate result.

In devising that formula certain assumptions have got to be made, as is pointed out in the passage I have already cited from Scrutton on Charterparties. In this case Roberts assumed that the bill of lading weights of the consignments of Woodalls and Sloans were correct, or at least that those weights should be the basis on which he, Roberts, would decide, as he did, what weight of chestnuts each of them should be allowed to take away. I do not think that it now lies in the defendants' mouth to say that the same assumption should not be made in assessing the plaintiffs' share. However, Mr. Nelson said that at the time when Woodalls and Sloans demanded to be allowed to take delivery of their goods the defendants had not sufficient data to enable them to make any better apportionment than they did, and they would have rendered themselves liable to actions for damages for loss of future market if they had refused to give delivery to Woodalls and to Sloans.

On the other hand, Mr. Wooll says that the only information the defendants needed was the total weight of the chestnuts and the weight of the " mixed-loose " and that it was not only their right, but their duty, to weigh them, and if they did not know the weights it was their own fault. Mr. Wooll referred me to sections 23 and 24 of the Mersey Docks (Corporation Purchase) Act, 1861. In my opinion these sections do not impose an absolute obligation on the master-porter to weigh all goods which he receives, but they do impose on him a duty, which he owes as well to the consignee as to the board, to weigh correctly, and having weighed accurately to record the weights of all such cargoes as in the circumstances of any given case he may have been required to weigh. By-law 2 (3) (*a*) makes it clear that if weighing is necessary he must weigh without any extra charge. This view is confirmed by the entry in the scale of charges in a booklet put before me which shows that the charges authorized to be made by the master-porter for the landing of chestnuts in bags include the cost of weighing each bag separately. I do not think the defendants were under a duty to supply bags if the consignee refused to pay for them, but they could have weighed the chestnuts in the hampers in which they were unloaded or in other containers and tared the containers. I am of the opinion that if it was necessary for them to do so in order to apportion the chestnuts fairly then they should have done so.

If, as Mr. Nelson says, the defendants were under no obligation to weigh unless expressly required by one of the parties to do so, they need not have weighed the quantities actually

delivered; although in fact they did so, apparently on the instructions of the shipowner. On the other hand, if the defendants had not weighed the chestnuts which they actually delivered then they would have deprived every consignee, so far as I can see, of any information concerning the total weight of chestnuts unloaded or the quantities delivered to the other consignees, and thus deprived each consignee of the opportunity to find out whether or not he had received his fair share of chestnuts. Mr. Nelson further says that to weigh the " mixed-loose " would have been costly so as to make the transaction unprofitable for the defendants. I daresay it would, but master-porters like almost everyone else exercising any profession or trade must take the rough with the smooth and must not expect to be guaranteed a profit upon every transaction. If a master-porter finds the business unprofitable he should give it up or else persuade the Mersey Docks and Harbour Board to increase his charges.

I have next to select a method of apportionment which I think fair. As between these three consignees no injustice is done in my opinion by assuming for this purpose that the consignment weights were correct, but I reject Mr. Wooll's contention that having found the weight of the " mixed-loose " the defendants should have apportioned it in proportion to the consignment weights, because it does not follow that each consignment contributed in equal or near equal proportion to the loss. For example, Sloans received no fewer than 173 sound bags out of 200 in one of their consignments, and it is clear that the contribution of this consignment to the loss was proportionately less than that of the others. What should have been done I think was to divide the " mixed-loose " in proportion to the difference between the total weight of the chestnuts—whether contained in sound or in damaged bags—which could be recognized as forming part of each consignment, and the bill of lading weight of that consignment. I am satisfied that if this had been done the plaintiffs would have received a greater share, and it follows that in my opinion the defendants, in breach of their duty, failed to give the plaintiffs their fair share.

I must next seek to assess the damage suffered in consequence by the plaintiffs. I cannot now re-apportion the " mixed-loose " because I do not know how much of the re-bagged chestnuts delivered to each consignee came from damaged but identifiable bags, and how much from the " mixed-loose," but I think the plaintiffs' loss can be assessed with substantial accuracy by re-apportioning on the same principle the whole amount of the chestnuts which were re-bagged.

[His Lordship then gave the amount by which the weight of the sound bags delivered in respect of each consignment fell short of the bill of lading weight for that consignment, which he called the " prima facie shortage." He then calculated the rateable shares due by multiplying the " prima facie short- " age " on each consignment by a fraction of which the numerator

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was the total weight of chestnuts actually delivered in re-packed bags and the denominator the total prima facie shortage on all consignments, and continued:] It was agreed that the re-bagged chestnuts were sold at 121s. per cwt. and I think, therefore, that a figure of £175 represents nearly enough the value of the chestnuts which ought to have been, but which were not, delivered to the plaintiffs, and for this sum there must be judgment.

The conclusion at which I have arrived renders it unnecessary to discuss the question as to whether or not the plaintiffs have satisfied me that there was a conversion by the defendants of any specific goods which could have been shown to be the plaintiffs' property, and I do not think that I need express any opinion upon that issue.

*Judgment for the plaintiffs.*

Solicitors: *G. H. Hindley & Co., Liverpool; Weightman, Pedder & Co., Liverpool.*

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[QUEEN'S BENCH DIVISION.]

1953
*Nov.* 16.

## * PRACTICE NOTE (JUSTICES' CLERKS).

Lord Goddard C.J.

*Justices—Practice—Clerk—Consultation with—On what matters and in what manner.*

LORD GODDARD C.J. made the following statement: In three recent cases the Divisional Court has had to consider the question when and for what purposes it is proper for a clerk to justices to accompany them when they retire to consider their decision or to remain in their room while the case is under consideration. It is evident from letters received both by the Lord Chancellor and myself, and from correspondence in newspapers, that there is uncertainty in the minds of magistrates on this subject and, indeed, some degree of misunderstanding as to the effect of what was said in the cases to which I have referred. They are *Reg.* v. *East Kerrier Justices, ex parte Mundy*,[1] *Reg.* v. *Welshpool Justices, ex parte Holley*[2] and *Reg.* v. *Barry (Glamorgan) Justices, ex parte Nagi Kashim*.[3] I propose, therefore, to endeavour

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[Reported by Miss C. J. ELLIS, Barrister-at-Law.]

[1] [1952] 2 Q.B. 719; [1952] 1 T.L.R. 1618; [1952] 2 All E.R. 144.

[2] [1953] 3 W.L.R. 583; [1953] 2 All E.R. 807.

[3] [1953] 1 W.L.R. 1320; [1953] 2 All E.R. 1005.

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PRACTICE NOTE (JUSTICES' CLERKS).

to clear up this matter and I have the authority of the Lord Chancellor to say that he concurs in the statement which I am about to make, as do all the judges who were parties to the decisions I have mentioned.

There are two questions which arise in this connexion. The first is, on what matters may justices consult their clerk? The second, and one of equal importance is, in what manner should they consult him?

On the first question it is clear that they may seek his advice on questions of law or of mixed law and fact, and also on questions regarding the practice and procedure of the court. The latter are, indeed, questions of law. There are other matters on which justices may require the assistance of their clerk and on which they are entitled to ask his advice. They may, for instance, ask him for information as to the sentences which have been imposed by their bench or by neighbouring benches in respect of similar offences to that which they are trying. It is, indeed, most desirable that penalties for such matters as obstruction by vehicles, lack of lights and other what may be called public order offences should have some degree of uniformity. Moreover, it would be proper for the clerk himself to call the attention of the justices to the fact, if they do not appear to be already aware of it, that a question of law does or may arise. It would then be for them to consider whether they wanted his further advice on that question.

In no circumstances, however, may justices consult their clerk as to the guilt or innocence of the accused so far as it is simply a question of fact, but if a question arises as to the construction of a statute or regulation they may consult him on whether the facts found by them constitute an offence because that would be a question of mixed law and fact. They may also properly ask the clerk to refresh their memory as to any matter of evidence which has been given. They can take with them or send for any note the clerk may have taken, and if there is anything in the note which needs elucidation, or if they think that something has been omitted or wrongly taken down, it would be perfectly proper for them to consult him.

They must not ask his opinion as to the sentence which they ought to impose, but they may, as I have said, ask for information as to the sentences imposed for comparable offences, and they most certainly may consult him on what penalties the law allows in any particular case if they do not already know it, and on any consequential matters that may follow on conviction. One obvious instance would be, with regard to certain motoring offences, whether reasons which they are prepared to give can amount to special reasons for not disqualifying a driver according to the decisions of this court on that subject. They may also want to know whether it is a case in which they can require sureties for good behaviour in addition to imposing a penalty.

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As regards the manner in which justices may consult their clerk, the court, I think, made it clear in the *East Kerrier* case [4] that the decision of the court must be the decision of the justices and not that of the justices and their clerk, and that if the clerk retires with the justices as a matter of course it is inevitable that the impression will be given that he may influence the justices as to the decision or sentence or both. A clerk should not retire with his justices as a matter of course, nor should they attempt to get round the decisions to which I have referred merely by asking him in every case to retire with them or by pretending that they require his advice on a point of law. Subject to this, it is in the discretion of the justices to ask their clerk to retire with them if in any particular case it has become clear that they will need his advice. If, in the course of their deliberations, they find that they need him, they can send for him. On this matter I would stress one further point, and that is, that if the clerk does retire with the justices or is sent for by them, he should return to his place in court as soon as he is released by the justices, leaving them to complete their deliberations in his absence and to come back into court in their turn. I wish to add that the rulings which this court has given on the subject derive from and are really part of the rule so often emphasized, that justice must not only be done but must manifestly appear to be done, and if justices bear that in mind I feel sure that they will have no difficulty in loyally following the decisions of this court.

I should add that the rulings of this court do not apply to justices when exercising jurisdiction in matrimonial cases, as they are then subject to the directions and control of the Probate, Divorce and Admiralty Division.

[4] [1952] 2 Q.B. 719.

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[QUEEN'S BENCH DIVISION.]

1953
*Oct.* 7, 8.

Lord Goddard C.J., Sellers and Havers JJ.

## * REGINA *v.* INDUSTRIAL DISPUTES TRIBUNAL; *Ex parte* TECHNALOY LD.

*Master and Servant — Industrial Disputes Tribunal — Jurisdiction — Reference of issue to tribunal by Minister—Whether employer bound by national terms—Distinction between "dispute" and "issue"—Matter wrongly referred to tribunal as a "dispute"— Industrial Disputes Order,* 1951 (*S.I.* 1951, *No.* 1376), *arts.* 1 *and* 2.

Representatives of employers and workmen made an agreement whereby a rise was to be given to all workers in the union by employers who were members of the employers' federation. The applicant company refused to implement this agreement on the ground that they were already paying their employees a wage which was at least equal to and in some cases in excess of the wage which

other employers in the same trade were paying even after giving the rise. The Minister referred the matter to the Industrial Disputes Tribunal as a "dispute." In proceedings for prohibition against the Minister on the ground that by the terms of the Industrial Disputes Order, 1951,[1] the matter should have been referred as an "issue" and not a "dispute":—

*Held*, that the question whether an employer should be required to observe the agreed terms of employment was not a "dispute" within the meaning of article 1 of the Order, but an "issue" under article 2, and that, accordingly, prohibition must go.

*Regina* v. *Industrial Disputes Tribunal, ex p. Practical Banking Ld.* [1952] 2 Q.B. 662; [1952] 1 T.L.R. 1448; [1952] 1 All E.R. 1370 followed.

APPLICATION for order of prohibition.

Employers and the union in the iron foundry trade made an agreement whereby a rise of 3d. per hour was granted to all workers in the union by employers who were members of the employers' federation. The agreement also concerned how the length of holidays was to be calculated. The applicants, Technaloy Ld., refused to give their workmen who were trade union members this rise as they alleged that they were already paying a wage which was at least equal to and in some cases in excess of the wage which other iron foundries were paying, even with the addition of the rise.

On December 4, 1952, the Minister of Labour referred to the Industrial Disputes Tribunal a dispute described in these words: "Employers: Technaloy Ld. Iron Founders. Workers: Members of the Amalgamated Union of Foundry Workers of Great Britain and Ireland in the employment of the said employers. Description of the dispute: The dispute arises out of a claim made by the said workers that the company should implement

[1] The Industrial Disputes Order, 1951, art. 1: "Where a dispute exists in a trade or industry or section of a trade or industry or in an undertaking and that dispute is reported to the Minister in accordance with this Order by—(i) an organisation of employers, on behalf of employers who are parties to the dispute; (ii) an employer, where the dispute is between that employer and workers in the employment of that employer; or (iii) a trade union, on behalf of workers who are parties to the dispute . . . that dispute shall be dealt with in accordance with the subsequent provisions of this Order."

Art. 2: "Where—(*a*) in any trade or industry or section of trade or industry in any district terms and conditions of employment are established which have been settled by machinery of negotiation or arbitration to which the parties are organisations of employers and trade unions representative respectively of substantial proportions of the employers and workers engaged in that trade or industry or section of trade or industry in that district (hereinafter referred to as 'recognised terms and conditions'); and (*b*) an issue as to whether an employer in that district should observe the recognised terms and conditions (hereinafter referred to as 'an issue') is reported to the Minister in accordance with this order by an organisation of employers or a trade union; and (*c*) the Minister is of opinion that the organisation of employers or trade union reporting the issue habitually takes part in the settlement of terms and conditions of employment in the trade or industry or section of trade or industry concerned; that issue shall be dealt with in accordance with the subsequent provisions of this Order."

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" the agreement between the Engineering and Allied Employers' " National Federation and the Confederation of Shipbuilding and " Engineering Unions dated November 29, 1951, relating to wages " and holidays with pay. . . . The dispute was reported to the " Minister on November 20, 1952, by the Amalgamated Union " of Foundry Workers of Great Britain and Ireland on behalf of " the workers."

The tribunal heard the case and on January 8, 1953, made their award which was later quashed by the Divisional Court as it was bad on its face: the tribunal, in purporting to decide in favour of the men, gave an increase of wages retrospective beyond the date which the Industrial Disputes Order, 1951, allowed. The tribunal gave notice to the parties that they proposed to start again on the same reference and the applicants now sought an order of prohibition to prohibit the tribunal from further proceeding on the reference.

The order was sought on two grounds: first, that there never was a dispute between the workmen and the employers; and secondly, that if there was anything in the nature of a difference, it was by the terms of the Industrial Disputes Order, 1951, an " issue " and not a " dispute."

*F. W. Beney Q.C.* and *Neil Lawson* for the applicants.

*D. N. Pritt Q.C.* and *D. J. Turner-Samuels* for the Amalgamated Union of Foundry Workers.

*S. B. Cooke* for the tribunal.

LORD GODDARD C.J. (after stating the facts as set out above). The court had an interesting argument on the question whether or not it was open to the tribunal to proceed, once their award had been quashed, on the reference; in other words whether it was functus officio and could only proceed on a new reference. The point is by no means an easy one. It certainly cannot be said to be free from doubt, but we are going to assume that it is still open to the tribunal—subject to the point which I am about to consider—to proceed with the reference and that it would not be any objection to argue that it had already made an award. We are willing to assume, for the purpose of this judgment, that as the award is a nullity it is just as if the tribunal had never proceeded at all and can now proceed to determine the application.

The first ground upon which prohibition is sought is that it is said that there never was any dispute between the workers and the employers at all. Secondly, if there was anything in the nature of a dispute which, to use a neutral expression, I will call a difference, it was by the terms of the Industrial Disputes Order, 1951, a difference which is therein described as an issue and not as a dispute, the importance of it being, as will later appear, that the machinery for hearing the matters which must be taken into account by the tribunal if it is an issue—and it

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is not for us to inquire why a difference is made—is different from that which obtains on the hearing of a dispute.

As regards the first point, all the members of the court feel, having read the affidavits, that it would be impossible to hold that in December, 1952, when the reference was made by the Minister there was not a difference of some sort between the employers and the men who were then in their employment. Whether there is any difference today between the men who are at present employed by the company and the company, is an entirely different matter. But, as Mr. Pritt very forcibly pointed out, assuming that there was a difference between men who may now have left the employment and the company, in December, 1952, and at the time when the tribunal was sitting or even at the time when the reference was made, they might be entitled, if some increase of wages were given, to claim in a court of law that the wages found to be payable by the tribunal should be paid.

We, therefore, approach this case on the footing that in December, 1952, there was a prevailing difference beween the employers and some of the workmen. It is therefore necessary to look carefully at the terms of the Industrial Disputes Order, 1951, which was an order taking the place of a much wider and more comprehensive Order passed during the war in 1940; both Orders having as their object the prevention of strikes. Part I is headed "Reporting of Disputes and Issues," which seems clearly to recognize a distinction between disputes and issues. [His Lordship read articles 1 and 2 and continued:]

Article 12, the definition clause, provides: "'dispute' does "not include a dispute as to the employment or non-employment "of any person or as to whether any person should or should not "be a member of any trade union but, save as aforesaid, means "any dispute between an employer and workmen in the employ-"ment of that employer connected with the terms of the "employment or with the conditions of labour of any of those "workmen; 'issue' has the meaning assigned to it in Article 2 "of this Order."

Before I consider the matter of construction, it is necessary to point out that article 8 concerns references of disputes and how the tribunal is to treat them. Article 9 concerns the reference of issues to the tribunal, and the most important thing in this case is that clause (2) of that article provides: "Where an "issue has been referred by the Minister to the Tribunal and the "Tribunal is of opinion that there are recognised terms and con-"ditions applicable to the case and that the employer concerned "is not observing those terms and conditions or terms and "conditions of employment which, in the opinion of the Tribunal, "are not less favourable than those terms and conditions, it may "by its award require the employer to observe the recognised

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" terms and conditions or such terms and conditions of employ-
" ment as may be determined by it to be not less favourable
" than the recognised terms and conditions."

[His Lordship stated the facts as set out above and continued:]

The way that this matter arose was that a trade union organizer in discharge of his duties towards his members, knowing that there were one or two members of the trade union in the employ of Technaloy Ld., visited the offices of the company and found that those trade union workers had not had the additional 3d. per hour. Accordingly, the attention of the employers was called to it, and the employers' answer was to the effect that they were paying a wage which was at least equal to and in some cases in excess of the wage which other iron founders were paying even after the increase of 3d. per hour was added. The trade union considered, however, that it would be desirable that these employers should observe the terms that had been negotiated what I may call nationally. The position is exactly the same as arose in *Reg.* v. *Industrial Disputes Tribunal, ex parte Practical Banking Ld.*[1] In that case the employers were the proprietors of a weekly newspaper known as the " Muswell Hill Record." There had been a rise granted to some persons employed in printing newspapers, and it was sought to impose on the proprietors of the " Muswell Hill " Record " an obligation to pay the same rate of wages as had been paid by the Newspaper Proprietors Federation, although the proprietors claimed not to be members of that federation.

In the present case the general secretary of the Amalgamated Union of Foundry Workers by letter dated November 19, 1952, reported the difference to the Minister of Labour as follows: " The terms of reference quoted by our Mr. Cornwell to " Mr. Silk "—that is the industrial relations officer—" were as " follows:—' failure to agree to implement the agreement as " between the Engineering and Allied Employers' National " Federation and the Confederation of Shipbuilding and Engineer-
" ing Unions dated November 29, 1951, relative to the national " wage increase and provision of 16 days' paid holidays per " annum "; and that is exactly what the Minister referred to the tribunal except that he did not put in the last words " relative " to the national wage increase and provision of 16 days' paid " holidays per annum "; he put " relating to wages and holidays " with pay."

It seems to the court clear that the difference between the parties was whether Technaloy Ld. should obey the national terms and conditions which had been negotiated between the two big organisations. The court, therefore, cannot see how it can successfully be said that this does not fall exactly within paragraph (*b*) of article 2, which is: " Where . . . (*b*) an issue as

[1] [1952] 2 Q.B. 662; [1952] 1 T.L.R. 1448; [1952] 1 All E.R. 1370.

"to whether an employer in that district should observe the "recognised terms and conditions (hereinafter referred to as 'an "'issue') is reported to the Minister in accordance with this "order." Here what was being reported to the Minister was a question whether or not Technaloy Ld. should abide by, implement and perform the terms of this national agreement.

Mr. Pritt has argued strenuously that nonetheless there is a dispute. Of course there is a dispute if there is an issue; nobody denies that. If two parties are at issue, they are at issue because they are disputing about some matter. The joinder of issue between parties to a law suit shows that there is a dispute between them, but we think that as a matter of construction this Order, which refers both to disputes and issues, means to distinguish between them. Any issue involves a dispute, but for the purpose of this Order certain disputes or differences are called issues, and if there is an issue between the parties, then it ought to be referred as an issue and article 9 applies. The importance of it in the present case is that Technaloy Ld. seek to say—rightly or wrongly—that they were giving terms not less favourable to their workmen than they would get under the provisions of the national agreement. When they have that point to consider, the tribunal may find that although in some respects there is a difference between the nationally agreed terms and the terms under which the particular employees are working, taken as a whole the terms and conditions of employment are not less favourable than they would be under the national agreement. However, that is a manner for the tribunal, and it is not disputed that when the matter was before the tribunal in January of this year, the tribunal refused to go into the question of the amount of wages and wage rates and increases paid and granted by the company, and stated that the only question to be determined was whether or not the company should be bound by the agreement. If that was the question, it was an issue, and it ought to be determined according to the provisions of article 9 of this Order. For these reasons, as the matter was referred to the tribunal as a dispute when, in our opinion, it should have been referred to the tribunal as an issue, this order of prohibition must go.

SELLERS J. I agree.

HAVERS J. I agree.

*Application granted.*

Solicitors: *Hardman, Phillips & Mann; W. H. Thompson; Solicitor, Ministry of Labour and National Service.*

S. C.

[COURT OF APPEAL.]

C. A.

1953
*Nov.* 10.

Somervell, Denning and Romer L.JJ.

## * GRIFFITHS *v.* EVANS.

*Solicitor—Negligence—Accident to workman—Retainer as to workmen's compensation—No duty to advise generally—Loss of option to elect remedy — Workmen's Compensation Act,* 1925 (15 & 16 *Geo.* 5, *c.* 84), *s.* 29.

A workman suffered an accident in the course of his work which resulted in severe injuries and a partial disablement. From the time of the accident weekly payments under the Workmen's Compensation Acts were made to him by his employers, whose negligence or breach of statutory duty were admitted, for the present purposes, to have caused the accident. Some five months later the workman consulted a solicitor on the ground that he feared a reduction in his weekly payments of workmen's compensation. The solicitor advised him as to his claim under the Workmen's Compensation Acts and continued so to advise him. The workman, some years later, brought an action against the solicitor on the ground that, by reason of his negligent failure to consider or advise as to the right to claim damages at common law by exercising the option under section 29 of the Workmen's Compensation Act, he (the workman) would be held to have lost that right against his employers.

*Held* (Denning L.J. dissenting), that the solicitor had not been negligent.

*Per* Denning L.J. (Somervell and Romer L.JJ. expressing no opinion on the point): A workman who claims payments under the Workmen's Compensation Acts, through his solicitor, must be taken to know of his rights and, therefore, to have exercised his right of option under section 29 of the Act of 1925. I agree with Lord Goddard C.J. in *Medcalf* v. *Samuel Jones & Co. Ld.* [1951] 1 T.L.R. 832.

Decision of Croom-Johnson J. affirmed.

APPEAL from a judgment of Croom-Johnson J. given at Stafford Assizes on March 6, 1953.

On February 3, 1947, the plaintiff, William Griffiths, while working in the employ of Thompson (Wolverhampton) Ld., suffered an accident when the wire rope of a lift which he was using broke and the lift fell, causing severe injury to his foot or leg, which eventually resulted in a partial disablement. For the purpose of the present proceedings it was admitted that the accident had been occasioned by the employers' negligence or breach of statutory duty. From the time of the accident the employers made weekly payments of workmen's compensation to the plaintiff.

On July 11, 1947, the plaintiff consulted the defendant solicitor, Randle James Evans, and told him that he had reason to believe that the weekly payments of workmen's compensation were about to be reduced. The solicitor took instructions as to the details of the accident and, having in mind the service of a notice under section 12 of the Workmen's Compensation Act of 1925, advised the plaintiff to await further developments. The

[Reported by MISS ELAINE JONES, Barrister-at-Law.]

instruction sheet read: "Wire rope of lift broke—I came down "on lift with barrow—compound fracture os calcis—Mr. Freeman "at hospital—He says never be able to do this work again," and contained other matters relevant to a claim under the Workmen's Compensation Acts.

A notice under section 12 (3) of the Act of 1925 was, in fact, received by the plaintiff. He again consulted the defendant, who carried on negotiations from time to time as to the quantum of payment and, later, as to a lump sum settlement which, however, proved abortive.

In July, 1950, the plaintiff withdrew his instructions and took other advice, as a result of which he learned, for the first time, that at the date of consulting the defendant he had had an alternative remedy by way of an action for damages at common law as well as his claim under the Workmen's Compensation Acts. He sued the defendant, alleging that by his negligent failure to consider or advise him as to his common law right he had lost the right given to him by section 29 of the Act of 1925 to elect to pursue that remedy. The defence was that the defendant had not been asked to advise in respect of the accident, but simply as to the amount of compensation under the Workmen's Compensation Acts.

Croom-Johnson J. dismissed the action, holding that the defendant had not acted negligently in failing to consider or advise the plaintiff as to his common law right arising from his employers' negligence or breach of statutory duty.

The plaintiff appealed.

*Ryder Richardson Q.C.* and *John Garrard* for the plaintiff.
*E. W. Eveleigh* and *O. B. Popplewell* for the defendant.

The following cases were cited in argument: *Lewis* v. *Cammell Laird & Co. Ld.*[1]; *Young* v. *Bristol Aeroplane Co. Ld.*[2]; *Leathley* v. *John Fowler & Co. Ld.*[3]; *Medcalf* v. *Samuel Jones & Co. Ld.*[4]; *Gander* v. *John Every Ld.*[5]; *Pilkington* v. *Wood*[6]; *Purves* v. *Landell*[7]; *Birch* v. *Pease & Partners Ld.*[8]; *Lake* v. *Bushby*[9]; *Reeve* v. *Van Den Bergh*[10]; *Hillyard* v. *Porn & Dunwoody Ld.*[11]

SOMERVELL L.J. [after stating the facts]: It is submitted, on the part of the plaintiff, that the reference to the breaking of the rope should have put the defendant on inquiry, and that he

[1] [1929] W.C. & I.Rep. 372; 22 B.W.C.C. 410.
[2] [1946] A.C. 163; 62 T.L.R. 99; [1946] 1 All E.R. 98.
[3] [1946] K.B. 579; 62 T.L.R. 488; [1946] 2 All E.R. 326.
[4] [1951] 1 T.L.R. 832.
[5] (1946) 62 T.L.R. 605.
[6] [1953] 3 W.L.R. 522; [1953] 2 All E.R. 810.
[7] (1845) 12 Cl. & Fin. 91.
[8] [1941] 1 K.B. 615; 57 T.L.R. 361; sub nom. *Pease and Partners* v. *Birch* [1941] 1 All E.R. 343.
[9] [1949] 2 All E.R. 964.
[10] Unreported (July 10, 1950).
[11] Unreported (July 12, 1950).

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should have followed up the question whether the plaintiff had not a claim under the Factory Act or at common law and whether he had considered the matter and realized the alternative possibility. The plaintiff had not considered the matter, nor had he had any previous advice. Reliance is placed by the plaintiff on an answer given by the defendant when he said that the breaking of the rope might well indicate negligence. As to the defendant's state of mind when he was taking down the facts which appear on the instruction sheet, I will read three questions and answers in his cross-examination. "Mr. Ryder Richardson: "If this employer had been very careless, did it occur to you "that the workman would have a right to common law "damages? (A) At that time that proposition did not enter my "mind. (Q) Why not? (A) As the man only discussed with me "the question of his weekly payment of compensation and the "possibility of some interference with it. (Q) But why did it "not occur to you that he probably had a common law right? "(A) I am telling you the fact as it was in my mind at that "time. It did not come into my mind because the man was "discussing with me the question of his weekly payments of "compensation, and there was some possibility of some inter-"ference with those weekly payments." It was later suggested to the defendant that he had considered the possibility of a claim at common law but had not pursued it, believing that the acceptance of the weekly payments over some months would have precluded the plaintiff from claiming. He did not agree with that. His mind had not reached that stage.

The judge found that the defendant was not guilty of negligence. It is submitted that that decision was coloured by the judge's assumption that the plaintiff had already lost his rights at common law by accepting the payments. That, of course, was assumed to be the law over a long period, but it had ceased to be so in 1947 as a result of decisions to which I will refer in a moment. There is a passage, perhaps more than one, which indicates that the judge was proceeding on this basis, and this might well have coloured his finding as to negligence. In any case, however, where, as here, the defendant's evidence is accepted in full, and an appellant is prepared to argue his case on the basis that the defendant made a favourable impression on the trial judge, the difficulties which sometimes arise when this court is asked to reverse a finding of negligence or no negligence are absent. It is unnecessary to read section 29 of the Act of 1925, which confers the option to proceed at common law or for compensation. In *Selwood* v. *Townley Coal & Fireclay Co. Ld.*[1] this court held that, as the workman had been paid compensation known to be such under the Workmen's Compensation Act, even although he had made no claim for compensation, he was pre-

[1] [1940] 1 K.B. 180; 56 T.L.R. 6; [1939] 4 All E.R. 34.

cluded under section 29 (1) of the Workmen's Compensation Act from recovering damages from his employers at common law.

In *Young* v. *Bristol Aeroplane Co. Ld.*[2] section 29 was considered. The workman in that case had accepted payments over a period without knowing of his rights at common law, and that would have barred his claim at common law if *Selwood's* case [3] had been rightly decided. At a later period he had come to know of the choice given to him by the subsection and, with that knowledge, had continued to receive the compensation until he returned to work. The House of Lords was unanimous in holding that what had happened in that latter period constituted an election. Their Lordships did, however, consider whether the receipt of payments before knowledge was sufficient or, in other words, whether *Selwood's* case [3] was rightly decided. Viscount Simon, Lord Russell of Killowen and Lord Porter held that *Selwood's* case [3] was wrongly decided. Lord Simonds and Lord Macmillan held that it was rightly decided. In *Leathley* v. *John Fowler & Co. Ld.*[4] it was argued before this court that *Selwood's* case,[5] and other cases which had laid down or applied a similar principle, were still good law on the ground that all the observations in the House of Lords on this topic were obiter. This court decided that as each of their Lordships had dealt with this matter this court ought to apply the opinion of the majority. *Selwood's* case [5] was, therefore, overruled as from that date. *Leathley's* case [6] was not cited to the judge in the court below, but I think, in considering the question of negligence, that it is relevant to bear in mind the somewhat unfortunate history of judicial decisions on the application of section 29 to the facts as they existed when the plaintiff consulted the defendant.

I have found the question of negligence a difficult one. I think that the defendant, being wise after the event, may well reproach himself for not having gone outside the question put to him and made inquiries as to the accident generally. The variety of matters with which a solicitor has to have some familiarity increases annually. The case may well be on the border line, but I am not satisfied that the plaintiff has made out a case of negligence. If such a case had been made out, Mr. Eveleigh submitted that no damage had resulted, and that the employers of the plaintiff at the time of the accident would have had no answer under section 29 to a claim if put forward, as we understand it may still be put forward, today. It is unnecessary for me to consider that issue.

We were referred to *Medcalf* v. *Samuel Jones & Co. Ld.*,[7] a decision of Lord Goddard C.J., who held that an injured workman, who had consulted solicitors as to his rights generally, must

[2] [1946] A.C. 163; 62 T.L.R. 99; [1946] 1 All E.R. 98.
[3] [1940] 1 K.B. 180.
[4] [1946] K.B. 579; 62 T.L.R. 488; [1946] 2 All E.R. 326.
[5] [1940] 1 K.B. 180.
[6] [1946] K.B. 579.
[7] [1951] 1 T.L.R. 832.

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be taken to have exercised his option under section 29 if the solicitors claimed compensation under the Act, although they had not informed him of his possible alternative remedy at common law. In that decision Lord Goddard C.J. distinguished a decision of Ormerod J. (*Reeve* v. *Van Den Bergh* [8]) in which the solicitors had been consulted as to the quantum of compensation only. We have a transcript of that judgment and also of a decision of Barry J. in *Hillyard* v. *Porn & Dunwoody Ld.*,[9] which contains some observations which I think are in conflict with *Medcalf's* case.[10] If a claim against the employers is proceeded with these cases may well become relevant to the issue and I do not, therefore, think that it would be right to make any comment upon them. For those reasons I would dismiss the appeal.

DENNING L.J. The duty of a solicitor depends, of course, very much on what he is employed to do. In this case the defendant says that he was employed solely for the purpose of a claim under the Workmen's Compensation Acts and, therefore, that he was under no duty to consider the possibility of a common law claim: whereas the plaintiff says that he employed the defendant to conduct his case for compensation without specifying whether it was under the Acts or not, leaving it to the defendant to do the best he could for him and, therefore, the defendant ought to have considered the possibility of a claim at common law.

On this question of retainer, I would observe that where there is a difference between a solicitor and his client upon it, the courts have said, for the last 100 years or more, that the word of the client is to be preferred to the word of the solicitor, or, at any rate, more weight is to be given to it (see *Crossley* v. *Crowther*,[11] *per* Turner V.-C., and *Re Paine*,[12] *per* Warrington J.). The reason is plain. It is because the client is ignorant and the solicitor is, or should be, learned. If the solicitor does not take the precaution of getting a written retainer, he has only himself to thank for being at variance with his client over it and must take the consequences.

In the present case the judge found there was no conflict on the retainer. The judge said in terms that the plaintiff was giving the best account of these matters that he could, and that he did not find anything inconsistent in the plaintiff's evidence with the account given by the defendant. Nor do I. I think that the two accounts come to this: The plaintiff went to the defendant and said, " Will you take on my case? " The defendant said, " What have you done? " The plaintiff said, " I have " had an accident at work. The wire rope of the lift broke." He gave full details of the accident and then went on to say,

[8] Unreported (July 10, 1950).
[9] Unreported (July 12, 1950).
[10] [1951] 1 T.L.R. 832.
[11] (1851) 9 Hare 384.
[12] (1912) 28 T.L.R. 201.

"My employers' insurance company have been paying me "£2 15s. 0d. a week compensation and I think that they are "going to try and reduce it." Thereupon the defendant told him that he was receiving the maximum compensation and should wait until the insurance company made a move to reduce it. The defendant said that it did not enter his head to consider a right to common law damages. He thereafter treated the case as solely a workmen's compensation case. When the insurance company did give notice to terminate the compensation, the defendant wrote to them saying, "William Griffiths & John "Thompson (Wolverhampton) Limited. Mr. William Griffiths "has now placed this matter in my hands and I enclose his "doctor's certificate." The defendant thereafter claimed compensation for partial incapacity and agreed the amount of it from time to time, and it was duly paid for over three years. Eventually, the defendant negotiated for a lump sum settlement of the workmen's compensation payments at a figure of £250. Those negotiations had not concluded when the plaintiff, disappointed with the figure, went to other solicitors.

On those quite simple facts the question is whether the defendant did his duty by the client. In particular, ought he to have considered whether the man had a claim at common law? I am clearly of opinion that he should have done so. When a workman goes to a solicitor and tells him he has had an accident and wants the solicitor to take on the case, the very first question the solicitor ought to put to himself is this: What is the man's legal position? Every solicitor ought to know that there is all the difference in the world between a case where the employer is to blame and a case where he is not. If the employer is not to blame, the man gets only workmen's compensation. If the employer is to blame, either for negligence or for breach of statutory duty, the man gets the much higher award given by the common law. I cannot think that it is right for the solicitor to escape by saying, "You only consulted me about workmen's "compensation, not about common law damages." That attributes to the workman a legal knowledge of the difference between them. Many workmen do not in fact know the difference, and it would be most unfair to attribute it to them. This plaintiff certainly did not. All he knew was that he was receiving weekly payments from his employers or their insurance company, and that he was receiving them as compensation for his accident. It was not for him to know the difference between compensation under the Acts and compensation at common law: but it was the business of the defendant to know it, and to know also, in those days, that the plaintiff had an option to claim one or other which, once exercised, could not be retracted.

If the plaintiff had indeed known of the difference, and with that knowledge had consulted the defendant about workmen's compensation only, pursuing that claim alone, then his conduct might itself have been an exercise by him of his option. He

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would have chosen for himself to receive workmen's compensation and not common law damages. But it was not suggested before us that he had any such knowledge. It was accepted by both parties that when he went to the defendant he was ignorant of his rights and had not lost his option. The judge was in error in thinking that the plaintiff had already lost his option by the mere fact of accepting payments. If this defendant had considered, even for a moment, what were the rights of this man, he would have been bound to come to the conclusion that the plaintiff had a good claim at common law. The accident was caused by the breaking of the lift rope, which was a plain breach of the Factory Acts. But the defendant did not consider it at all. He agreed the plaintiff's compensation with the employer's insurance company and thought nothing about the common law.

A most critical question is: What is the effect of the defendant's conduct? Does it mean that the plaintiff, through his solicitor, has exercised his option? Does it mean, if he should now sue his employers for damages, he would fail on the ground that he had already chosen to take workmen's compensation? There is a decision of Lord Goddard C.J., *Medcalf* v. *Samuel Jones & Co. Ld.*[13] which goes far to show that the defendant's action binds the plaintiff and that he cannot now claim against his employers, though there are earlier decisions of two other judges which rather point to the contrary. (Ormerod J. in *Reeve* v. *Van Den Bergh,*[14] and Barry J. in *Hillyard* v. *Porn & Dunwoody Ld.*[15])

This question, like so many others, depends very much on how one looks at it. From the plaintiff's point of view it would seem hard that, when he did not know of his option, he should be bound by what the defendant has done: but from the employers' point of view, it would seem that they should be entitled to assume that the defendant had advised the plaintiff as to his rights and that he had elected to take compensation. Lord Goddard C.J. in *Medcalf* v. *Samuel Jones & Co. Ld.*[16] expressed his opinion in these words[17]: "when an employer has been asked formally "by the workman's legal adviser to admit a claim for compensa- "tion and has done so, surely it is not for him to ask the solicitor "what advice he has given to his client and whether he has made "him aware of his alternative claims. . . . In my opinion, where "a workman who has sought legal advice puts forward a claim "through his solicitor for compensation and accepts it he cannot "afterwards say that he did not know of the option which the "Act of 1925 gives him and claim damages." Barry J. in an unreported case, *Hillyard* v. *Porn & Dunwoody Ld.*[18] put the same view most cogently, although he did not give effect to it in that case, having regard to the very special facts which he had to consider. This is what he said: "During the course of the

[13] [1951] 1 T.L.R. 832.
[14] Unreported (July 10, 1950).
[15] Unreported (July 12, 1950).
[16] [1951] 1 T.L.R. 832.
[17] Ibid. 836.
[18] Unreported (July 12, 1950).

"argument it seemed to me a most unfortunate position that "a workman who consults solicitors and authorizes them to "conduct negotiations with his employers on his behalf should "be able, after a long period of time, to say that although he "had sought legal advice, yet those whose advice he had sought "had not told him of all the relevant considerations which should "be present in his mind. It seems to me that if a workman "can say, after he has been instructing solicitors for a long "period of time, that the solicitors failed to tell him of his alter-"native rights, the employers are placed in a position of very "grave difficulty. It is, I think, virtually impossible for them "to produce evidence which might tend to contradict the work-"man's statement, and any investigation as to the confidential "discussion between a solicitor and his client seems to me to be "an unfortunate matter for the court to have to undertake, "irrespective of any question of privilege."

In this situation I must say that I agree with Lord Goddard C.J. It must be remembered that, in an action by the workman against his employers, the conversations between the workman and his solicitor are privileged. If the workman asserts that he did not know of his option, the employers cannot call the solicitor to contradict him. They cannot even ask the solicitor what advice he gave to his client. The conversations are privileged. If the law imposes on the employers such a handicap in meeting the claim, surely it will give them a corresponding relief. It will hold the workman bound by everything done by his solicitor within his ostensible authority. It will assume that the solicitor has done what it was his duty to do and what any careful solicitor would do, namely, tell the workman of his option. If the solicitor thereafter, on the workman's behalf, makes an agreement for workmen's compensation, the law will assume that he does it with the workman's authority and with knowledge of his option. If it should turn out that the solicitor has not done his duty, that should not affect the employers who acted on the faith of his authority. It should be a matter to be thrashed out between the workman and his solicitor, for it is only in proceedings between them that it can be thrashed out free of privilege. It has often been said that a solicitor is the agent of his client in all matters that may reasonably be expected to arise for decision in the cause: *In re Newen.*[19] There can be no doubt that the exercise of an option is a matter which may reasonably be expected to arise for decision. The workman is, therefore, bound by what the solicitor does in regard to it.

If the reasoning of Lord Goddard C.J. is correct, then it follows that this plaintiff has, by the defendant's action, been deprived of his claim against his employer. He has been deprived of well over £1,000. I reckon it at £1,290. Surely, in

[19] [1903] 1 Ch. 812, 818.

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those circumstances, he should have a remedy against the defendant. I realize that the defendant's reputation is at stake. We must be very careful of that: but we should remember also that the solicitor's profession will suffer more if the members of it make mistakes which they ought not to make, and cause loss for which no remedy is given.

Even if the reasoning of Lord Goddard C.J. is not correct, it must at least make it very difficult for the workman to succeed against his employers, at any rate in a court of first instance. I doubt whether anyone can say with certainty, short of the House of Lords, whether Lord Goddard C.J. was right or wrong, and even the House of Lords may be divided upon it, as they were on an analogous point in *Young* v. *Bristol Aeroplane Co. Ld.*[20] Yet all this difficulty is due to what the defendant has done. The plaintiff is left now with a claim against his employers which is disputable and is, indeed, disputed, instead of being undisputed, as it would otherwise have been. I do not think that the plaintiff can recover the full amount from the defendant because allowances must be made for the chance that he may still recover from the employers. We were told that his present solicitors have already issued a writ against the employers so as to save the Statute of Limitation from running. I think that the damages recoverable from the defendant must be assessed by taking into account the inconvenience and expense to which the plaintiff will be put in suing the employers and the risk of failure. I would assess the damages at £600 and give judgment for the plaintiff accordingly. I would allow this appeal.

ROMER L.J. The evidence of the defendant as to the instructions which he received from the plaintiffs was accepted by the trial judge, and the gist of it was that the plaintiff consulted the defendant solely with regard to the anticipated reduction in the plaintiff's weekly payments of compensation, and later as to a redemption of such payments, and that the plaintiff never, in any shape or form, asked the defendant to advise him generally as to his rights against the employers. The plaintiff's case is that the defendant was, nevertheless, at fault in not applying his mind to the position generally, and, in particular, in not advising the plaintiff that he had, or might have, a right of action against his employers at common law. This contention was rejected by the judge, and I have not been persuaded that the judge's conclusion was wrong.

The employers started to make the weekly payments to the plaintiff shortly after the accident which befell him in February, 1947. When he went to see the defendant, in the following July, he was still receiving them, and, as the defendant ascertained, they were at the maximum amount to which the plaintiff was entitled by virtue of the Workmen's Compensation Acts. The plaintiff never entertained, nor in any way communicated either

[20] [1946] A.C. 163; 19 T.L.R. 247.

directly or indirectly to the defendant, any dissatisfaction with the nature or amount of those weekly payments. The only thing that troubled him was the belief that in the near future the employers were intending to diminish them. That was the problem which was weighing on his mind and which he took to the defendant for solution. The statutory provision which is relevant to this question is section 12 of the Act of 1925, and is the provision to which the defendant's mind would naturally be directed. It prescribes the circumstances in which it is permissible for weekly payments to be discontinued or reduced by employers. The section is directed to one particular aspect of the compensation legislation; but the aspect is a large one, which has given rise to many reported cases, and section 12 is attended by no fewer than 16 pages of notes in the 37th edition of Willis on the Workmen's Compensation Acts.

The problem which the plaintiff presented to the defendant came within this special and potentially difficult field of inquiry, and I cannot think that it was negligent of the defendant not to apply his mind to another, and totally different, field as well. The plaintiff had received the weekly payments for months, and an agreement (albeit implied and unrecorded) was constituted between himself and his employers in such circumstances that, as the law was believed to be before the decision in *Young's* case,[21] the option conferred by section 29 of the Act of 1925 would no longer have remained open to the plaintiff. In the light of the majority speeches in that case the option did in fact remain open, but questions as to its existence and exercise were, as it seems to me, altogether distinct from, and unconnected with, the issue upon which, and upon which alone, the plaintiff sought the professional advice of the defendant. The plaintiff said in his evidence that he asked the defendant to advise him upon his position generally; and indeed, if, in fact, he had wanted general advice nothing could have been easier than for him to have asked for it. But his recollection in this respect was wrong, and he did not ask for it, and the defendant did not give it, and I am not satisfied that the defendant's omission in this respect amounted to an actionable neglect of his professional duty to the plaintiff.

Having regard to the conclusion which I have expressed on the question of negligence, it is unnecessary for me to indicate an opinion as to what (if any) damages should be awarded to the plaintiff if he had established a breach of duty on the part of the defendant, and in view of possible future events I prefer to refrain from doing so.

In my opinion the appeal should be dismissed.

*Appeal dismissed.*

Solicitors: *W. H. Thompson; William Charles Crocker.*

[21] [1946] A.C. 163.

[PRIVY COUNCIL.]

J. C.† 1953 Nov. 17.

* WUDANU KWASI, ACTING CHIEF OF ATIPRADAA, AND ANOTHER . . . . . APPELLANTS;

AND

NANA OSEI TWUM, OHENE OF BUKURUWA, AND ANOTHER . . . . . RESPONDENTS.

ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL.

*West Africa (Gold Coast) — Jurisdiction — Lands Division of the Supreme Court—Transferred case—Power to amend pleadings—Native Administration (Colony) Ordinance (Laws of the Gold Coast*, 1936 *Rev., c.* 76), *s.* 75.

Once a cause has been validly transferred by the Provincial Commissioner from the Kwahu State Tribunal to the Lands Division of the Supreme Court of the Gold Coast pursuant to the powers conferred on him by section 75 of the Native Administration (Colony) Ordinance, the power of the Supreme Court to amend the pleadings remains uncurtailed by the transfer: its jurisdiction is full and unfettered. Any limitation of such power would be so unusual that, if it was ever found necessary to impose one in a special case, the legislature would normally use express words of limitation. In the relevant statute law applicable to a transfer there are no words which can be said to impose a limitation even by implication.

Dictum of Graham Paul C.J. in *Ababio* v. *Ackumpong* (1940) 6 W.A.C.A. 173, 177, that "the Divisional Court [now the Lands "Division of the Supreme Court] can and must deal with any "transferred case in every respect as if it were a case originally "brought before it by its own writ of summons," approved.

Judgment of the West African Court of Appeal affirmed in the result.

APPEAL (No. 20 of 1950) from a judgment of the West African Court of Appeal (Gold Coast Session) (March 1, 1948), which affirmed a judgment of the Lands Division of the Supreme Court of the Cold Coast (May 2, 1947).

The action out of which this appeal arose was instituted by the respondents in the tribunal of the Paramount Chief of Kwahu State, Gold Coast Colony. By order dated March 21, 1942, the action was transferred to the Supreme Court of the Gold Coast. By their statement of claim the respondents claimed, inter alia, a declaration of their title to a parcel of land situate in Kwahu, and bounded on the north by the River Obosom, on the south by the River Afram, on the east by the River Volta, and on the west by the Abetifi, Nkwatia, Pitiku and Kwahu Tafo Stool lands. The respondents' contention was that the said land was attached to and possessed by the Stool of Bukuruwa under the Kwahu Stool, the ultimate owners.

The appellants, while not claiming title to the whole of the said land, contended that a large part thereof was the property of the

†*Present*: LORD OAKSEY, SIR LIONEL LEACH, MR. L. M. D. DE SILVA.

Wusuta Stool, and that various sub-Chiefs, including the first appellant, the Chief of Atipradaa, held parts of it under that stool.

There were concurrent judgments of the Supreme Court (M'Carthy Ag.C.J.) and of the West African Court of Appeal (Lucie-Smith P., Coussey and Quashie-Idun JJ.) by which it was determined that the respondents had established that the land in question was attached to the Bukuruwa and Kwahu Stools and were accordingly entitled to succeed in the action.

1953. Oct. 7, 8. *Raymond Walton* and *Gilbert Dold* for the appellants.

*Colin Duncan* and *Brian T. Neill* for the respondents.

Nov. 17. The judgment of their Lordships was delivered by MR. L. M. D. DE SILVA: The action was instituted by the respondents on March 13, 1940, in the Kwahu State Tribunal, for a declaration of title to land and for an injunction. It arose out of a dispute concerning title to a tract of land between certain Kwahu Chiefs and certain Wusuta Chiefs. The case was transferred to the Lands Division of the Supreme Court of the Gold Coast by an order of the Commissioner of the Eastern Province dated March 21, 1942. In the Supreme Court various parties were added or substituted for existing parties in order, inter alia, that the real contestants of the questions that had arisen for investigation might be brought into court and bound by its order.

The attempt so to bring them in did not completely succeed because an order made on September 29, 1946, that certain parties be added was rescinded by consent on February 24, 1947, owing to difficulties encountered in serving notice. This, however, does not affect the views expressed by their Lordships in the following paragraphs.

The description of the land claimed as it appeared in the papers filed in the Kwahu State Tribunal and in the original pleadings in the Supreme Court was amended in the latter court on April 17, 1947, as the result of an application which had been made earlier, but the date of which does not appear. The amendment was made at the instance of the appellants, without objection by the respondents. It fixed the western boundary of the land claimed with a definiteness greater than had been achieved in the Kwahu State Tribunal, and for the northern boundary substituted the River Obosom for the River Faa. The eastern and southern boundaries were not altered. A plan (exhibit A) was prepared by a surveyor for the purposes of the case on an order of court. It was stated by the appellants that they (the appellants) claimed only a part of the land claimed by the respondents. The land claimed by the appellants has not been delineated on the plan (exhibit A) or on any other plan. But this fact has not led to any difficulty in understanding the judgments of the courts in Africa. Further, no difficulty can arise in giving effect to those judgments because those courts have arrived at the conclusion,

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which their Lordships accept for reasons hereinafter stated, that the appellants are not entitled to any portion of the land claimed by the respondents.

Although the amendment referred to in the previous paragraph was not objected to before the trial judge or before the Court of Appeal, it has been contended before their Lordships that it was made without jurisdiction and that it has vitiated the proceedings. It is admitted that the amendment is one which could properly have been made in the Kwahu State Tribunal, but it is argued that once the transfer was made the Supreme Court had not the power to do even that which the Native Tribunal might have done. This view, in their Lordships' opinion, is erroneous.

By reason of the provisions of section 17 of the Courts Ordinance (c. 4, Laws of the Gold Coast) the Supreme Court could not have exercised jurisdiction over the matter which was pending before the Kwahu State Tribunal. But under section 75 of the Native Administration (Colony) Ordinance (c. 76 of the Laws of the Gold Coast) the Provincial Commissioner under stated conditions could "by order stop the hearing of any civil or "criminal cause, matter or question commenced or brought" before the Kwahu State Tribunal and "direct that such cause, "matter or question shall be inquired of, tried, and determined" in the Divisional Court, which, by virtue of recent legislation, has become the Lands Division of the Supreme Court. By an order of March 21, 1942, the Provincial Commissioner transferred the case to the Lands Division of the Supreme Court. It is admitted that the order of the Provincial Commissioner was properly made and that the case was validly transferred. It is argued, however, that the scope of a "cause, matter or question" transferred becomes so rigidly fixed in the process of transfer that the Supreme Court had no jurisdiction to make the amendments which it has made.

The power to amend pleadings possessed by the Supreme Court is necessary to enable it to deal effectively with the matters that come before it. Any limitation of such powers would be so unusual that, if it was ever found necessary to impose one in a special case, the legislature would normally use express words of limitation. In the relevant statute law applicable to a transfer their Lordships are unable to find words that can be said to impose a limitation even by implication.

In their Lordships' opinion, once a valid transfer is made by the Provincial Commissioner to the Supreme Court its power to amend pleadings remains uncurtailed by the transfer. Its jurisdiction is full and unfettered. In *Ababio* v. *Ackumpong* [1] Graham Paul C.J. said: "The Divisional Court can and must deal with "any transferred case in every respect as if it were a case originally brought before it by its own writ of summons." Their Lordships respectfully agree.

[1] (1940) 6 W.A.C.A. 173, 177.

It is convenient at this point to refer to an award made by a travelling commissioner in the year 1903 in arbitration proceedings in a dispute between Kwahu Chiefs and Wusuta Chiefs concerning much of the land which is the subject-matter of this action. What the trial judge regarded as an extract from the award (exhibit F) was admitted in evidence by him. It is signed by the travelling commissioner and, inter alia, expresses the view that the Kwahus were entitled to succeed for reasons therein stated. It was not in fact an extract from the award but an extract from a report relating to the award made by the travelling commissioner to the Secretary for Native Affairs at Accra. The Court of Appeal, after considering arguments relating to exhibit F advanced by the appellants, took the view that "there was no evidence before the "court as to the terms of the actual award made." Their Lordships do not find it necessary to decide whether this view is correct, and therefore refrain from commenting upon it, because the courts in Africa arrived at concurrent findings of fact in favour of the respondents on a consideration of the evidence apart from the award and the arbitration proceedings. The trial judge said: "I should, if of opinion on the evidence before me that the com-"missioner came to a wrong decision, give effect to that "opinion. But having weighed the evidence outside the award "my view is that the balance is slightly in favour of the Kwahu "Stools."

He did say "in my final conclusion I have been influenced by "the award." In the circumstances this must be taken to mean that he was satisfied on the other evidence that the Kwahus had the better claim, and that this conviction was strengthened by the award which he thought admissible. The Court of Appeal said: "During the four days that this appeal has been argued "before us it has been increasingly clear to us that the evidence "is far from slightly in favour of the plaintiffs' (Kwahu) Stools "as the judge has found. We are satisfied upon a review of all "the evidence that the plaintiffs are entitled to the declaration."

The question which has now to be considered is whether there is sufficient reason to disturb these concurrent findings of fact arrived at on the evidence apart from the evidence furnished by the arbitration proceedings and the award. The principles which guide the Board in dealing with cases in which there are concurrent findings of fact are clearly and exhaustively set out in the judgment of the Board delivered by Lord Thankerton in *Srimati Bibhabati Devi* v. *Kumar Ramendra Narayan Roy*,[2] and there is no need to restate them here. There is nothing in this case which would entitle the appellants to ask their Lordships to review the evidence in detail with the object of testing the correctness of the concurrent findings arrived at by the courts below.

In support of his submission that their Lordships should review the evidence counsel for the appellant argued that the judgment

[2] [1946] A.C. 508.

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of the trial judge was historically inaccurate. In particular, he argued that the view of the trial judge that after certain incidents which he referred to "it seems probable that any Wusutas then "settled on the west bank of the Volta on the land in dispute "would have fled before the enemy" was historically incorrect. There is nothing that has been pointed out to their Lordships from the historical material which was placed in evidence before the trial judge which demonstrates that he could not have arrived at the finding mentioned. The finding is concurred in by the Court of Appeal. It has been suggested that there is material in historical works not placed before the courts in Africa which indicates that this concurrent finding is historically inaccurate. The appellants had a full opportunity of placing all the relevant evidence before the courts in Africa and their Lordships are not prepared to review that evidence in the light of further historical material which may be placed for the first time before them.

Counsel for the appellants argued further that his case had been prejudiced by the consideration at the trial of the title to a tract of land larger than the land claimed by them. Prejudice can sometimes be caused in that way. But counsel was constrained to admit that in this case, decided largely on facts derived from tradition, the evidence relating to the land not claimed by the appellants was relevant to the consideration of title to the land claimed by them. Their Lordships are therefore unable to find any substance in the argument.

It was also argued that the courts below had misapprehended the case as presented by the parties. In support of this contention their Lordships were referred to a statement made by the trial judge that "The Wusuta case is that the Wusutas regained "dominion over the land." This statement is quoted with approval by the Court of Appeal. It has been said that the Wusuta case was that the Wusutas had always had dominion over the land, had never lost it and consequently never "regained" it. Their Lordships are of the view that when the words referred to are read in the context of the judgment as a whole the contentions for the appellants, even if accepted, do not lead to the inference that the courts in Africa have misapprehended any point of material importance.

The argument of misapprehension was sought to be supported by a reference to a statement in the judgment of the Court of Appeal that the area of the subject-matter of the case was 20 square miles when in fact it was very much larger. This same mistake occurs in the evidence of a surveyor. The plan (exhibit A) shows the scale upon which it was prepared. It is difficult for their Lordships to imagine that this plan, which played a prominent part in the presentation of this case to them, was given so little consideration by the Court of Appeal that they did not realize that they were dealing with a tract of land vastly exceeding 20 square miles in area. Their Lordships are of the view that the misstatement in the place where it occurs was

purely inadvertent, and that there has not been a lack of appreciation of the true extent of the land or, as the result thereof, of the true character of the points upon which a decision has been given.

Lastly, it was said that the Court of Appeal have failed to attach due importance to the evidence of occupation. The trial judge discusses the question of occupation in a paragraph which begins, "I would however state that it does appear that at "present there are more Ewes on the land than Kwahus," a statement prima facie in favour of the appellants. This discussion is not commented on by the Court of Appeal, but "evidence "of occupation" is referred to by the Court of Appeal, and their Lordships are convinced that it was fully conscious of the views expressed by the trial judge and gave due weight to those views and to the question of occupation.

The appellants have failed to satisfy their Lordships that there is any ground for reviewing in detail the evidence upon which the courts in Africa have arrived at concurrent findings.

For the reasons given their Lordships will humbly advise Her Majesty that the appeal be dismissed. The appellants must pay the respondents' costs in this appeal.

Solicitors: *A. L. Bryden & Williams; Sydney Redfern & Co.*

C. C.

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[COURT OF APPEAL.]

## *LEWIS *v.* CARMARTHENSHIRE COUNTY COUNCIL.



[1952 L. No. 1.]

*Negligence—Duty of care—Extent—Personal injuries—Child straying from school premises on to highway—Lorry driver killed in avoiding child—Negligence of school mistress—Liability of education authority to driver's dependants—Remoteness—Reasonable contemplation.*

A four years old boy, who was attending a nursery school which was under the management of the defendant county council as education authority, strayed from the school premises on to a public highway, and the plaintiff's husband, who was driving a lorry, in his efforts to avoid the child, struck a telegraph post and was killed. The plaintiff sued the county council for damages, alleging that the death of her husband was caused by the negligence of a school mistress in failing to take proper steps to prevent the child from straying on to the highway. The trial judge found for the plaintiff and awarded her damages. On appeal by the defendants:—

*Held*, affirming the decision of the judge, that a duty was owed by the school management and staff not only to a child who was allowed to stray into the street but also to the users of the highway who were injured in seeking to avoid injuring the child; that the straying of the child in question was due to the carelessness or negligence of a school mistress; and that the death of the lorry driver

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was not too remote a consequence of that negligence, because it should have been in the reasonable contemplation of the school staff that the straying of a child on to the highway might result in an accident such as had happened.

*Bourhill* v. *Young* [1943] A.C. 92; [1942] 2 All E.R. 396 and *King* v. *Phillips* [1953] 1 Q.B. 429; [1953] 2 W.L.R. 526; [1953] 1 All E.R. 617 applied.

Decision of Devlin J. affirmed.

APPEAL from Devlin J., sitting at Carmarthen Assizes.

The action was brought by Mrs. Dilys Eileen Lewis, on behalf of herself and her three children, claiming damages against the Carmarthenshire County Council for the death of her husband.

On April 19, 1951, the plaintiff's husband was driving a laden lorry along a public road when he saw ahead of him a boy, about four years old, who had strayed away from adjacent school premises, in the nursery school part of which he was a pupil. The driver swerved in an effort to avoid injuring the child, but in so doing the lorry collided with a telegraph pole and the driver was killed. The plaintiff alleged negligence on the part of a school mistress who had the child in her charge. Devlin J. found the negligence proved and awarded the plaintiff £2,137 19s. 6d. and her three children £900, a total of £3,037 19s. 6d.

The defendants appealed.

*D. Lloyd-Jones Q.C.* and *Norman Richards* for the defendants.
*Edmund Davies Q.C.* and *Geoffrey Jennings* for the plaintiff.

The following cases were referred to in argument: *Bourhill* v. *Young* [1]; *Bolton* v. *Stone* [2]; *Haynes* v. *Harwood* [3]; *Lynch* v. *Nurdin* [4]; *King* v. *Phillips* [5]; *Hyett* v. *Great Western Railway Co.* [6]

*Cur. adv. vult.*

November 13. SOMERVELL L.J. This is a tragic case. A small child aged some four years, while at a school under the management of the defendants, strayed into the road. The late husband of the plaintiff, the driver of a lorry, in seeking to avoid doing injury to the child, drove into a telegraph post and, as a consequence, was killed. There was no evidence called as to the actual accident because the case proceeded on the basis that he was driving carefully and that the only cause of his death was his effort to avoid injuring the child.

The school faces on to a street from which there is an entrance into the school leading to a yard or open space. Then there are

[1] [1943] A.C. 92; [1942] 2 All E.R. 396.
[2] [1951] A.C. 850; [1951] 1 T.L.R. 977; [1951] 1 All E.R. 1078.
[3] [1934] 2 K.B. 240; [1935] 1 K.B. 146; 51 T.L.R. 100.
[4] [1841] 1 Q.B.D. 29.
[5] [1953] 1 Q.B. 429; [1953] 2 W.L.R. 526; [1952] 2 All E.R. 459.
[6] [1948] 1 K.B. 345; 63 T.L.R. 411; [1947] 2 All E.R. 264.

buildings in which the children from 7 to 11 are taught; another yard, and finally further buildings which contain the schools for the children from 5 to 7 and also a nursery school for children such as this boy, from 3 to 5. The yard in between the two buildings has a gate opening out of it on to a lane which leads down on to the street, which is fairly busy. The plaintiff alleged that the death of her husband was caused by the negligence of one or other of the school teachers, and the learned judge has found that that claim is made out. The defendants appeal.

The straying on to the road happened after the morning period when for some time the children were taken into what is called a play-pen, a locked enclosure, and they there played under the supervision of one of the mistresses—on the day in question, a Miss Rees. Devlin J. in his judgment stated what happened as follows: "It is Miss Morgan's habit, during this period, to go "for a walk in the town and to take two of the nursery children "with her. David"—that is the child who strayed—"had been "hoping for this treat for some time past, and on the morning "of this day his mother, when she brought him to school, had "asked Miss Morgan that he should have it. Miss Morgan "decided to take him and another child of about the same age. "So at 12.15, the others being out in the play-pen, Miss Morgan "got the two children ready in the classroom and made ready "herself. Then she went out to the toilet, which is off the play-"pen just beyond the cloakroom. As she got out she found that "a little child in the play-pen had fallen and cut itself. She "took it into the cloakroom and cleaned it up and attended to "it. This occupied about 10 minutes. Then she decided to "take it to the headmistress in case a doctor ought to see it. "She went back into the cloakroom. There was no one there, "and she was crossing the vestibule when she saw David Morgan, "who had been brought back by a bystander after the accident."

On that short statement of facts two questions arise. First: Was the teacher careless? Secondly, if there was carelessness or negligence at law within a certain scope, was the deceased within the scope of the reasonable contemplation of the teacher, on the principles which I will not repeat but which can be found laid down, for example, in two or three of the speeches of the noble and learned Lords in *Bourhill* v. *Young*.[1]

In considering the question whether Miss Morgan was careless or negligent, the learned judge first of all considered two matters which she, herself, had put forward as relevant to the issue. One was that the yard in between the classroom and the school into which this child and the other child got—it was common ground that they could open the door—would have had in it at that time the children from 5 to 7 who would be playing under the supervision of one or two mistresses. The other matter which she put forward, and which came out in cross-examination,

[1] [1943] A.C. 92; [1942] 2 All E.R. 396.

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was that the door into the lane was usually kept locked. The judge said, and I agree, that if there had been two teachers out in the yard who could have supervised the boy should he have opened the door and got out as far as that, that would have been very relevant, and in his view would have been an answer to any suggestion of negligence.

But that evidence was not correct. The headmistress was called and she said that the infants were at dinner until 12.30. On that point the learned judge said, "I find it difficult to "believe that she was ignorant of their dinner hour, or that she "could really have thought that the side gate was usually kept "locked." One feels great sympathy with Miss Morgan. Even if she was (as the judge found) negligent, the consequences were very terrible. But I think it is clear from that that Miss Morgan did not create a wholly favourable impression on the judge and so far as that was relevant to his decision that was a matter which he could weigh and we cannot.

There is another point which I think I will mention now to dispose of it. The judge made some complaint that Miss Rees was not called and he was not given more information about the injury to the child. It is a matter for counsel to decide what witnesses he shall call but, of course, if the case had been that Miss Morgan was deflected from taking steps which she normally would take by a sudden emergency that would have been very relevant in applying a standard of what a reasonable person does in the circumstances. The judge said: "If the case had been "that the child was hurt sufficiently badly to give rise to a "degree of alarm that drove from Miss Morgan's mind the other "calls upon her, or to put her into the position of having to "choose between two duties, both of which she could not "adequately perform, I should have felt gravely handicapped by "lack of material. But I think it emerged quite clearly from "Miss Morgan's evidence that the defence was not that. There "was nothing to prevent Miss Morgan from calling to David and "the other child to come out into the play-pen, or from asking "Miss Rees to keep an eye on them, or from keeping an "occasional eye on them herself from the cloakroom, or at least "from telling the junior children not to leave them alone."

The judge, who clearly found the case a difficult one, put forward three matters as affecting his mind. One was a statement by Miss Morgan herself, that although she had these two children whom she was going to take out, she could not safely ask Miss Rees to attend to the hurt child because it would have meant leaving the others alone in the play-pen. That no doubt pointed, as the judge said, to a very high standard of care. If the children could not have been properly left alone in the play-pen, ought the two children properly to have been left in the classroom? He then referred to the fact that these two children were dressed up and expecting to go out. It is common ground that Miss Morgan—nobody criticises her for this—took the

occasion of her half-hour off to take small children out into the town on an expedition which they no doubt very much enjoyed.

It was suggested, picking out one isolated sentence in the judgment, that the judge had applied the wrong test, that he had asked himself whether there was anything Miss Morgan could possibly have done, rather than whether she failed to do something a reasonable person in those circumstances would have done. I do not think that is right. It is very easy to pick out isolated sentences. The judge poses the question in this form: "... the cardinal question is, therefore, whether she ought to "have anticipated that two four-year-olds, left in the position "of David and the other one, might leave the classroom and get "out into the street." For the moment, I would prefer to say "leave the classroom or get into trouble or do some hurt to "themselves." Having considered all the points the judge said: "On the whole, I have come to the conclusion that Miss Morgan "ought not to have been unmindful of these children, and that "she ought to have foreseen the possibility that they might go "out on their own." I agree with that.

But part of the second point has given me more difficulty, and I can put it in this way. Primarily, of course, a duty of this kind is owed to the child and if in this case the children, being left, as they were, for 10 minutes, or possibly more, alone in a room of which they could open the door and get into the yard, had got into the yard and damaged themselves in some foreseeable way, I would have thought it would be difficult to say that that was not due to the carelessness which, on the basis on which I am at present considering it, the judge below has found. Was the street, as it were, too far off, so as to be outside the reasonable contemplation of the teacher? On the whole, I have come to the conclusion that it was not. We have the photographs and we have the plan, and it was not disputed that the door of the room where these children were left could be opened by them, small as they were, and also the door out into the side lane. Of course, they all knew the road was there and I should think it would have been visible as soon as they got over towards the lane side of the yard. I have come to the conclusion, therefore, though that part of the case is on the borderline, that it ought to have been contemplated that these children might get into the street. Once one comes to that conclusion then I agree with the judge that the deceased was clearly within the scope of the duty. A duty is owed to a child who is allowed to stray into the street and it must, I think, also be owed to those who seek to avoid injuring a child and in that way injure themselves. For these reasons I would dismiss the appeal.

DENNING L.J. I ask myself, What if the child had been run over? Would the school authorities have been held free from blame? Surely not. They ran a nursery school for children of

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3 to 5 years of age. The mother had left her small son, not quite 4, in their charge. Somehow or other, he got on to the busy main street in the town, where he was in imminent peril. Those facts call for an explanation by the school authorities. What is the explanation put forward by them? Only this: The mistress was going to take this little boy and a little girl out with her into the town. She had got them ready to go when she had to leave them for 10 minutes to attend to another child who was hurt. While she was away for these 10 minutes, the two children made their way through a door and a gate (which were both unlocked) and out into the main street. The judge thought that she need not have left these two mites on their own for so long a time. She could have told them to go into a play-pen where there was a mistress looking after the other children, or she could have kept an occasional eye on them herself as she was only next door and could have left the door open. The judge found that she ought not to have been unmindful of these children, and I entirely agree with him. If the child himself had been run over by the lorry, I have no doubt that any jury would have found the school authorities to blame, and so would most judges of the Queen's Bench. At any rate Devlin J. would have so held, and we ought not to interfere with his decision on this point unless we are clearly of the opinion that he was wrong: see *Bolton* v. *Stone*,[2] *per* Lord Porter and Lord Normand.

But the child was not run over. He was not injured at all. It was the lorry driver who was killed. In order to avoid hitting the child, he swerved, struck a telegraph pole and was killed. The question is whether that makes any difference. Does it mean that the school authorities are no longer to blame? I think not. Their fault is just the same, whether it is the boy or the man who is killed. Only the damage is different. Does this difference in damage mean, then, that the school authorities need not pay compensation? If it were so, it would be a grievous state of the law. In the emergency created by this boy's presence in the road, the child might have been killed and the man saved, in which case the school authorities would have to pay damages. As it happened, the child was saved and the man killed. He died saving the school authorities from the consequences of their own fault. Can it be the law that they need pay his widow nothing? The truth is that the man's death is just as direct a consequence of their fault as the child's death would have been. They are just as responsible for it as they would have been for the child's death, and the law should hold them liable.

Mr. Lloyd-Jones, however, sought to say that the distinction lay in this: The school authorities, he said, owed a duty of care to the child and his mother, but no duty to the lorry-driver, because injury to the child could reasonably be foreseen, but not

[2] [1951] A.C. 859, 861–862; [1951] 1 T.L.R. 977; [1951] 1 All E.R. 1078.

injury to the lorry driver. This argument contains, I believe, a fallacy. The duty of the school authorities is not merely a negative duty to avoid injury to the child: it is a positive duty to look after the child with reasonable care, to see that it does not get out into the road, and this is a duty which they owe not only to the child and its parents but also to everyone in the vicinity. The reason is because a child of four is an unpredictable creature who may quite likely run into the road if given a chance. That is a thing that the school authorities can and should foresee. If they negligently leave the child to his own devices, with the result that he gets into imminent peril on the road, then their breach of duty is the same, no matter whether the child is injured or someone else, and they must be responsible for all injuries caused by their negligence, unless they are too remote in law to be recovered: see *King* v. *Phillips*.[3] As Mr. Edmund Davies pointed out, it is not unlike the cases where a van-driver leaves his horse and van unattended and a mischievous child frightens it so that it runs away. The questions in such cases are, first, was the van-driver negligent? Second, if so, was the damage done too remote? See *Lynch* v. *Nurdin*,[4] and *Haynes* v. *Harwood*.[5]

The question of remoteness in cases of this kind, as in shock cases, depends on foreseeability, but as Greer L.J. said, "It is "not necessary to show that this particular accident and this "particular damage were probable: it is sufficient if the accident "is of a class that might well be anticipated." That is, I think, the case here. The accident was of a class which might well be anticipated. The damage done was not too remote and I think the widow is entitled to recover. Accordingly, I agree that the appeal should be dismissed.

ROMER L.J. I confess that, for myself, I have entertained very considerable doubts, which have not been altogether resolved, as to the defendants' liability for negligence in this case. I cannot help feeling that in all the circumstances which existed at the time almost super-human vision would have been required to enable Miss Morgan to appreciate the likelihood of the little boy David leaving the classroom with his companion, crossing the school grounds, which were forbidden territory to them, passing through the main gate and occasioning an accident in this street, more especially as the evidence disclosed no parallel or even similar incident having ever occurred at the school before. However, in an action such as this, an action founded upon negligence, in which the judge had the advantage of seeing the witnesses, something more than doubt is necessary to justify the appellate court, or any member of an appellate court, in interfering with the judge's finding. Only a feeling of reasonable

[3] [1953] 1 Q.B. 429; [1952] 2 All E.R. 459.
[4] (1841) 1 Q.B.D. 29.
[5] [1934] 2 K.B. 240; [1935] 1 K.B. 146; 51 T.L.R. 100.

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certainty that the decision was wrong should justify such interference, and having regard to the views which my brethren have formed and expressed upon the matter it is obvious that no such certainty can, in my own mind, exist. I therefore concur in the proposed order dismissing the appeal, but I should like to make it plain that, so far as I can see, no moral blame of any kind attaches to Miss Morgan for the tragic accident which befell the plaintiff's husband.

*Appeal dismissed.*
*Leave to appeal to House of Lords refused.*

Solicitors: *A. V. Vandamm & Co., for Le Brasseur, Davis & Son, Newport, Mon.; Davies, Arnold & Cooper, for T. Llewellyn Jones, Neath.*

A. W. G.

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[PROBATE, ETC., DIVISION.]

1953 *Oct.* 14, 15, 16, 19.

Willmer J.

## *THE SEIRSTAD (OWNERS OF) *v.* HINDUSTAN SHIPPING CO. LD. THE WAZIRISTAN.

*Shipping—Compulsory pilotage—Foreign port—Negligence—Pilot in control of navigation—Defence to action for damages—Shipowner not liable under foreign law for negligence of pilot—Port of Basrah By-laws—Incorporation of article* 29 *of Regulations for Preventing Collisions at Sea.*

Where a by-law of a foreign port required vessels using its waterways to carry a compulsory pilot, and there was evidence, which was accepted by the court, that by the law of that country a shipowner was not civilly liable for the negligence of a compulsory pilot, the by-law meant what it said—that the navigation was to be placed in the hands of the pilot—and it was a good defence to an action for damages brought by a shipowner in respect of damage caused to his vessel by the negligent navigation of another vessel, and on proof of absence of any negligence on the part of any servant of the defendant shipowner, that the damage was caused by the negligence of the compulsory pilot of the defendant's vessel.

*The Arum* [1921] P. 12, 20–1; 37 T.L.R. 38 applied.

*The Augusta* (1888) 6 Asp.Mar.Cas.(N.S.) 58, 161; *The Guy Mannering* (1882) 7 P.D. 132; *The Andoni* [1918] P. 14, 18; and *The Benue* [1916] P. 88, 98 considered.

On the facts of this case, however, the court having found that there was no negligence on the part of the pilot in charge of the defendant's vessel, or on the part of the master or any other servant of the defendant, the action was dismissed.

The purpose of the incorporation in the by-law relating to compulsory pilotage of a printed note in substantially the same terms as article 29 of the Regulations for Preventing Collisions at Sea would appear to be to serve as a reminder that, although control of the ship was handed over to the pilot, the master and crew were not to be absolved from their ordinary duties.

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ACTION.

The plaintiffs were the owners of the Norwegian motor vessel *Seirstad*, and the defendants were the owners of the British motor vessel *Waziristan*, which, with a number of other vessels, were both proceeding down the Shatt-al-Arab river on June 10, 1950, outward bound from Abadan with a cargo of oil. The *Waziristan* was navigating ahead of the *Seirstad* and both had a pilot on board in compliance with the Port of Basrah by-laws, which made pilotage compulsory. While so proceeding the *Waziristan* took the ground on a falling tide.

The plaintiffs alleged that the *Waziristan* was negligently caused, or allowed, to ground in such a position and in such a way as to block the channel, and that in consequence the *Seirstad* could not pass, with the result that, as the tide fell, the *Seirstad* was also forced to take the ground whereby she sustained damage in respect of which she now claimed against the owners of the *Waziristan*.

The defendants denied the charge of negligence but admitted that the plaintiffs had sustained damage. Alternatively, they contended (inter alia) that, if there was negligence, it was solely that of the pilot who was compulsorily in charge of the *Waziristan* and for whose acts they were not liable under the law of Iraq.

*W. W. Porges Q.C.* and *H. E. Browning* for the plaintiffs.
*J. V. Naisby Q.C.* and *J. B. Hewson* for the defendants.

The following cases were cited in argument: *The Augusta* [1]; *The Guy Mannering* [2]; *The Andoni* [3]; *The Benue* [4]; *J. D'Almaida Araujo* v. *Sir Frederick Becker & Co. Ld.* [5]; *Machado* v. *Fontes* [6]; *The Nord.* [7]

WILLMER J., after stating the facts and considering the issue of negligence, said that he had come to the conclusion that the *Waziristan* was not at fault for taking the ground and that that finding really disposed of the case, and, on that basis, the defendants were entitled to judgment.

His Lordship continued: But in case I am wrong, and as the question of compulsory pilotage has been argued before me, I think that it is only fair to the parties that I should state my view on the interesting question which has been discussed. This casualty took place in Iraqi territorial waters. The law of Iraq makes pilotage compulsory in this river. It is common ground that in Iraq there is no equivalent of section 15 of the Pilotage Act, which makes a shipowner in this country

[1] (1888) 6 Asp.Mar.Cas.(N.S.) 58, 161.
[2] (1882) 7 P.D. 132.
[3] [1918] P. 14.
[4] [1916] P. 88.
[5] [1953] 3 W.L.R. 57; [1953] 2 Q.B. 329.
[6] [1897] 2 Q.B. 231; 13 T.L.R. 407.
[7] [1916] P. 53; 32 T.L.R. 292.

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responsible for the negligence of a compulsory pilot. In those circumstances, the question was raised whether the presence of a compulsory pilot on board the *Waziristan* would constitute a defence for the defendants. It would not, of course, constitute any defence for the defendants if I were able to find negligence on the part of any servant or agent of their own. If, for instance, I had found the master guilty of negligence the defence of "compulsory pilotage" would have been of no avail to the defendants, even though the pilot was also negligent. But, for reasons which I have already given, I am unable to find any such negligence on the part of any actual servant of the owners. Although I do not find that the pilot was guilty of negligence, I am satisfied that if there was any negligence anywhere it could only have been that of the pilot—and that would raise in the clearest possible form the question whether compulsory pilotage would be any defence.

The argument put forward by Mr. Porges, for the plaintiffs, is that on the true construction of the rules, whereby pilotage is made compulsory, it is made compulsory only in the sense that the ship must carry on board a pilot as an adviser. It is contended that under the rules there is nothing to compel a master to hand over the navigation of his ship to the control of the pilot. Mr. Porges in fact goes further and says (as is indeed the fact) that on the evidence the master of the *Seirstad* never did hand over the control of his vessel to his pilot, whatever the master of the *Waziristan* may have done. According to the evidence of the master of the *Seirstad*, he regarded his pilot merely as an adviser, and he, the master, remained in charge of the vessel. I noticed incidentally that Mr. Porges did not make any application to amend paragraph 2 of the statement of claim, which avers that the *Seirstad* was "in charge of a duly "licensed pilot." Be that as it may, that was the argument put forward on behalf of the plaintiffs.

In support of that argument reliance was placed on the special note printed at the beginning of the Basrah Port by-laws. I do not propose to read that note; it is sufficient to summarize it by saying that, apart from one or two verbal alterations, it is, practically speaking, the same in effect as article 29 of the Collision Regulations. It is argued that the effect of incorporating that note in the book of rules and by-laws is to reserve the ultimate control to the master of every ship, so as to leave the pilot only as an adviser. On that basis Mr. Porges relies on the old decisions in *The Augusta* [1] and *The Guy Mannering*,[2] both of which raised questions of compulsory pilotage in foreign waters. In *The Augusta* [3] it was a question of the law of France, and in *The Guy Mannering* [4] it was a question of the law of the Suez Canal. In both cases the court, after inquiry into the

[1] 6 Asp.Mar.Cas.(N.S.) 58, 161.
[2] 7 P.D. 132.
[3] 6 Asp.Mar.Cas.(N.S.) 58, 161.
[4] 7 P.D. 132.

foreign law, came to the conclusion that the pilot was not compulsorily in charge of the vessel, but was merely taken on board as adviser, leaving the control of the vessel with the master; in those circumstances, in both those cases the court came to the conclusion that " compulsory pilotage " was no defence.

It seems to me at least open to question whether the special note in the by-law, upon which Mr. Porges relies, does not prompt precisely the opposite inference from that which he claimed for it. As I have said, it reproduces in substance article 29 of the Collision Regulations, and it seems to me equally arguable that its real purpose is to serve as a reminder that, although control of the ship is handed over to the pilot, the master and crew are not to be absolved from their ordinary duties, such as exhibiting lights, keeping a lookout, taking all precautions as are required by the ordinary practice of seamen, and so on. It might be argued that the very fact that it is necessary to incorporate such a note in the by-laws at all prompts the inference that the pilot was indeed intended to be compulsorily in charge of the vessel so far as her navigation was concerned. In any case, I should have been disposed to hold that when the by-law says, as it does, that pilotage is compulsory, it means exactly what it says, that is to say, that the operation of piloting the ship (which is equivalent to the control of the navigation of the ship) is to be placed in the hands of the pilot.

That was the view which Hill J. took in *The Andoni*,[5] and it is not unhelpful to refer to a very brief passage in his judgment in that case, where he said[6]: " In my opinion a pilot, in the " mouths of British authorities, prima facie means, to use Lord " Tenterden's words, ' A person taken on board at a particular " ' place for the purpose of conducting a ship through a river, " ' road or channel or from or into a port.' And where you " find that pilotage is compulsory, that, prima facie, means, in " the mouths of British authorities, that the pilot is entitled, " and the master is bound to permit him, to conduct the ship, " that is, to take charge of the navigation of the ship." It was pressed upon me by Mr. Porges that, as was laid down by Sir Samuel Evans P. in *The Benue*[7] there is a very severe burden of proof upon any defendant relying on the defence of compulsory pilotage. The President, having pointed out that the plaintiffs must, of course, establish a case of negligent navigation, went on to say[8]: " The defendants must then prove that a " pilot was in charge compulsorily and in fact; that the negli- " gent navigation was due solely to the fault of the pilot: that " is to say, that the particular negligent acts or defaults, found " by the court to have caused the collision, were committed by " the pilot himself, or by the master or crew in obedience to " the pilot's orders. If the case rested in that state, the defence

[5] [1918] P. 14.
[6] Ibid. 18.
[7] [1916] P. 68.
[8] Ibid. 98.

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" of compulsory pilotage would prevail. But if, in addition, " evidence is given, either adduced by the plaintiffs, or obtained " from the defendants' own witnesses, or in any other way " forthcoming in the course of the case, that there were also " acts or defaults on the part of the master or crew which might " have contributed to the collision, the defence would fail, unless " the defendants satisfied the court that such acts or defaults " did not in any degree contribute to the collision. If the defen- " dants did satisfy the court of that, their defence would hold " good; if they did not, their defence would fail."

In my judgment, in so far as the onus of proof has passed to the defendants in this case, they have, on the facts which I have found, discharged that onus of proof. It follows, therefore, that I should in any case have found difficulty in accepting Mr. Porges' argument.

But the matter goes further than that. We are concerned here with a question of foreign law. So far I have only been attempting to interpret *these* by-laws as they would be read by a court in this country. But it is clear that a question of foreign law is raised, as it was in *The Augusta*[9] and *The Guy Mannering*,[10] to which I have referred, and, on the question of that foreign law, I have had the benefit of hearing the evidence of Mr. Lloyd, who was for many years himself a judge in Iraq. I do not propose to state his views at length; I think that they can all be summarized by two or three answers which he gave. When he was asked, in examination-in-chief, what was the position in regard to compulsory pilotage in Iraq at the time of the casualty, he said: " The shipowner is not civilly liable for the negligence " of a compulsory pilot by the law of Iraq." Then, in cross-examination, he enlarged upon that a little, and said: " If the " owner has to surrender control of the ship to a third party, " liability can only arise if an actual servant has been guilty of " neglect or default "—and then he went on to say: " The Iraq " court would assume that the ship was in control of the pilot." Then finally, in re-examination, he was asked a hypothetical question based on the facts of this case, to which his answer, in the abbreviated form in which I took it down, was this: " If " ship A. grounds solely through the negligence of the pilot, and, " in consequence, ship B. sustains damage which could not be " prevented, the owner of ship A. is not liable."

It seems to me that Mr. Lloyd had no doubt whatsoever as to what, in his view, the law of Iraq on the subject was at the date of this casualty. No evidence to the contrary was called by the plaintiffs, and, in my judgment, I can do no other than accept Mr. Lloyd's evidence as a correct statement of Iraq law. That being so, this case is left in exactly the same position as was the case of *The Arum*.[11] In that case, tried before Hill J.,

[9] 6 Asp.Mar.Cas.(N.S.) 58, 161.
[10] 7 P.D. 132.
[11] [1921] P. 12.

arising out of a collision which occurred in the harbour at Gibraltar, it was held that the position had not been affected by British legislation dealing with compulsory pilotage. Hill J. said in that case [12]: " If the owners of the *Arum* had been sued " in respect of the collision in the courts of Gibraltar, there " would have been no answer to the defence that the collision " was caused by the negligence of a person who was not the " owner's servant. The tort of which the plaintiffs complain " was one which did not create a cause of action against the " defendants by the law of the place where the tort was com- " mitted. How then does the Pilotage Act make it a cause " of action against the defendants in this country? Before the " Pilotage Act the defendants could have pleaded: (1) ' We are " ' not liable by the law of the United Kingdom for the negligence " ' of a compulsory pilot who is not our servant,' and (2) ' we " ' are not liable by the law of Gibraltar for such negligence.' " Either defence, if made good, would have been an answer to " an action in these courts for negligence committed in the " enclosed waters of Gibraltar. Conceding that the effect of the " Pilotage Act is that the defendants can no longer set up the " first defence, they can still set up the second."

It seems to me that, substituting the word " Iraq " for the word " Gibraltar " and the word *Waziristan* for the word *Arum*, every single word of what Hill J. there said applies to the present case. Therefore, had I found negligence on the part of the pilot of the *Waziristan* in this case, I should undoubtedly have come to the conclusion that the state of the law in Iraq is such that the defendants could not be made liable here for such negligence.

That being so, I do not propose to waste time over the remaining point which was raised in this case, namely, whether, assuming that there was negligence for which the defendants were responsible, the damages claimed flowed from such negligence. That question raises an interesting problem whether English law or Iraqi law applies in considering the question of remoteness of damage. It also raises an interesting practical problem—a problem of seamanship—as to what practical courses were open to the *Seirstad* after she was put in a difficulty. Indeed, all the familiar questions which one canvasses in discussing " chains " or " nets " of causation seem to me to be raised, or potentially raised, by the facts of this case. I am relieved from arriving at any decision on that point. I think that probably it is sufficient for me to give this indication, that had I been able to find that the *Waziristan* was guilty of negligence, and negligence for which the defendants could be made responsible, I should have been disposed to conclude that the damages here claimed did flow from the negligence complained of; but, on my findings, that is an academic question, and I do not propose to waste further time over it.

[12] Ibid. 20, 21.

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For the reasons which I have given, it is my duty, as I conceive it, to dismiss this action on the ground that there was no actionable negligence on the part of the defendants.

*Claim dismissed.*

Solicitors: *Thomas Cooper & Co.; Middleton, Lewis & Co. for Middleton & Co., Sunderland.*

H. G.

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[CHANCERY DIVISION.]

1953
*Nov.* 3.

Vaisey J.

## * PRACTICE NOTE (TRUSTEES' COSTS).

*Costs—Trustees—Indemnity as to costs—Explanation as to form of order—Trustee Act,* 1925 (15 *Geo.* 5, *c.* 19), *s.* 60.

At the sitting of the court on November 3, 1953, VAISEY J. made a reference to the Practice Direction with regard to trustees' costs (*ante*, p. 1365). In the course of his observations his Lordship said:—

For years, ever since I can remember, it has been the practice on a summons by trustees, for such a purpose as the construction of a will, to direct that the costs of all parties should be taxed as between solicitor and client. That has continued, as I say, ever since I can remember, and has been the normal practice.

It has recently been realized that, under a solicitor and client taxation, the trustees may not get the whole of what they are entitled to. A solicitor and client taxation is on a lower basis, not a higher basis, than the basis which is appropriate when trustees' costs are being dealt with. The matter arose, in a very plain form in the case of *In re Robertson, decd.*,[1] where the Public Trustee, who had his costs taxed as between solicitor and client, was disallowed the sum of £2 1s. 0d. in respect of a payment made for taking a shorthand note and for a copy of the transcript. That case came before me, and in point of fact I felt able to vary the taxing master's certificate and to allow that sum of £2 1s. 0d.

One thing is perfectly plain, and it is important that the profession should understand it. If a trustee submits to having his costs taxed as between solicitor and client, he is entitled to his costs as so taxed and nothing more. He is not entitled to take the taxing master through his bill and then, when the taxing master disallows certain items, to go away and say: "That does not matter. I know I have wasted the taxing

[1] [1949] W.N. 225; [1949] 1 All E.R. 1042.

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" master's time, but I do not care about that. I do not care " what he taxes off. I will help myself to whatever he has " disallowed." That is wrong, and, hoping that I could help to resolve that difficulty in which trustees have found themselves, I, with the assistance of the Chief Registrar and the Chief Taxing Master and with the approval of all the judges of the Chancery Division, came to the conclusion that a form of words should be used which would give trustees more than solicitor and client costs, that is to say, give them all the costs to which they are entitled. The form of words which was adopted for that purpose is taken from section 60 of the Trustee Act, 1925, which relates to orders appointing new trustees and is in these words: " The " court may order the costs and expenses of and incident to any " application for an order appointing a new trustee, or for a " vesting order, or of and incident to any such order, or any " conveyance or transfer in pursuance thereof, to be raised and " paid out of " the trust estate.

It is, I think, plain that those words " the costs and expenses " of and incident to any application " are intended to cover the whole of the costs that the trustees were entitled to, and mean almost the same as costs on an indemnity basis, or costs as between solicitor and own client. It seemed appropriate to use the words of the statute. Any suggestion that trustees are being deprived of costs, and that this would be a more hostile taxation than there has been under the old solicitor and client taxation is absolutely wrong; the whole point of making this change was to give the trustees more, to give them a wider range and to make sure that all costs and expenses which had been properly incurred would be allowed on the taxation. It is an attempt to get the taxation on a better, juster and higher basis than the old taxation, which, in the judgment of myself and my brother judges, did not always give the trustees that to which they were entitled.

I. G. R. M.

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[PRIVY COUNCIL.]

* ANDREW *v.* ANDREW.

J. C.†

1953
*Nov.* 25.

PRACTICE NOTE.

*Husband and Wife—Divorce—Practice—Evidence—Admission of fresh evidence on appeal—Principles applicable.*

*Corbett* v. *Corbett* [1953] P. 205; [1953] 2 W.L.R. 1124; [1953] 2 All E.R. 69 followed.

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† *Present*: LORD OAKSEY, SIR LIONEL LEACH and MR. L. M. D. DE SILVA.

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In giving the judgment of the Board in an appeal (No. 20 of 1952) which arose out of proceedings instituted by the respondent wife against her husband, the appellant, in the Supreme Court of Bermuda for a decree of divorce on the ground of cruelty, SIR LIONEL LEACH, after stating that counsel for the appellant had applied, during the hearing of the appeal, for leave to put in evidence further letters written by the respondent to the appellant, said: An application for the admission of fresh evidence on appeal is one which requires very careful scrutiny. The granting of such an application lies in the discretion of the appellate court, but, of course, the discretion must be exercised in accordance with established principles. Two recent cases were quoted in argument, and their Lordships consider that it will be useful to refer to them at this stage. The first is *Leeder* v. *Ellis* [1] and the second is *Corbett* v. *Corbett*.[2]

In *Leeder* v. *Ellis*,[1] which was an appeal to Her Majesty in Council from the High Court of Australia, the Board held that the principles which should guide an appellate court when considering an application for leave to adduce fresh evidence in order to obtain a retrial before a jury were of general application and applied to an appeal from a judge sitting alone.

In *Corbett* v. *Corbett*,[2] Evershed M.R. said that it was not in doubt that in general the rule of the Court of Appeal laid down in *Shedden* v. *Patrick* [3] and since followed in many cases is that fresh evidence on appeal will not be permitted unless two conditions are satisfied. The first is that the new evidence was not available to the party seeking to use it at the trial, or that reasonable diligence would not have made it so available. The second condition is that the fresh evidence, if true, would have had, or would have been likely to have had, a determining influence on the court below. *Corbett* v. *Corbett* [2] was a matrimonial suit, and it was submitted that the general rule is not or should not be so strictly applied in such cases, but the Court of Appeal rejected the suggestion. Their Lordships can see no ground for differentiation and find themselves in agreement with the Court of Appeal.

C. C.

[1] [1953] A.C. 52; [1952] 2 T.L.R. 577; [1952] 2 All E.R. 814.

[2] [1953] P. 205; [1953] 2 W.L.R. 1124; [1953] 2 All E.R. 69.

[3] (1869) L.R. 1 Sc. & Div. 470.

[COURT OF APPEAL.]

C. A.

1953
*Oct.* 9.

Evershed M.R., Jenkins and Morris L.JJ.

* BRAY *v.* PALMER.
[1952 B. No. 1347.]

* BRAY *v.* PALMER.
[1952 B. No. 1348.]

*Negligence—Running down action—Plaintiff or defendant held solely to blame for accident—No decision as to which liable—Action and counterclaim dismissed—New trial.*

On August 6, 1951, the plaintiffs, the driver and his pillion passenger, were proceeding upon a motor-cycle southward on a main road in daylight. The defendant was driving a motor-car northward. Neither party was proceeding at undue speed when they came into head-on collision in the centre of the road. The plaintiffs suffered injuries and in these two actions respectively claimed damages for negligence. The defendant counterclaimed. Each party alleged that the cause of the accident was due to the negligence of the other. Oliver J. held that the accident was due solely to the gross negligence of the plaintiff, the driver of the motor-cycle, or to that of the defendant, the driver of the motor-car. On the evidence he did not see his way to holding that both were responsible. He was unable to decide whether the plaintiffs' story or that of the defendant was true and he dismissed the action and counterclaim. The plaintiffs appealed:—

*Held*, that the explanation that both the plaintiff driver of the motor-cycle and the defendant driver of the motor-car were in some measure to blame for the accident was at least as likely as the explanation that one or other was wholly to blame; that until the judge had decided that the accident had happened in some particular way, he was not in a position to say that it was not a case in which both were partly to blame; and that there should be a new trial.

Decision of Oliver J. reversed.

APPEAL from Oliver J.

In the first action William Henry Walter Bray, the driver of a motor-cycle, and in the second Arthur Joseph Bray, the pillion passenger on the motor-cycle, claimed damages from the defendant, Walter Palmer, the driver of a motor-car, for injuries sustained when the motor-cycle came into a head-on collision with the defendant's motor-car in the middle of a main road. The defendant counterclaimed. Oliver J. held that the stories both of the plaintiffs and of the defendant were wildly improbable. The accident was caused by the grossest negligence of the one driver or the other. He was unable to say which story was true and he dismissed the action and counterclaim. The facts and the reason for Oliver J.'s decision sufficiently appear from the judgment of Evershed M.R.

The plaintiffs appealed.

*N. R. Fox-Andrews Q.C.* and *Cyril Williams* for the plaintiffs.
*M. L. Berryman Q.C.* and *G. G. Macdonald* for the defendant.

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Evershed M.R. This is a curious and difficult case. Curious in that the experienced judge who tried it himself said it was unique in his experience, and difficult because it is with reluctance upon a matter of this kind that I approach any criticism of this judge's judgment; but I have come to the regrettable conclusion in the circumstances that there should be here a new trial. Having reached that conclusion (which I hope I will justify in a moment or two) it obviously is not proper that I should give more than the barest necessary outline of the facts. Fortunately, they can be simply and shortly stated.

The two plaintiffs were proceeding upon a motor-cycle travelling southwards towards Bristol upon the main road from Gloucester about the middle of a summer's day, namely, on August 6, 1951. That road was approximately 26 ft. wide. Coming in the opposite direction was the defendant driving a small motor-car with passengers. There was no other traffic at the material part of the road and the only obstacle in the way of either was a pool of water (the exact dimensions of which is a matter in dispute) which had been caused by the circumstance that, following heavy rains earlier in the day or in the previous night, a gutter had become blocked on the side of the road, which was the left side from the point of view of the defendant. It appears not to be in dispute that the defendant moved outwards (that is, towards the centre or right hand of his road) in order to avoid driving through this pool. What is the kernel of the matter, so far as the conflict of evidence is concerned, is the extent of his right-handed movement and whether it was one movement or more than one. However that may be, the plaintiffs on their motor-cycle as they approached near to the car moved themselves right-handed to their off side. They said it was because the defendant, in the course of his manœuvre or the second part of his manœuvre, left them no room to pass on their own side. The defendant said it was an inexplicable move on the plaintiffs' part for which there was no justification such as the plaintiffs had suggested. Whatever be the truth, the fact is that the two, the motor-car and the motor-cycle, met more or less in what is called a head-on collision more or less exactly in the middle of the road. Neither the motor-car nor the motor-cycle was proceeding at an unduly fast speed, but, of course, the effect of a head-on collision is to add the two speeds together for the purpose of judging the result of the impact, so that the plaintiffs, one or both of them, suffered severe injuries. They alleged in their actions that the cause of it was the negligence of the defendant and the defendant by his counterclaim said that the collision was due to the negligence of the plaintiffs or that one of them who was driving. The allegations in the pleadings follow the usual form in these cases.

The stories, as I have very briefly indicated them, are obviously in direct conflict. The defendant added a further embellishment in that, according to him and his witnesses, there

was also a pool of water on the motor-cyclists' side of the road and that the plaintiffs were moving away or driving towards the centre in order to avoid that puddle. But that embroidery on the story the judge found to be untrue. The judge heard evidence of other witnesses independent of the accident and not participants in it, namely, a man called Galloway, who lived in a nearby house, and a policeman; but, beyond rejecting that part of the defendant's story which I have mentioned, he did not give any indication of a preference for one set of witnesses over the other in the matter of credibility.

Having heard the evidence, the judge reserved his judgment overnight, and it is plain from his judgment that he considered it most carefully. The judgment includes a full summary of the evidence. His conclusion was to the effect that, after considering the evidence and its mutually repugnant character, he was of opinion, as a matter of fact, that the accident must have been due to the exclusive negligence of one side or the other, and he put aside altogether the possibility of both having been to blame. But, having stated his first conclusion, he then said that, on the evidence, he was quite unable to make up his mind which was the right story and therefore, on the principle that the claimant must prove his case, he rejected both and dismissed the claim and counterclaim.

At the beginning of his judgment, after a brief account of the accident, he stated the following: " Such a circumstance must " suggest to my opinion the grossest possible negligence on the " part of one or the other. It seems to me on the ordinary " principles of logic "—which obviously meant on the ordinary probabilities of the case—" that it is not likely that simultan- " eously negligence so gross as that could be committed by both " the plaintiff and the defendant, neither of whom can be " suggested to be going at any excessive speed, and I have, if " I can, to solve the problem of which of the two was responsible " for this accident. I do not see my way to find that both were " responsible, or even that both were to blame. It seems to me " to be a case of one or the other." Then, after a discussion of the evidence at length, there comes this (which really is a re-statement of the beginning): " There it is, one or other of " those stories must approximate to the truth. I do not know " which. It seems to me that one is as good as the other, or as " bad. Someone of these two parties must have driven " abominably. Either for some mad reason the car did go right " across and blocked the motor-cyclist's road and put him into " the emergency that he had to cut across; or on the other hand " the motor-cyclist was not looking and did not see the car until " the last moment, and then panicking, thinking it was going to " run into him because it was over the road, tried to go across. " Either of those might be true; I cannot tell which is true. In " those circumstances I am driven, it seems to me, to do a thing " that I have never done before since I have been on the Bench;

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" that is to say I am quite unable to say that the one case is " more probable than the other, or less probable than the other. " They are both so wildly improbable, and yet one of them " happened."

Mr. Fox-Andrews put the case thus: He said that in essence and in substance the judge, having heard and considered the evidence, concluded, as a fact that the occurrence in issue was only explicable upon hypothesis " A " or upon hypothesis " B " and that, if that is right, then there is no duty upon a judge so compelling that he must, whatever the evidence and its nature and however great his experience, conclude the matter in favour either of " A " or of " B ". I do not find it necessary to express a conclusion whether the judicial duty in such a circumstance does require a judge to decide one or the other. I am not saying it does not, but it is unnecessary for me to say that he must, in those circumstances, make up his mind. Certainly no judge could have been more qualified by his experience to make up his mind between two conflicting stories than this judge; but I am not satisfied that the premise upon which it is said the final conclusion should have been reached is established.

I can borrow from the observations of my two brethren to put the point quite briefly. My Brother Morris observed, quoting from one of the last passages I have read: " The judge is saying " ' Both stories are wildly improbable and yet one of them " ' happened.' If they are so wildly improbable, I am not " satisfied that the judge was justified in excluding the possi- " bility of the truth lying somewhere between the two, so that " perhaps each would be less wildly improbable, or at least in " excluding the possibility (which it seems to me was open) of " both being wrong." I now come to the observation by my Brother Jenkins: " Unless that was so, the judge seems to me to " have stated the case and his conclusions in such a way that " one party or the other or both must have suffered an injustice." Whether that is so or not is perhaps another matter, but, if the result appears to be so, then, as it seems to me, it is not satisfactory to leave it thus, but this court ought to order a new trial.

I need not say that it is most regrettable that such a course should be followed because, after all, this accident happened more than two years ago and the recollections of the witnesses will have been either blurred or perhaps, by over-thinking, crystallised somewhat sharply in the interval. But still I have come to the conclusion, with the utmost respect for the judge and acknowledging his difficulty and his experience, that to have stated the matter as he did does involve either a real flaw, or something that looks so like it that it would not be right to leave the matter thus. I think, therefore, that this appeal must be allowed and a new trial ordered.

Jenkins L.J. I agree. There is, of course, no doubt that a judge is perfectly entitled in an action for damages for personal

injury occasioned by the negligent driving of the defendant to reject the plaintiff's case if, in the view of the judge, the evidence does not suffice to make out that case. The onus is on the plaintiff. The same, of course, applies where there is a counterclaim: the onus is on the defendant to make out the counterclaim.

On the part of the defendant it is said, in effect, that the present case was a simple case of this kind, the judge rejecting the plaintiffs' case on the ground that they had not discharged the onus which lay upon them, and dealing similarly with the defendant's counterclaim; but in my view the case is not really of that simple character. The judge did not simply reject the plaintiffs' and the defendant's evidence and say: "I do not "believe that the accident happened in the way claimed by "either side." If he had done that, then his decision would not, as far as I can see, be open to any criticism. The judge's reasoning appears, in effect, to have been: "The choice lies "between the plaintiffs' story and the defendant's story, either "of which may and one of which must be true. If the plaintiffs' "story is true, they are entitled to succeed, but I am unable to "say whether it is true or not, as it is equally possible that the "defendant's story may be the true one. On the other hand, "if the defendant's story is true he is entitled to succeed, but I "cannot say whether it is true or not, as it is equally possible "that the plaintiffs' story may be the true one. I will therefore "grant no relief either way." This seems to me to fall short of a decision of the case. Having come to the conclusion that the accident happened either in the way asserted on the plaintiffs' side or in the way asserted on the defendant's side, he said, in effect, that he was unable to decide which story was the right one. With the greatest respect to the judge, that seems to me to be a denial of justice. It can only mean that the parties to the case on one side or the other are deprived of relief to which they are entitled. In my view, it behoved the judge to form some conclusion one way or the other in the matter and I think the difficulty in which he found himself was in great measure due to his method of approaching the problem, which appears from his observation to the effect that he did not see his way to find that both were responsible or even that both were to blame and that it seemed to him to be a case of one or the other. With respect to the judge—although it has been pressed upon us that that question was one for him to be considered in the light of all the evidence—I cannot see how there is anything in the evidence in this case to justify that view. It seems to me that the explanation that both were in some measure to blame is, on the face of it, at least as likely as the explanation that one or other was wholly to blame, and that unless and until the judge had decided that the accident did happen in some particular way, he was not in a position to say that it was not a case in which both

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were partly to blame. Accordingly, I agree that this is a case in which there should be a new trial.

MORRIS L.J. I agree. The case of the plaintiffs and of the counterclaiming defendant depended upon a variety of allegations as set out in the pleadings, of a nature usual in cases of this kind. The judge thought that the stories both of the plaintiffs and of the defendant were wildly improbable. In those circumstances, I find it difficult to see how the case could proceed on the basis that one or other case must substantially be true and that the allegations on one side or the other must be rejected in their entirety. I do not think it was appropriate in this case to reject consideration of the possibility that there may have been some measure of fault on either side.

*Appeal allowed; new trial ordered.*

Solicitors: *Rider, Heaton, Meredith & Mills for Bobbett Bros., Bristol; Fred Hollis for F. E. Metcalfe & Co., Bristol.*

B. A. B.

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[CHANCERY DIVISION.]

1953 *Oct.* 13, 14; *Nov.* 18.

Upjohn J.

** LLOYDS BANK LD. *v.* TRUSTEE OF THE PROPERTY OF O——, A BANKRUPT.

[1953 L. 1068.]

*Husband and Wife—Property—Matrimonial home—Mortgage—Matrimonial home mortgaged by husband—Desertion by husband—Wife remaining in matrimonial home—Whether mortgagee's right to possession subject to right of wife to remain in possession.*

A mortgagee claimed possession of a flat, which was charged to the mortgagee by two legal charges by which the mortgagor attorned tenant at will. The wife of the mortgagor (who had deserted her several years after the date of the mortgages) sought to continue to occupy the flat as the matrimonial home:—

*Held*, that any right asserted by a wife independently of the husband by virtue of some right conferred on her by matrimonial status must, to be effective against a mortgagee, arise by virtue of some act or event in the law occurring before the date of the mortgage; so that, as the desertion was subsequent to the mortgages, the mortgagee's right to possession prevailed.

*Bendall* v. *McWhirter* [1952] 2 Q.B. 466; [1952] 1 T.L.R. 1332; [1952] 1 All E.R. 1307 distinguished.

ADJOURNED SUMMONS.

A husband and wife were married in March, 1940, and resided in a flat in Bournemouth as their matrimonial home. With the exception of a short period in 1945, they remained there until

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1952, when the husband deserted his wife. In November, 1952, she obtained an order, under section 17 of the Married Women's Property Act, 1882, allowing her to reside in the matrimonial home until further order.

On October 22, 1945, the husband mortgaged the premises to secure his overdraft at the bank attorning tenant at will, and on January 26, 1948, he executed a further mortgage for the same purpose.

On December 8, 1952, the bank called on the husband to repay the amount owing and, as a result of his failure to do so, he filed a petition in bankruptcy and a receiving order was made thereon on December 18, 1952.

The wife, having asserted against the mortgagee a right (pursuant to an order of April 14, 1953, made in an action in the Queen's Bench Division between the husband and wife) to continue to reside on the premises so long as they remained the matrimonial home, the bank took out a summons to obtain "possession of the premises . . . which premises are charged to "the plaintiffs by the said legal charges dated 22nd October 1945 "and 26th January 1948 respectively."

*Harold J. Brown* for the plaintiff bank.

*John Freeland* for the trustee of the property of the bankrupt mortgagor.

*Raymond Walton* for the wife.

Cases cited in argument: *Thompson* v. *Earthy* [1]; *Old Gate Estates Ld.* v. *Alexander* [2]; *Lee* v. *Lee* [3]; *Errington* v. *Errington* [4]; *Bendall* v. *McWhirter* [5]; *Bradley-Hole* v. *Cusen* [6]; *Vaughan* v. *Vaughan* [7]; *H.* v. *H.* [8]; *Middleton* v. *Baldock* [9]; *Weldon* v. *Weldon* [10]; *Regina* v. *Twickenham Rent Tribunal* [11]; *Millennium Productions Ld.* v. *Winter Garden Theatre (London) Ld.* [12]; *Clore* v. *Theatrical Properties Ld. and Westby & Co. Ld.* [13]; *In re Pomfret's Settlement* [14]; *Moreland* v. *Richardson* [15]; *Bramwell* v. *Bramwell.* [16]

*Cur. adv. vult.*

Nov. 18. UPJOHN J. In this summons a wife, the second defendant, who has been deserted by her husband, the mortgagor

[1] [1951] 2 K.B. 596; [1951] 2 T.L.R. 82; [1951] 2 All E.R. 235.
[2] [1950] 1 K.B. 311; 65 T.L.R. 719; [1949] 2 All E.R. 822.
[3] [1952] 2 Q.B. 489; [1952] 1 T.L.R. 968; [1952] 1 All E.R. 1299.
[4] [1952] 1 K.B. 290; [1952] 1 T.L.R. 231; [1952] 1 All E.R. 149.
[5] [1952] 2 Q.B. 466; [1952] 1 T.L.R. 1332; [1952] 1 All E.R. 1307.
[6] [1953] 1 Q.B. 300; [1953] 2 W.L.R. 193; sub nom. *Hole* v. *Cuzen* [1953] 1 All E.R. 87.
[7] [1953] 1 Q.B. 762; [1953] 1 W.L.R. 236; [1953] 1 All E.R. 209.
[8] (1947) 63 T.L.R. 645; [1947] 2 All E.R. 192.
[9] [1950] 1 K.B. 657, 666; 66 T.L.R. (Pt. 1) 650; [1950] 1 All E.R. 708.
[10] (1883) 9 P.D. 52.
[11] [1953] 3 W.L.R. 517; [1953] 2 All E.R. 734.
[12] (1946) 115 L.J.Ch. 297, 302.
[13] [1936] 3 All E.R. 483.
[14] [1952] Ch. 48; [1951] 2 T.L.R. 990; [1951] 2 All E.R. 951.
[15] (1857) 24 Beav. 33.
[16] [1942] 1 K.B. 370; 58 T.L.R. 148; [1942] 1 All E.R. 137.

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of the matrimonial home, is asserting against the mortgagees a right to remain in possession of the mortgaged premises, notwithstanding that as against the mortgagor and his trustee in bankruptcy, the mortgagees have an undisputed right to possession. The whole question I have to determine is whether that claim is good in law.

The mortgagor and his wife were married in March, 1940, and they at once entered into a flat in Bournemouth and continued to reside there, as the matrimonial home, until some date in 1948. On October 22, 1945, the husband mortgaged the matrimonial home together with other premises, as to which no question arises, to the plaintiff bank to secure his overdraft up to a limit of £1,600. The mortgage was by way of legal charge and clause 10 contained the following provision: "The mortgagor "hereby attorns and becomes tenant at will to the bank of such "part of the mortgaged premises as are in the occupation of "the mortgagor at a monthly rent of sixpence if demanded "provided that neither the receipt (if any) of the said rent nor "the tenancy created by the said attornment shall render the "bank liable to account as mortgagee in possession." In 1948 the husband entered into a further legal charge with the plaintiff bank in the same terms as the mortgage of 1945 to secure an advance of a further £500.

Later on in the same year the husband and wife vacated the premises for a short period but returned there shortly afterwards. In September, 1952, the wife went into a nursing home, but came out on October 13, when her husband took her and the children of the marriage to a house of the wife's sister, telling them that they must stay there for a few days.

About this time (the exact date is not in evidence) it is common ground that the husband deserted the wife and she then discovered that while she was in the nursing home the husband had removed all the furniture and her clothes from the matrimonial home. Accordingly, on November 18, 1952, the wife applied in the Queen's Bench Division, under section 17 of the Married Women's Property Act, for an order against the husband permitting her and the children of the marriage to reside in the matrimonial home until further order. On that summons an order was made by Barry J. on April 14 of this year in the following terms: "(a) That the said . . . [wife] and the three "children of herself and of the said . . . [husband] be permitted "to reside in and to occupy the lower flat . . . until such time "as the husband provides suitable accommodation for the appli- "cant and her three children of the marriage. (b) That the said "[husband] shall take no step by sale or assignment of any "right title or interest which he now has in the said property "or by any other act whatsoever create any right title or interest "in any other person to evict his said wife and the children or "any of them from the lower flat . . . or in any way interfere "with their residence therein, until such time as the husband

" provides suitable accommodation for the applicant and her " three children of the marriage. That the said [husband] be " restrained and an injunction is hereby granted restraining him " from selling or agreeing to sell the said flat or from otherwise " creating any right title or interest therein in any person to " evict his said wife or children or any of them therefrom or " from otherwise interfering with the residence in the said flat " of his said wife and children or any of them, until such time " as the husband provides suitable accommodation for the appli- " cant and her three children of the marriage." Pursuant to that order the wife has been put back into possession of the matrimonial home and she remains there pending the determination of this summons.

On December 8, 1952, the bank gave a notice to the husband calling in the amount of the overdraft, then some £2,273, and on December 18, 1952, a receiving order was made against the husband on his own petition and in due course the first defendant was appointed his trustee in bankruptcy.

In that state of affairs it is clear that, ever since the mortgage of 1945, the only right of the husband and subsequently of his trustee in bankruptcy to remain in possession as against the plaintiff bank was as tenant at will, and that tenancy was brought to an end by the issue or, at any rate, service of the summons for possession (see *Woolwich Equitable Building Society* v. *Preston* [1]), it being conceded that no prior notice to determine the tenancy is required by the terms of the mortgage.

From this it follows, first, that no right asserted by the wife on behalf of or as agent of her husband will be of any avail against the plaintiff bank and, secondly, that any right asserted by the wife independently of the husband, that is, not as his agent but by virtue of some right conferred on her by matrimonial status, to be effective against the plaintiff bank, must arise by virtue of some act or event in the law before the mortgage of 1945; it is useless for the wife to assert any right to remain in possession of the matrimonial home by virtue of her matrimonial status, which arose for the first time after the mortgage of 1945, e.g., by reason of his desertion or the order of Barry J., for as against the plaintiff bank she could never assert any right to remain in possession which exceeded her husband's interest in the premises.

In these circumstances Mr. Walton, in his argument on behalf of the wife, put his claim in two ways. He formulated his first proposition in this way, namely, that on entering into the matrimonial home a wife, as an incident of her matrimonial status, is entitled to an irrevocable licence to continue to reside on the premises so long as they remain the matrimonial home and thereafter during any desertion by the husband and the subsistence of the marriage, subject always to an order being made against her under section 17 of the Married Women's

[1] [1938] Ch. 129; 54 T.L.R. 80.

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Property Act ordering her to vacate the matrimonial home. That right attached on the moment of entering into the matrimonial home and is, he submitted, in the nature of an equity which binds all persons having subsequent dealings with the premises except a purchaser for value without notice of her claim. This right, Mr. Walton submits, really originated from the old order of restitution of conjugal rights.

He cited to me the case of *Weldon* v. *Weldon*.[2] In that case the usual decree ordering the husband to take his wife home and render her conjugal rights had been made. In purported compliance therewith the husband had provided a suitable home for his wife, but he had not proposed to share it with her. The question was whether that was a sufficient compliance with the order, and it was held that it was not. Sir John Hannen said [3]: "The principle derived from the law on which the Ecclesiastical "Courts proceeded was, that it is the duty of married persons to "live together, and that this duty should be enforced by the "decree of the court, unless it could be shown that the complaining party had been guilty of some matrimonial offence for which "a judgment authorizing living apart might have been obtained "by the other. Authority for this proposition is not needed, but "I may quote the words of Blackstone:—'The suit for restitution "'of conjugal rights is brought whenever either the husband or "'wife is guilty of the injury of subtraction or lives separate from "'the other without any sufficient reason, in which case they "'will be compelled to come together again, if either party be "'weak enough to desire it, contrary to the inclination of the "'other'."

Pausing there, it does not seem to me that the ancient power of the court to order the spouses to live together affords any support for the broad principle submitted by Mr. Walton. At common law husband and wife on marriage become one, and though a wife has always been entitled to pledge her husband's credit for necessaries if he failed to maintain her, the proposition advanced by Mr. Walton in relation to the matrimonial home would, I venture to think, have startled not only the lawyers but all husbands 100 years ago.

The position of a wife before the Married Women's Property Acts of last century has indeed recently been stated by Denning L.J. in *Bendall* v. *McWhirter* [4] in these terms: "The first "question on the facts is whether the wife has any right of her "own to stay in the house. Under the old common law as it "existed until 70 years ago she had no rights at all apart from "those of her husband. She was treated by the law more like "a piece of his furniture than anything else. The husband "could not sue her in ejectment or trespass, but neither could he "sue a piece of furniture. He could bundle his furniture out "into the street, and so he could his wife. The law did not say

[2] 9 P.D. 52.
[3] Ibid. 55.
[4] [1952] 2 Q.B. 466, 475.

" him nay. It merely gave the wife authority to pledge his " credit for necessaries. If her husband turned her out, she had " to go and find lodgings elsewhere, pledging his credit for the " rent, that is, if she could find anyone to trust to his credit."

Mr. Walton, however, submitted that there were three modern cases which supported his general proposition. The first is that of *Bramwell* v. *Bramwell*,[5] a case in the Court of Appeal. The actual decision there is not in point in this case, but Goddard L.J. suggested that a husband could not bring an action for recovery of land against his wife, for that would be an action for tort which could not be maintained by a husband against a wife having regard to section 12 of the Married Women's Property Act, and the only remedy available to the husband was under section 17. That authority was dealing with a matter of procedure and with all respect to the argument, had nothing to do with the true nature of the right of a wife to continue in the matrimonial home.

The next case was *H.* v. *H.*[6] The headnote is in these terms: " A wife, whose husband had left her, obtained a decree " of judicial separation and continued to live in the house which " had been the matrimonial home and of which the husband " was the owner. The husband claimed, under section 17 of " the Married Women's Property Act, 1882, that the wife should " forthwith be ordered to give up possession of the house to " him. The wife stated that the house was the only home of " herself and the son, who was suffering from a serious illness; " that it would be injurious, mentally, physically and psycho- " logically to the health of the son if they had to leave the " house; that she had refused to accede to her husband's request " that she should divorce him; and that the husband had bought " another house in which he was living with another woman. " *Held*, that the court had a judicial discretion whether or not " to make an order for possession under section 17 of the Act " of 1882; that the granting of a decree of judicial separation " did not affect the exercise of that discretion; and that in the " circumstances no order for possession would be made."

Again I can find nothing in that case which supports the proposition sought to be established. No doubt, it must now be taken to be established by *Bendall* v. *McWhirter*[7] in the Court of Appeal that a wife who had been deserted has a right as against her husband, subject to an order under section 17, to remain in occupation of the matrimonial home, but there is nothing in either of the authorities I have mentioned which goes to the length of establishing that a wife has something in the nature of an irrevocable licence which attaches at the moment of entering into the matrimonial home.

The next case was *Middleton* v. *Baldock*.[8] That was a case on the Rent Restriction Acts, and Mr. Walton relied on

[5] [1942] 1 K.B. 370.
[6] 63 T.L.R. 645.
[7] [1952] 2 Q.B. 466.
[8] [1950] 1 K.B. 657.

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certain passages in the judgments of Evershed M.R. and of Denning L.J.

I forbear to examine that case in detail, however, because what the case decided was not that a wife had anything in the nature of an irrevocable right to remain in possession of the matrimonial home, but that a deserted wife could on behalf of the husband assert a continued right to possession of premises protected by the Rent Acts which the husband was powerless to prevent. But for the reasons I have already given, a right only maintainable as agent of the husband does not help the wife in this case.

Finally I was referred to the case of *Bendall* v. *McWhirter*,[9] particularly to the judgment of Denning L.J. In that case the Court of Appeal decided that a wife who had been deserted could remain in possession of the matrimonial home as against the trustee in bankruptcy of the husband, the bankruptcy being subsequent to desertion. I do not propose to refer to that judgment at length for it seems to me clear that Denning L.J., who stated the law more favourably to the wife than the majority of the court, did not consider that any right to possession arose in the wife before she was deserted. The Lord Justice said this [10]: "In my opinion, therefore, the right of a deserted wife "to stay in the matrimonial home proceeds out of an irrevocable "authority which the husband is presumed in law to have con- "ferred on her. This accounts for the fact that the husband "cannot turn the wife out. It also accounts for the fact that, "as against the landlord, the wife must assert her right in the "husband's name. The authority which is thus conferred on "her is an authority to stay in the house until the court orders "her to go out. This authority flows from the status of "marriage, coupled with the fact of separation owing to the "husband's misconduct."

That authority in my judgment also makes it abundantly clear that a wife who has been deserted can, as against third parties only, assert rights on her husband's behalf and in his name.

In my judgment there is no support to be found in any authority that was cited to me for the broad proposition advanced by Mr. Walton. The proposition that a wife has anything in the nature of an irrevocable licence to remain in the matrimonial home which arises on entry is wholly contrary to the conception of marriage. It is the duty of a husband and wife to live together in such matrimonial homes as the fortunes or vicissitudes of life may dictate, and it is their duty to agree upon that home from time to time.

The position was recently stated by Denning L.J. in *Dunn* v. *Dunn* [11]: "The decision where the home should be is a decision "which affects both the parties and their children. It is their "duty to decide it by agreement, by give and take, and not by

[9] [1952] 2 Q.B. 466.
[10] Ibid. 477.
[11] [1949] P. 98, 103; 64 T.L.R. 570; [1948] All E.R. 822.

" the imposition of the will of one over that of the other. Each " is entitled to an equal voice in the ordering of the affairs which " are their common concern. Neither has a casting vote, though " to be sure they should try so to arrange their affairs that they " spend their time together as a family and not apart. If such " an arrangement is frustrated by the unreasonableness of one " or the other and this leads to a separation between them, then " the party who has produced the separation by reason of his or " her unreasonable behaviour is guilty of desertion."

However, Pilcher J. made this qualification: " I agree with " every word that has been said by Denning L.J. on the question " of onus, but it seems to me that in the case of a difference of " opinion between the spouses as to the place of the matrimonial " home, someone must have the casting vote."

In my judgment the earliest moment at which the right of the wife to continue to reside in the house of the husband against his will arises is when the husband deserts his wife. In this case that happened long after the mortgages were created and must therefore be subject to the mortgagees' rights.

In these circumstances it becomes unnecessary to consider in detail Mr. Walton's second and even broader proposition which he put forward to overcome the additional difficulty with which he was faced in this case, namely that after the date of the further charge the premises for a short time ceased to be the matrimonial home. Therefore, even if he established his first proposition, it would be open to the plaintiff bank to contend that the wife gave up her irrevocable licence on going out of possession in 1948 and the licence arose again on re-entry after the mortgages had been effected.

Briefly, Mr. Walton's proposition was that a wife has upon entering the matrimonial home a right to continue in occupation of the matrimonial home and even prior mortgagees are bound by this right when it arises. It was said, for example, that a mortgagee who permits the mortgagor to remain in possession knows that his bachelor mortgagor may marry, whereupon the wife's right to occupation of the matrimonial home will arise on entry. The mortgagee, it is said, must have entered into the mortgage with that possibility in mind, to accept that risk and take subject to the after-taken wife's right of possession. I say no more about so fantastic a proposition.

There must be judgment for the plaintiff bank for possession against the wife.

*Order accordingly.*

Solicitors: *Cameron, Kemm & Co.; F. J. M. Gale & Co., Bournemouth; D. B. Levinson & Co. for Harry Ellis & Co., Bournemouth.*

J. L. D.

[QUEEN'S BENCH DIVISION.]

[COMMERCIAL LIST.]

1953
*Nov.* 6, 19.

Devlin J.

## *SMEATON HANSCOMB & CO. LD. *v.* SASSOON I. SETTY, SON & CO. (No. 1).

*Sale of Goods—Arbitration clause—"Any claim must be made within "14 days from final discharge"—Buyers' claim for compensation made out of time—Appointment of arbitrator—Award—Jurisdiction of arbitrator—Question of waiver—Whether buyers' claim barred —Contract—Exceptions clause—Fundamental term—Breach—Whether clause applicable.*

A clause in a contract for the sale of logs provided: "Should "any dispute arise with respect to any matter connected with this "contract, the buyers shall . . . accept the goods as shipped, and "make due payment . . . such payment, however, shall not affect "their right . . . to . . . compensation. . . . Such difference shall "be referred to arbitration. . . . Any claim must be made within "14 days from the final discharge of the goods. . . ."

More than 14 days after final discharge the buyers claimed compensation from the sellers in respect of an alleged shortage in measure and percentage undergrade. On a special case stated by an arbitrator which raised the question whether the buyers were entitled to maintain a claim against the sellers:—

*Held* (1) that the sellers' breach did not amount to breach of a fundamental term of the contract; and that, accordingly, they were not debarred from relying on the limitation clause on the principle that an exceptions clause did not protect one who had committed a breach of a fundamental term of a contract;

(2) that the limitation clause was not one which merely gave the sellers the right to object to arbitration proceedings if the claim was out of time, and the clause applied to bar the buyers' claim.

SPECIAL CASE stated by an arbitrator.

On May 22, 1951, a contract in writing was made between Smeaton Hanscomb & Co. Ld. as buyers and Sassoon I. Setty, Son & Co. as sellers, for the sale of about 35 tons of round mahogany logs. The contract, which contained certain provisions as to quality and size, fixed the price at £24 per ton f.o.b. Lagos. It provided for shipment to Liverpool of the goods, which were on the high seas at the time the contract was made.

The contract contained the following clause: "Should any "dispute arise with respect to any matter connected with this "contract, the buyers shall nevertheless accept the goods as "shipped and make due payment as already provided; such pay-"ment, however, shall not affect their right, if any, to claim "compensation for breach of this contract by the sellers. Such "difference shall be referred to arbitration. . . . Any claim must "be made within 14 days from the final discharge of the goods "and before they are removed."

The ship reached Liverpool on May 27, 1951, and final

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SMEATON HANSCOMB & Co. LD. v. SASSOON I. SETTY, SON & Co. (No. 1).

discharge was completed on June 6. Twenty-one logs were discharged in purported fulfilment of the contract. The buyers, through their Liverpool agents, arranged for Arthur Dobell & Co. to measure and grade the logs at Liverpool. Their specification dated July 3 disclosed a shortage of measure and a serious percentage undergrade. The buyers caused the logs to be taken to their saw mills at High Wycombe. On July 12 or 13 they complained of the quality of the logs and on July 16 they claimed by letter to reject the consignment and to have returned to them the price which they had paid against the documents before the ship arrived.

The buyers appointed an arbitrator who was later appointed sole arbitrator as the sellers made no appointment. He made his award substantially in favour of the buyers subject to certain questions for the consideration of the court; the first question being whether the buyers were entitled to maintain a claim against the sellers.

*Adrian Hamilton* for the sellers.

*J. P. Widgery* for the buyers.

The following cases were cited in argument: *Perkins* v. *Bell*[1]; *Watson* v. *Hodgson*[2]; *Pinnock* v. *Lewis and Peat Ld.*[3]; *Vigers Brothers* v. *Sanderson Brothers*[4]; *H. E. Daniels Ld.* v. *Carmel Exporters and Importers Ld.*[5]; *W. Bruce Ld.* v. *J. Strong*[6]; *Pompe* v. *Fuchs*,[7] and *Ayscough* v. *Sheed, Thomson & Co. Ld.*[8]

*Cur. adv. vult.*

November 19. DEVLIN J. read the following judgment: The questions of law in this case arise upon an award stated in the form of a special case which finds certain facts in relation to the purchase and sale in 1951 of mahogany logs.

[His Lordship stated the facts, and continued:] On these facts, the first question stated is whether the buyers are entitled to maintain any claim against the sellers. This question raises the point that the claim was not brought within the period prescribed by the contract, that is, within 14 days of final discharge and before the goods were removed; it was not in fact brought until after 14 days from the completion of final discharge at Liverpool, and until after the goods were removed from Liverpool to the buyers' place of business at High Wycombe.

Mr. Widgery makes three answers to this point. The first is that the claim is not out of time, because the place of the final

[1] [1893] 1 Q.B. 193; 9 T.L.R. 147.
[2] (1876) 40 J.P. 487.
[3] [1923] 1 K.B. 690; 39 T.L.R. 212.
[4] [1901] 1 K.B. 608; 17 T.L.R. 316.
[5] [1953] W.L.R. 216; [1952] 2 All E.R. 401.
[6] [1951] 2 K.B. 447; [1951] 1 All E.R. 1021.
[7] 34 L.T. 800.
[8] [1924] 40 T.L.R. 707.

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discharge of the goods was not Liverpool but High Wycombe; alternatively, because the time must be taken to run from the date when Arthur Dobell & Co. completed their detailed specification. I think, with respect, that both these points are quite unarguable.

Secondly, Mr. Widgery submits that the sellers can rely on this clause only if they have delivered the goods that correspond with the contract description; he cited an obiter dictum by Roche J. in *Pinnock* v. *Lewis and Peat Ltd.*[1] It is no doubt a principle of construction that exceptions are to be construed as not being applicable for the protection of those for whose benefit they are inserted if the beneficiary has committed a breach of a fundamental term of the contract; and that a clause requiring the claim to be brought within a specified period is to be regarded as an exception for this purpose: see *Atlantic Shipping and Trading Co. Ltd.* v. *Louis Dreyfus & Co.*[2] In that case the fundamental term was the implied condition of seaworthiness, which is treated, as Lord Sumner said[3] as "underlying the whole contract of "affreightment." The same principle has been applied to cases of deviation and other fundamental terms. I do not think that what is a fundamental term has ever been closely defined. It must be something, I think, narrower than a condition of the contract, for it would be limiting the exceptions too much to say that they applied only to breaches of warranty. It is, I think, something which underlies the whole contract so that, if it is not complied with, the performance becomes something totally different from that which the contract contemplates. If, for example, instead of delivering mahogany logs the sellers delivered pine logs, and the buyers inadvertently omitted to have them examined for 14 days, it might well be that the sellers could not rely on the time clause. Roche J. in *Pinnock* v. *Lewis and Peat Ltd.*[4] dealt with the same point in relation to another clause in the same contract which sought to exclude the right of rejection; and in relation to that he said[5]: "The delivery in this case could not "be properly described as copra cake at all." In the case I am considering the goods delivered are described throughout as round mahogany logs, and it does not appear that anyone quarrelled with that description. What the arbitrator found was that there was "a shortage in measure as well as a serious percentage under-"grade." That finding is not, in my view, sufficient to bring into operation the principle upon which Mr. Widgery relies.

Mr. Widgery's third point raises a question upon the construction of this type of clause. He submits that clauses of this type in contracts which also contain an arbitration clause have been held on the authorities to fall within one or other of two categories. In one category they are treated as true limitation

[1] [1923] 1 K.B. 690, 695; 39 T.L.R. 212.
[2] [1922] 2 A.C. 250; 38 T.L.R. 534.
[3] [1922] 2 A.C. 250, 260.
[4] [1923] 1 K.B. 690.
[5] Ibid. 697.

clauses, which bar the claim for all purposes, whether in the arbitration or at law. In the other category, they have no effect except in conjunction with the arbitration clause. In this second category the object of the clause is merely to fix a limit to the time within which the party aggrieved may claim to enjoy the benefits of arbitration; if he does not act within the time prescribed he loses his right to arbitrate but his claim in law is unaffected. Mr. Widgery submits that on the true construction of this clause it does not fall into the first category, but into the second, and all that befell the buyers was that they lost the right to arbitrate: or conversely, that the sellers obtained the right to object to the arbitration proceedings as being out of time. That was, Mr. Widgery contends, the only right which the clause gave to the sellers; they failed to exercise it at the appropriate time by objecting to the arbitration and there is now nothing left in the clause. It is, of course, admitted that Mr. Hamilton at the arbitration took the point on the clause and, indeed, the question with which I am dealing is stated upon that point. But Mr. Widgery submits that that is not good enough. The only effect, he says, that can be given to the clause is to deprive the arbitrator of jurisdiction. The party therefore who wishes to exercise his rights under the clause can do so only by objecting to the jurisdiction; if he fails to do that, he loses the benefit of the clause. There is, in fact, a dispute about whether Mr. Hamilton at the arbitration did or did not in terms protest against the arbitrator exercising jurisdiction. That is a point which I could determine only on motion by taking evidence ab extra. There is no protest noted in the special case and for the limited purpose of these proceedings I shall assume that none was made.

I do not think that all clauses of this type must be placed in one or other of the two categories which Mr. Widgery has specified. If a clause provides that an arbitrator is to be nominated within 14 days, I can see the force of an argument that a party must either take the objection to an appointment as being out of time or waive it, and that he cannot in effect say: "I do not object "to your appointment as arbitrator, but I am going to leave it to "you to determine whether you were properly appointed or not." Perhaps he can; I do not know and I need not decide it. For this clause does not go to the appointment of the arbitrator, but to the making of the claim which the arbitrator has to determine. I can see no reason why a party should not say in effect: "I agree "that you are quite properly appointed and have jurisdiction, and "I want you to determine whether this claim was made within "the contract time or not."

On Mr. Widgery's argument that the clause is limited to arbitration proceedings, it must be read as if it provided that any claim in the arbitration must be made within 14 days. That does not on the face of it touch the jurisdiction of the arbitrator. There is no reason why a clause should not be worded in that way so as to provide that a limitation point should not deprive the arbitrator

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of jurisdiction, and that it should be for him and not for the court to determine the point finally, so far as it is a question of fact. I think that the authorities accept a third category of this sort. In *Ayscough* v. *Sheed, Thomson & Co. Ld.*[6] Lord Cave seemed to think that there was one; and so, I think, did Roche J. when in *Pinnock* v. *Lewis and Peat Ld.*[7] he considered *Ayscough* v. *Sheed, Thomson & Co. Ld.*[8] At any rate, upon these authorities, if the point is dealt with in the arbitration, whether as a limitation point or as one going to the jurisdiction of the arbitrator which the parties leave him to determine for himself, his finding—subject, of course, to a case stated—is conclusive. Furthermore, if I have to choose between construing a clause which provides that any claim must be made within 14 days either as a clause that bars the claim altogether or as a clause that goes to the jurisdiction of the arbitrator, I should choose the former; for I can see no reason for holding that a clause which is in form a limitation clause should be construed so as to affect the authority of an arbitrator or the validity of his appointment.

Accordingly, I answer the first question stated in the negative, and consequently the other questions do not arise.

*Judgment for the sellers.*

Solicitors: *Parker, Garrett & Co.; William A. Crump & Son.*

S. C.

[6] (1924) 40 T.L.R. 707.
[7] [1923] 1 K.B. 690, 696.
[8] (1923) 39 T.L.R. 207.

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[COURT OF APPEAL.]

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*Nov.* 17, 18, 26.

Somervell, Denning and Romer L.JJ.

## *BAKER *v.* MARKET HARBOROUGH INDUSTRIAL CO-OPERATIVE SOCIETY LD.
## WALLACE *v.* RICHARDS (LEICESTER) LD.

*Road Traffic—Negligence — Collision — In centre of straight road — Inference from facts—Impossibility of distinguishing between negligence of drivers—Both equally to blame—Failure to take avoiding action—Law Reform (Contributory Negligence) Act*, 1945 (8 & 9 *Geo.* 6, *c.* 28), *ss.* 1, 4.

Where the evidence established that a collision between two motor-vehicles proceeding in opposite directions occurred in the centre of a straight road during the hours of darkness, when both drivers were killed, the inference, in the absence of any other evidence enabling the court to draw a distinction between them, was that each driver was committing almost the same acts of negligence—failing to keep a proper look-out and to drive his vehicle on the correct side of the road—and accordingly both were equally to blame.

[Reported by Oliver J. Shaw, Esq., Barrister-at-Law.]

*Bray* v. *Palmer* [1953] 1 W.L.R. 1455 considered.

*Per* Denning L.J. Even assuming that one of the vehicles was over the centre line, and thus to blame, the absence of any avoiding action by the other vehicle made that vehicle also to blame. Once both were to blame, and there was no means of distinguishing between them, the blame should be cast equally on each.

Decision of Sellers J. affirmed.

Decision of Ormerod J. reversed.

APPEALS from Ormerod and Sellers JJ.

On January 7, 1952, about 7 a.m., when it was still dark, a motor-lorry driven by the husband of the first plaintiff, Mrs. Eva Phyllis Baker, collided on a straight road—the Northampton–Market Harborough road—with an Austin van, the driver of which was the husband of the second plaintiff, Mrs. Doris Evelyn Wallace. Both drivers were killed. The two vehicles had collided whilst the offside front wheel of one or the other, or perhaps of both, was over the " cat's eyes " marking the centre of the road.

In an action heard at Leicester Assizes in February, 1953, before Ormerod J., Mrs. Baker claimed damages from the Market Harborough Industrial Co-operative Society, the owners of the van, alleging negligence on the part of their deceased driver. Judgment was given for the defendants, the judge finding that the plaintiff had failed to prove negligence on the part of Wallace, the driver of the van.

In a separate action brought at Leicester Assizes in May, 1953, and tried by Sellers J., Mrs. Wallace sued Richards (Leicester) Ld., the owners of the lorry driven by the deceased Baker, also alleging negligence. In that action, in which the evidence was substantially the same as in the earlier one, Sellers J. found that both drivers were guilty of negligence and apportioned the blame equally between them.

In referring to Ormerod J.'s decision in the earlier case, Sellers J. said in his judgment: " The allegation which was made there " on behalf of the then plaintiff was that the driver of the motor-" van, the present plaintiff's husband, was negligent in that he " was driving on the wrong side of the road, and reliance was " placed on those measurements given by the police officers to " which I have referred. The judge accepted those measure-" ments, not without some doubt, I think, as being the position " of the Austin van after the collision, as I have done, but he " took the view—with which I entirely agree—that they did " not establish the position of the motor-van immediately before " the accident and in the result he said this: 'Therefore, " ' unfortunately, it is not possible for me to say here that the " ' responsibility for this unfortunate accident has been estab-" ' lished as being that of the driver of the baker's van. It follows " ' from that that there must be judgment for the defendants '."

Sellers J., although accepting the same facts as Ormerod J., differed in the inference to be drawn from them in finding that both drivers were to blame.

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The plaintiff in the first action appealed from the decision of Ormerod J., and the defendant in the second action from the decision of Sellers J. The appeals were heard together.

*Gilbert Paull Q.C.* and *J. P. Stimson* for the first plaintiff.

*F. W. Beney Q.C.* and *M. K. Harrison-Hall* for the first defendants and second plaintiff.

*Patrick O'Connor* and *Niall MacDermot* for the second defendants.

The following cases were cited in argument: *Bray* v. *Palmer* [1]; *Mayhew* v. *Boyce* [2]; *Cummings* v. *Richard Thomas and Baldwins Ld.*[3]; *Morgan* v. *Sim* [4]; *McGowan* v. *Stott* (as note to *Halliwell* v. *Venables*) [5]; *Davies* v. *Mann* [6]; *Hollington* v. *Hewthorne & Co. Ld.*[7]; *Wing* v. *L. G. O. C.*[8]; *Hummerstone* v. *Leary* [9]; *Dennis* v. *A. J. White & Co.*,[10] and *Cassidy* v. *Ministry of Health.*[11]

SOMERVELL L.J. stated the circumstances leading up to the appeals, and continued: Ormerod J. held that the plaintiff in his action had not discharged the onus of establishing that the deceased van driver was negligent. Sellers J. in the action before him found that both drivers were to blame and held that in the absence of any evidence indicating that one was more to blame than the other he was entitled to apportion the blame 50 per cent. to each, and he did so. In all essentials, the evidence before Ormerod J. was the same as that called before Sellers J. The only witness of the accident was one Mabbitt, who was driving a similar lorry belonging to the same employers behind the lorry which collided with the van. The other witnesses came up afterwards, and included police officers.

I will read the summary of the evidence as stated by Sellers J. in his judgment: "The respective vehicles were both "just prior to the accident descending quite a substantial slope, "and the collision seems to have happened at the bottom of the "slope closely adjacent to a pool, which is depicted on the plan. "The accident having happened, the Austin van was stationary "on the road in a damaged condition, but the lorry had gone "off the road on its off-side over a bank and had come into "collision with its off-side front with a tree which apparently "had held it up. There were no tracks on the road showing the "course of either vehicle immediately preceding the collision,

[1] [1953] 1 W.L.R. 1455.
[2] (1816) 1 Stark. 423.
[3] [1953] 2 Q.B. 95; [1953] 2 W.L.R. 1104, 1111; [1953] 2 All E.R. 43.
[4] (1857) Moo.P.C.C. 307, 311.
[5] (1930) 99 L.J.K.B.(N.S.) 353, 355.
[6] (1842) 10 M. & W. 546.
[7] [1943] 1 K.B. 587; 59 T.L.R. 321; [1943] 2 All E.R. 35, 38.
[8] [1909] 2 K.B. 652, 663; 25 T.L.R. 729.
[9] [1921] 2 K.B. 664, 666; 37 T.L.R. 711.
[10] [1917] A.C. 479; 33 T.L.R. 434.
[11] [1951] 2 K.B. 343, 354; [1951] 1 T.L.R. 539; [1951] 1 All E.R. 574.

" and conflicting evidence was given as to the position of the van " on the road when it was stationary after the accident. Two or " three witnesses, who took no measurements, were called on " behalf of the plaintiff, but from their observation expressed the " view that they found the plaintiff's van on its correct side of " the road but with its right off-side wheel close up to the cats' " eyes which demarked the centre of the road, and its rear " off-side wheel just a little way off on a slight angle, therefore, " to the road.

" On the other hand, two police officers gave evidence, one in " particular, who took measurements, that when he measured " he found the off-side front wheel of the van some two feet " over the cats' eyes on its wrong side, and the rear off-side " wheel some 18 inches from the cats' eyes, so that both the " off-side wheels were on the wrong side of the road. The police " evidence was not given with that conviction which one likes " to associate with police evidence. The officer was not, as I " say, very convincing, but, on the whole, I think that I ought " to accept his evidence as substantially correct. It was taken " in a more precise manner than the more casual observation of " the other witnesses, and I think probably that the position as " spoken to by the police officer who took measurements and by " another police officer who observed them, was the position of " the Austin van. But it does not follow, as I shall indicate " in a moment was also the finding of another judge who was " trying this same accident, that that was the position of the " Austin van before the collision. It was the position after- " wards, and it is not very reliable evidence of the course which " the van was taking down this road prior to the collision having " happened."

The witness, Mabbitt, to whom I have referred, saw the lights of the Austin van in the distance and suggested at first that he had noticed the lights of the van turn to the off-side before the accident. He later agreed, and both judges took the view, that the observed movement of the lights must have been at the time of and in consequence of the collision.

It is, of course, possible that a plaintiff injured by negligence may fail because he is unable to establish whether the negligence was " A's " or " B's." If his difficulties are due to any failure of " A " or " B " or both to call available evidence, adverse inferences may be drawn. Here all available evidence was called, and the question, as it seems to me, is one of probable inference from the facts as established. It seems plain that there must have been negligence. If the natural inference was that the accident was due to negligence on the part of one or other of the drivers but not to both I would have thought that the plaintiff would fail.

Sellers J., as I have said, came to the conclusion that both were to blame. He said: " In those circumstances the question " arises as to what is the position on liability. It seems to me

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"that, on those meagre facts, on a straight road, two vehicles "descending hills in opposite directions and meeting at the "bottom, the inference is that they were both to blame because, "in the absence of any other evidence that anything ill befell "either vehicle or driver, it would appear that they were both "committing almost the same negligent acts, failing to keep a "proper look out, failing to drive their respective vehicles on the "correct side of the road so that they would each pass the other "in safety. It seems to me that they were both hugging the "centre of the road and failing to give way to the other. In "those circumstances I would hold, and I do hold, that the "responsibility for this accident lies with the drivers of both "vehicles equally, they both having, by proper inference, com-"mitted the same negligent acts of driving."

I agree, and I think that the inference is supported by the fact to which the judge referred earlier—that there were no brake-marks. I therefore would dismiss the appeal in the case that was tried before Sellers J. and allow the appeal in the case that was tried by Ormerod J. to the extent of 50 per cent. of the damage.

DENNING L.J. It is pertinent to ask, what would have been the position if there had been a passenger in the back of one of the vehicles who was injured in the collision? He could have brought an action against both vehicles. On proof of the collision in the centre of the road, the natural inference would be that one or other or both were to blame. If there was no other evidence given in the case, because both drivers were killed, would the court, simply because it could not say whether it was only one vehicle that was to blame or both of them, refuse to give the passenger any compensation? The practice of the courts is to the contrary. Every day, proof of the collision is held to be sufficient to call on the two defendants for an answer. Never do they both escape liability. One or other is held to blame, and sometimes both. If each of the drivers were alive and neither chose to give evidence, the court would unhesitatingly hold that both were to blame. They would not escape simply because the court had nothing by which to draw any distinction between them. So, also, if they are both dead and cannot give evidence, the result must be the same. In the absence of any evidence enabling the court to draw a distinction between them, they must be held both to blame, and equally to blame.

Now take this case where there is no passenger, but both drivers are killed. The natural inference, again, is that one or other was, or both were, to blame. The court will not wash its hands of the case simply because it cannot say whether it was only one vehicle which was to blame or both. In the absence of any evidence enabling the court to draw a distinction between them, it should hold them both to blame, and equally to blame.

It is very different from a case where one or other only is to blame, but clearly not both. Then the judge ought to make up his mind between them, as this court said recently in *Bray* v. *Palmer*.[1] But when both may be to blame, the judge is under no such compulsion and can cast the blame equally on each.

So much seems so clear on principle that it is unnecessary to go further; but I would like to say that the evidence to my mind makes it much more likely that both were to blame than that one only was to blame. It shows that each driver kept his course, with his off-side wheels on or over the centre line of the road. There was room for each of them to pull in to his near-side of the road, but neither did so. There was not the slightest trace of any avoiding action taken by either—no brake marks; no swerve; no hooter; nothing. Assume that one of the vehicles was over the centre line a few inches, and thus to blame, why did not the other one pull in more to its near side? The absence of any avoiding action makes that vehicle also to blame. And once both are to blame, and there are no means of distinguishing between them, then the blame should be cast equally on each.

I find myself, therefore, in agreement with Sellers J. I think that Ormerod J. fell into error when he thought that the plaintiff, in order to succeed, had to prove that the other vehicle was over the white line. That might have been the case before 1945; but not so now. It is sufficient for the plaintiff to show that, assuming that her husband was at fault, nevertheless the defendant should have taken avoiding action. I confess that I am glad to come to this conclusion, because it would have been a discredit to the law for it to have given inconsistent findings on the same accident.

I agree with the order proposed by my Lord.

ROMER L.J. I agree. It appears to me that Ormerod J.'s findings of fact in Baker's case did not differ in any relevant respect from Sellers J.'s findings in Wallace's case; the difference, which it is for us to resolve, lay in the conclusions from those facts at which each of the judges respectively arrived.

Ormerod J. said that although there was plenty of room for the van and the lorry "to pass one another on the road, the road "being 21 feet wide and a perfectly straight road, these two "vehicles came into collision and came into collision somewhere "about the middle of the road." Sellers J. said that it was clearly established that "these vehicles came together with the "off-side of one vehicle against the off-side of the other in the "centre of the roadway," and added that the two vehicles overlapped by some two or three feet at least in what must have been practically a straight head-on collision. Both judges rejected the suggestion that the smash was occasioned by a last minute deviation by the van driver to his off-side; and both were in agreement

[1] [1953] 1 W.L.R. 1455.

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that the fact that, after the accident, the off-side front wheel of the van was found to be about two feet over the cats' eyes did not establish that it was in that position immediately before the collision. Sellers J. said that he saw no reason to infer any mechanical fault or defect in either of the vehicles, or that any physical mischance had befallen either of the drivers, and Ormerod J. expressed no view contrary to that. It was not suggested at the hearing of either action that any skid marks were visible on the road or that any other signs were apparent indicative of sudden evasive action by either driver. The accident occurred in darkness, and the evidence disclosed that the lorry had only one headlamp on, namely, the near-side light, which was dipped, and that the van was using both its headlamps, each of which was dipped. Both vehicles were also using their side lights.

On those facts Ormerod J. came to the conclusion that there was no such inference of negligence on the part of the van driver as to enable him to say that the lorry driver's widow had proved her case; whereas, Sellers J. held that the facts gave rise to the inference that both the drivers were negligent in failing to keep a proper look-out, and that both were therefore equally to blame for the accident which resulted therefrom.

I feel some sympathy with the view of Ormerod J. Mrs. Baker's action could not succeed unless she established negligence on the part of the van driver. If the facts which were proved rendered it uncertain how the accident happened, so that it might have been brought about either by the negligence of the lorry driver alone or without negligence on the part of either driver, then Mrs. Baker could not be said to have discharged the onus which lay upon her. In these circumstances I can, as I say, appreciate Ormerod J.'s view that the cause of the accident is so speculative, on the meagre facts available, that either of the alternative elements to which I have referred may have, in fact, existed, and that the plaintiff had therefore failed to prove her case.

I have, however, for two reasons, come to the conclusion that the decision of Sellers J. is to be preferred. First, I think that Ormerod J. was in error in saying that Mrs. Baker could not succeed unless she established that a part of the van was on the wrong side of the cats' eyes at the time when the accident occurred. This would have been true if it had been necessary for the plaintiff to show that the van driver was wholly to blame, but this onus never in fact lay upon her. The result of the test which the judge applied was to impose upon the plaintiff a heavier burden than the law, as it now stands, required her to discharge; for Mrs. Baker was entitled to succeed even on the footing that her husband was himself in part to blame, and it may well be that Ormerod J. would have arrived at a different conclusion if he had dealt with the case on that basis. Secondly, I agree with Sellers J. that the reasonable and probable inference to draw from the

facts as found by both the judges is that both of the drivers were at fault.

How, precisely, this unfortunate accident came about can never be known for certainty. I think, myself, that there is much to be said for the theory suggested by Mr. Beney, namely, that each driver was concentrating on his near-side and assumed, wrongly as it turned out, that his off-side was within the central cats' eyes, without looking also to the other approaching vehicle. If so, the absence of skid marks or other signs of emergency action is understandable. Whether, however, that be the true explanation or not, the fact is that at the moment of impact the off-side of each of these vehicles was in simultaneous occupation of a strip two feet to three feet wide in or about the centre of a straight road; and it seems to me that this overlapping of position is irreconcilable with the view that either driver was performing his obvious duty of keeping a proper look-out for the other. It follows that both of the drivers were to blame for the resulting accident, and I agree that in the absence of any guide (and there is none) which would lead to some other conclusion the blame should be apportioned equally.

In my opinion, accordingly, each of these appeals should be dealt with so as to give effect to the decision of Sellers J.

*Appeal in Baker's case allowed and new trial ordered as to damages. Appeal in Wallace's case dismissed.*

Solicitors: *Gregory, Rowcliffe & Co., for A. Denham Foxon, Leicester; Reid, Sharman & Co., for Toller, Son & Hales, Kettering; Hewitt, Whoollacott & Chown.*

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[QUEEN'S BENCH DIVISION.]

## * PRACTICE DIRECTION (SETTLEMENTS ON ASSIZE).



*Practice—Assizes—Settlement of action before it comes into day's list—Party under disability—Procedure.*

"The Practice Direction dated April 21, 1947, set out in the "Annual Practice as a note to Ord. 36, r. 22B, dealing with the "settlement of actions before they come into the day's list at "assizes applies to cases in which either party is under a disability "provided that a master or district registrar has approved the "settlement.

"GODDARD C.J."

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[QUEEN'S BENCH DIVISION.]

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*Dec. 4.*

Lord Goddard C.J., Sellers and Barry JJ.

## * *Ex parte* HOW.

*Justices—Practice—Clerk—Retirement with justices when no question of law raised—Certiorari refused.*

The court will not always quash a conviction when their direction to justices [Practice Note, ante, p. 1416] has not been followed and a clerk has improperly retired with justices. If justices disregard that direction it should be the ground of a complaint to the Lord Chancellor against the justices.

APPLICATION for leave to apply for an order of certiorari.

The applicant, Alfred James How, sought leave to apply for an order of certiorari on the ground that his conviction by justices was bad since, although no point of law was raised, the justices' clerk had accompanied the justices when they retired to consider their verdict.

The applicant's affidavit showed that on September 18, 1953, he pleaded not guilty before Dartford justices to a charge of driving a trolley bus without reasonable consideration for other road users, contrary to section 12 (1) of the Road Traffic Act, 1930. It was alleged in the affidavit that, after the evidence had been heard, the chairman of the justices leaned towards his clerk and said, "Dismissed," and the clerk spoke to the chairman in an inaudible voice; that the justices then retired to consider their verdict, and the clerk left the court and retired with them; that on returning to court the justices convicted the applicant and fined him £2 and ordered him to pay £4 4s. 11d. costs; and that the clerk had been with them throughout the whole of their retirement, which had lasted about five minutes, although he was not called to retire with them and no question of law was raised.

*Gerald Owen* for the applicant.

LORD GODDARD C.J. This is not a case in which the court will give leave. It should be understood that the court will not always quash convictions merely because justices have not followed the recent direction [1] which the court has given, since that does not necessarily go to the merits of the case at all. I am not suggesting that the justices in this case did not follow that direction; and in any case this hearing took place before it was given. If justices were to disregard the direction given by this court, that would be a ground of complaint against them to the Lord Chancellor, who would inquire into the matter and deal with it properly. It is not to be thought that every defendant who has been convicted when the clerk has retired

[1] Ante, p. 1416.

with the justices can come to this court and get the conviction quashed. We do not think in this case that the justices departed from the practice which, no doubt, they have always carried out till the recent decision of this court, and we do not think that this is a case for certiorari. Leave to apply for an order of certiorari will be refused.

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How, *Ex parte.*
Lord Goddard C.J.

SELLERS J. I agree.

BARRY J. I agree.

*Application refused.*

Solicitors: *Geoffrey B. Gush & Co.*

S. C.

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[QUEEN'S BENCH DIVISION.]

## * SMEATON HANSCOMB & CO. LD. *v.* SASSOON I. SETTY, SON & CO. (No. 2)

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*Nov.* 30; *Dec.* 1.
Devlin J.

*Arbitration—Costs—Discretion of arbitrator—Successful party normally entitled—Costs awarded to one party whatever result of appeal—Whether judicial exercise of discretion—Desirability of giving reasons for departing from usual order as to costs—Arbitration Act,* 1950 (14 *Geo.* 6, *c.* 27), *s.* 18.

An arbitrator made an award in favour of buyers in the form of a special case setting out questions of law for the opinion of the court and awarded that "However the court answers the . . . "questions . . . each party shall bear their own costs of the arbitra- "tion and . . . the sellers shall pay the cost of this my award. . . ." No reasons for the arbitrator's order as to costs were set out in the award. The court decided a question of law which was conclusive of the case in favour of the sellers. On a motion by the sellers for an order that that part of the award relating to the costs of the award itself be set aside:—

*Held,* that an arbitrator's discretion as to costs must be exercised judicially, and that there could be no distinction in principle between the costs of the reference and the costs of the award. Since a successful party was prima facie entitled to his costs the phraseology of the award in the present case showed that the arbitrator had not applied his mind judicially to the question of costs because it showed that he had excluded from his mind the result of the case which was one of the most important elements which ought to affect his discretion.

*Lloyd Del Pacifico* v. *Board of Trade* (1930) 46 T.L.R. 476 and *Stotesbury* v. *Turner* [1943] 1 K.B. 370 applied.

*Quaere,* whether *Foster* v. *Great Western Railway Co.* (1882) 8 Q.B.D. 515 is still good law.

Where an arbitrator wishes to depart from the usual order that costs follow the event, and makes an award in the form of a special case, it would be proper and convenient for him to set out in the case the grounds which caused him to depart from the usual order.

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SMEATON HANSCOMB & CO. LD. v. SASSOON I. SETTY, SON & CO. (No. 2).

MOTION.

The arbitrator in a dispute between sellers and buyers under a contract for the sale of mahogany logs awarded substantially in favour of the buyers who alleged short measure. The arbitrator, having set out his award in the form of a special case stating three questions of law for the opinion of the court, awarded: "However the court answers the three questions . . . "I award and direct that each party shall bear their own costs of "the arbitration and that the sellers shall pay the cost of this "my award which I assess at £75 17s." No reasons for the arbitrator's order as to costs were set out in the award.

Devlin J.[1] answered the first question of law "whether . . . "the claimants [buyers] are entitled to maintain any claim "against respondents [sellers]" in the negative and the other questions of law did not arise.

The sellers moved for an order that the award be set aside in so far as it ordered that they should pay the costs of the award however the court should answer the questions of law, on the grounds that the arbitrator did not in law have jurisdiction to order that they should pay the costs of the award if the court decided the questions of law in their favour, alternatively, that the arbitrator could not have exercised his discretion as to the costs of the award judicially in making that part of the award.

The motion was confined to that part of the award which concerned the costs of the award itself and no complaint was made as to the award that each party should bear their own costs of the arbitration.

*Adrian Hamilton* for the sellers.
*J. P. Widgery* for the buyers.

The following cases were referred to in argument: *Donald Campbell & Co. Ld.* v. *Pollak*[2]; *Foster* v. *Great Western Railway Co.*[3]; *Gray* v. *Ashburton*[4]; *Stotesbury* v. *Turner*[5]; *Lloyd Del Pacifico* v. *Board of Trade*[6]; *In re Stringer & Riley Brothers.*[7]

DEVLIN J. stated the facts as set out above and continued: The arbitrator's power to award costs is now governed by section 18 of the Arbitration Act, 1950, which provides: "(1) Unless "a contrary intention is expressed therein, every arbitration "agreement shall be deemed to include a provision that the "costs of the reference and award shall be in the discretion "of the arbitrator or umpire." It seems at first sight a little odd to find that one of the grounds of the motion is a complaint that the arbitrator had no jurisdiction, since the Act appears in

[1] Ante, p. 1468.
[2] [1927] A.C. 732; 43 T.L.R. 495, 787.
[3] (1882) 8 Q.B.D. 515.
[4] [1917] A.C. 26.
[5] [1943] 1 K.B. 370.
[6] (1930) 46 T.L.R. 476.
[7] [1901] 1 K.B. 105.

terms to confer discretion upon him. The basis of that submission is to be found in *Foster* v. *Great Western Railway Co.*[1] The Court of Appeal was there considering a section of a different Act,[2] but one in similar terms to section 18, which I have to consider. The reasoning of the court, if I may seek to paraphrase it, was that a section of this sort which leaves costs to the discretion of the arbitrator must be considered as giving the arbitrator no more than the sort of discretion that is enjoyed by a judge of the High Court: that is, a discretion which has to be exercised upon judicial principles. If, therefore, the arbitrator exercises a wider discretion and gives costs on grounds which cannot be supported on principle, then he is exceeding his jurisdiction. It is a matter, therefore, of the construction of the section whether it is to be given its wide apparent meaning or some limited meaning in relation to the practice of the High Court.

The principle that was thus laid down in *Foster* v. *Great Western Railway Co.*[3] was very strongly criticized by the House of Lords in *Gray* v. *Ashburton.*[4] If I may respectfully say so, I feel, quite apart from the authority of what was said in their Lordships' House, that there is very great force in the criticisms that were there made. The decision in *Foster* v. *Great Western Railway Co.*[5] is, however, a decision of the Court of Appeal, and Wright J. in *Lloyd Del Pacifico* v. *Board of Trade* [6] felt that on the whole he was not justified in treating *Foster* v. *Great Western Railway Co.*[7] as having been overruled. In view of that dictum it would be difficult for me to treat *Foster* v. *Great Western Railway Co.*[7] as having been overruled, but I cannot feel that any decision that was based upon it now would be a very satisfactory one, and, therefore, I prefer to proceed upon the second ground that is alleged in the motion.

In *Lloyd Del Pacifico* v. *Board of Trade,*[8] Wright J. laid it down as a principle that an arbitrator's discretion as to costs must be exercised judicially; he set aside the part of the award in that case which dealt with costs on the ground that the umpire had not exercised his discretion judicially, and that principle was followed by Atkinson J. in *Stotesbury* v. *Turner.*[9] The principle is stated in Russell on Arbitration, 15th ed., p. 233, in the following terms: "The discretion must be exercised judicially, "and it will be reviewed by the court to the same extent as a "judge's order as to costs will be reviewed upon an appeal." Mr. Widgery has not disputed that principle, but he does dispute its application in this case, mainly, I think, upon two grounds. The first is that he distinguishes between the costs of the arbitration or the reference and the costs of the award. He concedes

[1] (1882) 8 Q.B.D. 515.
[2] Regulation of Railways Act, 1873, s. 28.
[3] 8 Q.B.D. 515.
[4] [1917] A.C. 26.
[5] 8 Q.B.D. 515.
[6] 46 T.L.R. 476, 477.
[7] 8 Q.B.D. 515.
[8] 46 T.L.R. 476.
[9] [1943] 1 K.B. 370.

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that if a successful defendant is made to pay a part of the unsuccessful plaintiff's costs it is not prima facie (unless there are some exceptional grounds) a judicial exercise of his discretion, but he says that that principle does not apply to the costs of the award, which stand upon a different footing. I do not feel able to draw any distinction in principle between the costs of the award and the costs of the reference. I think that the costs of the award are usually kept separate as a mere matter of convenience, because the parties have to pay the arbitrator directly and the practice is now universal that the award is not handed over except to a party who takes it up and tenders the necessary payment of the arbitrator's costs. It is, therefore, convenient that the costs of the award shall be set out separately and mentioned in the award, but in principle I think that they are just as much costs in the arbitration as the court fees are costs in the action. I see, therefore, no ground for drawing any distinction there.

The second ground upon which Mr. Widgery relies is that there is not to be found in the case anything which shows that the arbitrator has proceeded upon a wrong principle in the exercise of his discretion. In the two cases to which I have referred, *Lloyd Del Pacifico* v. *Board of Trade* [10] and *Stotesbury* v. *Turner*,[11] there were grounds given by the arbitrator for the course which he had taken—grounds which the two judges thought to be inadequate. Here, Mr. Widgery argues, there is no reason given and therefore there is no material upon which this court can interfere with the way in which the arbitrator exercised his discretion. I have come to the conclusion on the whole that there is such material and that that material does show that the arbitrator did not exercise his discretion judicially. The phraseology of his award as to costs—" However the court answers the " three questions or any of them, I award and direct that each " party shall bear their own costs and the sellers shall pay the " costs of this my award "—appears to me to show that the arbitrator is not directing his mind to one of the most, if not the most, important of the elements which ought to affect his discretion, namely the result of the case. Prima facie, a successful party is entitled to his costs. To deprive him of his costs or to require him to pay a part of the costs of the other side is an exceptional measure, and if an arbitrator says that no matter what the result is going to be he will make a certain order as to costs which is the same in each case, that shows sufficiently that in arriving at his order he is excluding from his mind what ought to be the most important consideration affecting it. The fact also, as Mr. Hamilton points out, that he has ordered that each side should pay its own costs of the reference shows that he has not anything in mind which would cause him to feel that one party had committed some act of misconduct, or anything of that sort, which ought to affect the usual order that

[10] 46 T.L.R. 476.

[11] [1943] 1 K.B. 370.

costs follow the event. Even if the claimants had wholly succeeded they would still have had to bear their own costs of the reference. These considerations seem to me to be sufficient to show that the arbitrator has not applied his mind judicially to the question of costs.

I hope that it will not be thought that in saying that I mean to make the least reflection upon the conduct of the arbitration or of the arbitrator. It is very difficult for a lay arbitrator to know exactly what are the principles regarding costs which he ought to apply unless he is informed upon them (and I do not know whether this lay arbitrator was or was not). A lay arbitrator ought to bear in mind that there are certain principles as to costs which have been worked out by the court; if for any reason he thinks it desirable to depart from the usual order that costs follow the event, he ought to know that there are such principles so that he may invoke the assistance of those who appear before him, their counsel or solicitors, regarding what the principles are, and in the light of them make up his mind about what he is going to do. I think, also, that it would be very proper and indeed convenient that any arbitrator who is making an award in the form of a special case and who is departing from the usual order that costs follow the event, should set out in the case the grounds which have caused him to depart from the usual order. That will enable the court which is reviewing his decision to be fully informed on the matter which has influenced him, and it will not have to speculate from the nature of the case itself. Normally the court is not concerned with the arbitrator's discretion at all or how he exercises it, but only with questions of law. This jurisdiction, which the court, on the decision of Wright J., has taken upon itself, whereby the court reviews the arbitrator's discretion as to costs, is plainly an exceptional jurisdiction and calls for the exceptional measure of the arbitrator stating in the case the reasons which have led him to his conclusion as to costs. That is what a judge would normally do, and as the jurisdiction of this court is the same as that of a court of appeal over a judge in the matter of costs it is convenient that this court should be informed in the same way as the Court of Appeal would normally be.

Difficulties, I think, might also arise over the consequences of the conclusion at which I have arrived. There is no doubt that on the authority of the cases the proper course is to set aside that part of the award which is successfully complained of, and that I do in response to the motion which is before me. What the results of that would be in the ordinary case I do not know, but the parties here very sensibly agreed (as it is not a very large sum involved) that rather than spend a great deal more in going back to the arbitrator and possibly coming back to this court again, I should put myself in the position of a tribunal which has power to award costs and that I should determine the matter accordingly. I therefore determine that the buyers shall

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pay the costs of the award. I think that there are no grounds shown in the case—the only material which I have and upon which it is agreed that I may act—for departing from the usual rule, and indeed I think that the buyers can consider themselves rather fortunate if they have not got to pay the sellers' costs of the arbitration.

My order is that the part of the award which is complained of shall be set aside and that the buyers shall pay to the sellers the sum of £75 17s. The position is that the buyers originally took up the award and paid the arbitrator his fees, but the sellers desired to set it down and could only get it from the buyers upon paying to them the amount of the fees. The result is that the sellers are out of pocket, and accordingly the order should go for payment in the way that I have made it.

*Judgment for sellers.*

Solicitors: *Parker, Garrett & Co.; William A. Crump & Son.*

J. F. L.

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[Queen's Bench Division.]

1953
*Dec. 2.*

Lord Goddard C.J.

## * LEWIS *v.* HAVERFORDWEST RURAL DISTRICT COUNCIL.

*Arbitration—Costs—Discretion of arbitrator—Successful party normally entitled — Order for each party to pay own costs — Discretion — Whether judicially exercised.*

In the absence of special circumstances, the successful party to an arbitration is entitled to receive its costs.

*Donald Campbell & Co. Ld.* v. *Pollak* [1927] A.C. 732, 809; 43 T.L.R. 495 applied.

Special case stated by an arbitrator.

The applicant, David John Lewis, was the tenant and occupier of a small holding known as "Felin Isaf," St. Davids, Haverfordwest. In November, 1948, the respondent council, in exercise of their powers under Part II of the Public Health Act, 1936, entered on the applicant's property for the purpose of constructing an outfall sewer. The work was completed in November or December, 1949, and, the council having made no offer of compensation in respect of any damage suffered by the applicant, on June 8, 1953, the question as to compensation was referred to arbitration pursuant to section 278 of the Act of 1936. The arbitrator made an award assessing the compensation payable to the applicant at £156 2s. 6d. He awarded further that each party should bear its own costs incidental to the arbitration.

The applicant moved for an order that the award in so far as it related to costs be set aside, and that the council should pay the applicant's costs.

*J. D. May*, for the applicant.
*J. Cook Rogers* for the council.

The cases referred to in argument appear in the judgment.

LORD GODDARD C.J. stated the facts and continued: It is a curious circumstance—and one experiences it time and time again—that lay arbitrators always seem to think that parties should pay their own costs. Perhaps the present case and *Smeaton Hanscomb & Co. Ld.* v. *Sassoon I. Setty, Son & Co. (No. 2)* [1] before Devlin J. may be of some use as emphasizing to lay arbitrators that it has been laid down by the House of Lords in *Donald Campbell & Co.* v. *Pollak*,[2] reaffirming the Court of Appeal in *Ritter* v. *Godfrey*,[3] that there is a settled practice of the courts that in the absence of special circumstances a successful litigant should receive his costs and that it is necessary to show some grounds for exercising the discretion of refusing an order which would give them to him, and the discretion must be judicially exercised. Those words "judicially exercised" are always somewhat difficult to apply, but they mean that the arbitrator must not act capriciously and must, if he is going to exercise his discretion, show a reason connected with the case and one which the court can see is a proper reason.

In the present case the arbitrator, when asked why he made this order as to costs, answered: "I had several reasons for "awarding that each party should bear its own costs, and one "of those was that I had no evidence that during the long time "between the event and the date of the arbitration any serious "effort had been made by either party to settle the question." The question had to be settled at some time. Why, therefore, if the council did not take steps to settle or to make a tender, are they to be in a better position than they might otherwise have been? They made no effort to settle and the applicant, having now brought proceedings, is entitled to recover the compensation which the statute gives him the right to receive and which the council had apparently made no effort to pay. I do not think that it is a "judicial exercise" of discretion to say that "because neither party did anything, therefore I am not going "to award the successful party the costs." That seems to me to be going against what was said in *Donald Campbell & Co.* v. *Pollak*,[4] namely that it is the settled practice of the court that "in the absence of special circumstances a successful litigant "should receive his costs." I cannot find that that is a special

[1] Ante, p. 1481.
[2] [1927] A.C. 732, 809.
[3] [1920] 2 K.B. 47.
[4] [1927] A.C. 732, 809.

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circumstance, and therefore, I think the arbitrator was wrong in not awarding the successful applicant his costs.

Of course, in a matter of this sort, making an offer would be regarded in the same way as a payment into court, and if the council had made an offer of a sum round about that which the applicant recovered, or even more, that would have been an excellent reason for the arbitrator refusing to give him any costs. It might even be a reason for saying that the applicant should pay the council's costs; but I do not think there is any reason here for depriving the applicant of his costs when neither party did anything except allow the matter to go on for rather a long time.

The parties have sensibly agreed that I should deal with the costs. Therefore I make an order setting aside that part of the award which deals with costs and, by consent, I order that the applicant's costs of the arbitration be taxed and paid by the respondent council and that the applicant must have the costs of this motion.

*Judgment for applicant.*

Solicitors: *John L. Rendall; Denton, Hall & Burgin for Philipps, Williams & Co., Haverfordwest.*

J. D. P.

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[CHANCERY DIVISION.]

1953
*Oct.* 20, 21, 22, 23; *Nov.* 3, 4, 5, 6, 11, 25.

Danckwerts J.

* *In re* HOLT, DECD.

HOLT *v.* INLAND REVENUE COMMISSIONERS.

*Revenue—Estate Duty—Shares in private company—Valuation—Not a controlling interest — Hazardous trade — Dividends restricted — Finance Act*, 1894 (57 & 58 *Vict.* c. 30), *s.* 7 (5).

Estate Duty became payable under section 2 (1) (*c*) of the Finance Act, 1894, on 43,698 £1 ordinary shares in a private company, the subject of a voluntary settlement, on the death of the settlor on March 11, 1948, on which date the shares fell to be valued. The shares did not constitute a controlling interest in the company, and there were restrictions under the articles on the transfer of the shares to persons approved by the directors. The rest of the shares were held by the settlor's family or on family trusts. There was no Stock Exchange quotation for the shares.

The company was incorporated in 1897 and carried on the business of trading in West Africa, carrying goods to and from West Africa in its own ships. The company's practice had, since 1921, been to limit the dividend on the ordinary shares to 5 per cent. in order to build up its reserves, and to accumulate surplus profits in good years. In the Second World War, when trading profits greatly increased, the company was unable to pursue that policy to the same extent as in the War of 1914–18, owing to the heavy taxation.

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The commissioners determined the value of the shares for the purpose of estate duty at 34s. per share; at the hearing they were prepared to accept 25s. The trustees of the settlement contended that the value of the shares was 17s. 2d.

The evidence was that in 1948 two of the company's five ships needed replacing, and the company had an overdraft of nearly £1,000,000; there was no likelihood of an increased dividend on the ordinary shares, and no plan for an issue of ordinary shares to the public. The company carried a large stock and would be adversely affected by a fall in prices, which was expected in 1948. The witnesses for the trustees valued the shares between 12s. and 17s. a share.

The witnesses for the commissioners considered that the company was in a very sound position, and that it was bound in the near future to increase its dividend of 5 per cent., and to issue ordinary shares to the public. The valuation of the shares by these witnesses was between 25s. and 30s.:—

*Held*, that the shares ought to be valued at 19s., taking into account the following consideration:

(1) that, in accordance with *Inland Revenue Commissioners* v. *Crossman* [1937] A.C. 26; 51 T.L.R. 415; [1936] 1 All E.R. 762, in estimating the value of shares in a private company for estate duty, regard should not be had to the facts that a shareholder might by the articles be compelled to sell his shares at a fair value ascertained in accordance with the articles, and that the directors had power to refuse to register a transfer, although it had to be assumed that once on the register the purchaser would be bound by the articles;

(2) that under section 7 (5) of the Finance Act, 1894, and on the authorities, the value of the shares for estate duty purposes should be that which a hypothetical purchaser would pay on a hypothetical sale in the open market at the date of the death, but without the knowledge of after events;

(3) that the evidence given for the commissioners over-estimated the future prospects of an increased dividend and a public issue of ordinary shares, and had ignored the fluctuating nature of West African trade, and the difficulty in building up reserves; but that the witnesses for the trustees had slightly undervalued the possibility of an increased dividend or an issue to the public of ordinary shares;

(4) that the investor, who would be likely to purchase shares of this class, would not be the ordinary purchaser of shares on the Stock Exchange, but a person who would have some special reason for such a transaction, who would not rush heavily into the transaction, but would seek the fullest possible information on past history, the particular trade of the company and the future prospects, and would take into consideration the larger profits of the 1914–18 period, the heavy losses thereafter, and the general level of the inter-war profits.

PETITION.

The trustees of a settlement appealed under section 10 of the Finance Act, 1894, against the decision of the Inland Revenue Commissioners as to the value for the purposes of estate duty of 43,698 £1 ordinary shares in the capital of John Holt & Co. (Liverpool) Ld., a private company at the material time.

The shares had been settled by a voluntary settlement dated January 7, 1947, made by Robert Longstaff Holt, who died on March 11, 1948, estate duty becoming payable under section 2

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(1) (*c*) of the Finance Act, 1894, on his death on the principal value of the shares. The settlement also included a number of preference shares of £1 each, but their value for the purposes of estate duty had been agreed at 21s. 0d. per share. At the date of the settlement and the date of the death of Robert Longstaff Holt, the capital of the company was £1,150,000 divided into 150,000 preference shares and 1,000,000 ordinary shares of £1 each, of which 139,140 preference shares and 697,680 ordinary shares had been issued, the 43,698 ordinary shares included in the settlement thus constituted a minority holding.

The articles of the company contained restrictions on the transfer of shares, the essential features being that unfettered transfer to non-members was prohibited as long as a member or person approved by the directors was willing to purchase the shares at the fair value to be certified (in the case of difference) by the company's auditor in accordance with article 26 of the company's articles of association. By article 31 the directors were given a general power to refuse to register a transfer.

The company was incorporated on March 25, 1897, to take over the business of trading in West Africa started in 1867 by one John Holt, with the assistance of two younger brothers. The company also owned ships—this side of the business was started in 1869 with a 65-ton schooner, and in the relevant period the company owned five cargo ships which also had accommodation for some passengers. The company was during the material period a private company, and all the shares were held by members of the Holt family or held on Holt family trusts; and the family were anxious to retain control of the company and the ordinary shares. The company, however, became a public company on September 15, 1950, in connexion with an issue to the public of 650,000 5 per cent. First Cumulative Redeemable Preference shares of £1 each.

The company owned a number of trading stores in West Africa and the business consisted of purchasing and carrying to West Africa goods for sale there, and purchasing and reselling the products of West Africa, the goods being carried in both directions in the ships owned by the company. The company's results fluctuated considerably, because of the variations in price of the commodities in which it dealt, and because the West African trade was described as a particularly hazardous trade. The company maintained a settled policy of "making provision "in the good years for the bad ones which must inevitably follow "sooner or later." Since 1921 the practice of the company had been to limit distributions on the ordinary shares to 5 per cent. less tax and to build up its reserves by accumulating surplus profits in good years.

In 1914 there was a loss of £132,993, but in the years 1915 to 1919 (inclusive) very large profits were made, rising in 1919 to £797,437. In the years 1920 to 1923, however, during the post-war slump, severe losses were incurred, for example,

£597,768 in 1921. The company was able to tide over this period by means of the reserves accumulated during the profitable war years, there not being then the same taxation as during the Second World War. In the years between the two wars, except for a loss of £134,593 in 1931, a profit, averaging not more than £45,000 a year, was made until 1937 and 1938, which were very successful years. Very large profits were again made during the years of the Second World War, but the policy of making provision by means of reserves for a post-war slump was severely handicapped by the heavy taxation of "excess profits." Although the profits reached £762,285 in 1943, and similar figures in the other years of the war, comparatively small sums were available for dividends and reserves, after provision for taxation. There was some relief from taxation in 1946. The profit in 1946 amounted to £681,745, and in the year ending September 30, 1947, the profits reached £1,011,928. When the deceased died on March 11, 1948, the accounts for that last year had not been finally completed, but it could be assumed that information as to the approximate results of that year's trading would have been ascertained by a prospective purchaser.

A dividend of 5 per cent. on the ordinary shares (which had not been exceeded in the years in question) required some £22,000, so that the company's earnings during the years immediately preceding 1948 would have been sufficient to allow a much larger distribution to the shareholders, if large sums had not been set aside for other purposes, such as reserves, including the cost of new ships. At this date two of the five ships owned by the company needed replacement. The company had in 1947 an overdraft at the bank of nearly £1,000,000. It was common ground that the company was overtrading, and that the large figures for profits in the years 1946 and 1947 reflected the contemporary inflation.

The original value for the ordinary shares claimed by the Commissioners of Inland Revenue was £3 per share, but the value formally determined by them was 34s. 0d. per share and they now claimed 25s. 0d. per share. The figures given on behalf of the petitioners started at 11s. 3d., as the fair value stated by the company, and rose to 17s. 2d. per share put forward in the petition and at the hearing.

On previous deaths in the family, the value of the shares had been agreed at 17s. 6d. per share in 1943, and at 20s. 0d. per share in 1945 and in 1946.

There was no quotation at the material time for any of the company's shares on the Stock Exchange.

Under section 7 (5) of the Finance Act, 1894, the principal value of any property is, for the purposes of estate duty, estimated as "the price which, in the opinion of the Commissioners, such property would fetch if sold in the open market at the time of the death of the deceased. . . ." By section 10 of the Act a right of appeal is given to any person who is

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aggrieved by the amount of any duty claimed by the Commissioners, whether on the ground of the value of any property or otherwise.

*B. J. MacKenna Q.C.*, *L. C. Graham-Dixon Q.C.* and *G. A. Rink* for the petitioners, trustees of the settlement.

*Sir Reginald Manningham-Buller Q.C.*, *Geoffrey Cross Q.C.* and *J. H. Stamp* for the Crown.

Cases cited in argument are set out in the judgment.

*Cur. adv. vult.*

November 25. Danckwerts J., reading his judgment after stating the facts: The principles on which the value of shares in a private company are to be valued for the purpose of estate duty have been settled by the House of Lords in *Inland Revenue Commissioners* v. *Crossman*.[1] The House of Lords decided in that case (by a majority of three to two) that the facts that a shareholder by the articles of a company may be compelled to sell his shares at the "fair value" ascertained in accordance with the articles, and that by the articles the directors may have power to refuse to register a transfer must be ignored, but none the less it must be assumed that a purchaser will be bound by the company's articles once he is upon the register of members. The result is that I must enter into a dim world peopled by the indeterminate spirits of fictitious or unborn sales. It is necessary to assume the prophetic vision of a prospective purchaser at the moment of the death of the deceased, and firmly to reject the wisdom which might be provided by the knowledge of subsequent events. In my task I have had the assistance of a number of experts on each side who differ in their opinions in the manner in which experts normally do, and the frankest of them admitted that certain of his calculations were simply guesswork. It seems to me that their opinions are indeed properly described as guesswork, though, of course, it is intelligent guesswork, aided by the experience which they have gained by their work as stockbrokers or accountants. No possible suggestion can be made against the honesty of these witnesses, but their methods of calculation appear to me to be inevitably uncertain and controversial, and, in my view, statements by several of them that they would have been ready to buy the shares at the price reached by them if they had had the opportunity some five years ago must be discounted accordingly. None the less, I could not have approached my task without their valuable assistance, and my remarks must not be taken to belittle the efforts which have been made by them to provide an answer to a question to which no certain answer is possible.

By the terms of section 7, I have to imagine the price which the property would fetch if sold in the open market. This does

[1] [1937] A.C. 26; 51 T.L.R. 415; [1936] 1 All E.R. 762.

not mean that a sale by auction (which would be improbable in the case of shares in a company) is to be assumed, but simply that a market is to be assumed from which no buyer is excluded: see *Inland Revenue Commissioners* v. *Clay*,[2] *per* Swinfen Eady L.J. At the same time, the court must assume a prudent buyer who would make full inquiries and have access to accounts and other information which would be likely to be available to him: see *Findlay's Trustees* v. *Inland Revenue Commissioners*.[3]

With those principles in mind I approach the history of the company and the evidence of the witnesses in this case.

[His Lordship stated the history of the company substantially as set out above.] The first witness on behalf of the petitioners was Mr. Henry Alexander Benson of the firm of Cooper Brothers & Co., a chartered accountant with a knowledge of conditions in Africa as well as experience in this country. He said that the West African trade had had a very bad reputation in the last thirty or forty years, and referred to the riots following a boycott of European traders which occurred in February, 1948, shortly before the death of the deceased. He also referred to the devaluation of the French Colonial franc which occurred in January, 1948, as another depressing factor. He considered that a purchaser of the company's shares would be interested primarily in the profits made by the company and the dividends likely to be paid in the future. In his view, the war-time and post-war profits represented an artificial prosperity which in no circumstances would continue indefinitely, and he thought that a purchaser would observe the heavy losses suffered by the company after the First World War and would be apprehensive that such a phase might be repeated. Mr. Benson thought that the position in regard to the assets and liabilities of the company in 1946 and 1947 was very vulnerable, having regard to the large amount of the company's assets represented by stocks and the size of the company's overdraft. He said that a ratio of assets to liabilities of two to one was too low for a company of this character. The company's accounts showed the ratio to be 1·73 to 1 in 1946, and 1·55 to 1 in 1947.

Mr. Benson thought that, having regard to the steady dividend policy of the company, a purchaser would count on a dividend at the rate of 5 per cent. not being reduced, but on the other hand, he would not expect it to be increased. He thought that the absence of any quotation of the shares on the Stock Exchange and the restrictions on transfer to which the purchaser would be subject when he got on the register were factors which would make a purchaser require a further 1½ per cent. of income yield in reaching the appropriate price for the shares.

Mr. Benson supported his evidence with various tables, containing the figures relating to various companies whose shares had a quotation on the Stock Exchange, and other figures obtained

[2] [1914] 3 K.B. 466, 475; 30 T.L.R. 573.

[3] (1938) 22 A.T.C. 437.

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from the Actuaries' Investment Index. Such tables are not without value as they provide some possible basis of comparison for the purpose of checking the calculations of a witness, but it is easy to attack them on the ground that the varying circumstances of the companies and the difficulty of applying the prices of quoted shares to the shares of a private company not quoted on the Stock Exchange may render the comparison of little value. On this basis Mr. Benson reached a figure of 15s. 2d. per share, and to this he added the sum of 1s. 6d., making a figure of 16s. 8d. The addition of 1s. 6d. represented Mr. Benson's estimate of the allowance which a purchaser might make in his offer for the possibility sooner or later of the company's shares being offered to the public, with a resulting capital accretion in some way to the shares held by a previous purchaser. Mr. Benson considered that the time for this event would be later rather than sooner, and this was one of the points on which his evidence differed considerably from that of the witnesses for the commissioners, who considered that the issue of shares to the public would be sooner rather than later, and attributed a much greater value to this factor.

Finally, Mr. Benson added a further sixpence to his estimated price as representing the amount of the net dividend likely to be declared in respect of the year 1947. Thus the value which he placed upon the shares was 17s. 2d. a share.

Mr. Benson expressed the view that the prices of ordinary shares tended to follow the price of Consols, and produced a graph which recorded the rise of Consols to a peak in 1946 (when ordinary shares in the company were valued for estate duty at 20s. a share) and a subsequent fall in the price of Consols which, if followed by the company's shares, would bring the price of these to less than 16s. 8d. by March, 1948. Mr. Benson's view was not accepted by the witnesses for the commissioners in this respect.

Mr. John Alphonse Holt is one of the petitioners, and he is a director and, at the present time, the chairman of the company. He had, of course, a complete knowledge of the affairs of the company, and he had lived in West Africa. His description of the company's business was that the company exported from West Africa all the products which West Africa produces so far as possible, and imported into West Africa most of the merchandise which was required by the inhabitants of West Africa. Mr. Holt made it plain that no increase on the dividend of 5 per cent. on the ordinary shares of the company was contemplated by the board of directors in March, 1948. He regarded the financial position of the company at that time as "very unsafe." The liquid condition of the company's assets had not improved since the accounts for 1946 had been published, and the company's overdraft had substantially increased. The stocks carried by the company had increased by 50 per cent. The company were in the position of having to restore practically the whole of their buildings in West Africa, and to replace before long the two of

their five ships which had been built in 1929. But the company had no plans for putting the company's ordinary shares on the market in the foreseeable future.

One question of some importance dealt with by Mr. Holt was how far a prospective purchaser would have been able to obtain information as to the company's position and prospects by inquiry from the directors. Mr. Holt said that all the information which he had given in evidence would not have been given directly to a buyer of a small quantity of shares, but that it would have been made available, in confidence, to a reputable firm of accountants, acting on behalf of a buyer and approved by the board of directors, with the result, as I understood the position, that the information so revealed would not be passed on to the buyer, but his accountant would be in a position to advise him as to the prudence of the purchase and the price which could reasonably be offered for the shares.

Mr. John Holt said that the large profits which the company had been making were frightening because they represented the effect of inflation, and in March, 1948, he thought that the sellers' market was virtually disappearing, and a recession in trade was expected at any moment. In his view, as the company's reserves were in the form of the company's current trading assets, the company was extremely vulnerable.

I take the evidence of Mr. Frank Samuel next, because his evidence had some features in common with that of Mr. Holt. Mr. Samuel is chairman of the United Africa Co., a very much larger company than John Holt & Company, carrying on trade in West Africa, and a subsidiary of Unilever Ld. Mr. Samuel has had long experience of West African trading, and this led him to describe the trading risks in West Africa as immensely greater than in any other part of the world. These risks, he explained, were due to the prosperity of these territories being based on agriculture, and in some cases on some particular kind only, such as the culture of cocoa or ground nuts, so that they were affected by the wide fluctuations in the prices of the products and by growing conditions. In his view the necessity of traders in West Africa carrying heavy stocks at times of high prices represented a tremendous danger because it was only a question of time when a break in prices would come. In 1946, 1947 and 1948 Mr. Samuel expected that a break in prices was imminent, and his opinion was generally shared in the West African trade.

Another adverse factor in his view was the growing tendency in West African countries to try to get trade away from European firms. Mr. Samuel thought that the company might appear to be earning more money while in fact having "a much worse "time" because of the cost of replacing the company's assets and the level of taxation. He was of opinion that a buyer would not expect increased dividends to be paid by the company because of the company's earnings in 1946 and 1947, if he knew anything

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about West African trade. He could not see how the company's shares could be attractive to a surtax payer or other purchaser looking forward to capital accretion.

By comparison with the quoted prices of shares in other companies, Mr. Samuel reached a percentage yield of 4·89, to which he added 1¼ per cent. for weaknesses in the company's position compared with those companies, making a total required yield of 6·14 per cent. To this he thought it was necessary to add a further 2·05 per cent. to compensate for the lack of a quotation and difficulties of transfer, thus producing a yield figure of 8·19 per cent. This was equal to a value of 12s. 2d. ex dividend. Mr. Samuel could not see any real possibility of capital appreciation sufficient to bring into account, and added nothing for this factor.

It was suggested in cross-examination to Mr. Samuel and I think that it is a fair point, that an ordinary buyer would not have all the information on West African conditions which led him to take such a depressing view. Consequently, in my view, Mr. Samuel's estimate of the value of the shares, so far as based on the unattractiveness of the company's ordinary shares to him, must be discounted by this consideration.

Mr. Mark Richard Norman is a partner in Edward de Stein & Co., merchant bankers, who are also managers and advisers to investment trusts. He was provided with copies of the company's balance sheets and accounts, and extracts from the chairman's speeches and from the company's articles. He made inquiries from Mr. Benson (who asked him to make a valuation) and also outside inquiries, but he said that if he had really been faced with the problem of buying these shares he would have made longer inquiries. He was asked at what price he would have been willing to purchase 43,698 ordinary shares of the company on March 11, 1948, and his answer was that the highest price he would have paid was 15s. 0d. per share ex dividend. His view was confirmed by all he had heard since March, 1952, when he was asked to make his valuation. Mr. Norman thought that in March, 1948, it was generally expected that a fall in prices was going to follow the post-war boom, and the reason it did not occur was the outbreak of the Korean War in 1950. In 1948 he would not have expected the dividend to be increased because he did not think that the profits retained by the company after taxation were adequate—by a long way. After looking at the yield of other companies and the Actuaries' Investment Index, Mr. Norman thought that on an expected dividend of 5 per cent. a yield of half as much again—2½ per cent.—would be looked for. This produced a required yield of 7½ per cent. and a price of 13s. 4½d. per share. As this was an awkward figure and he would have been anxious to help if the company had come to his firm in 1948 for help, he increased the price to 15s. 0d., which is equivalent to 6⅔ per cent. yield on a 5 per cent. dividend, and therefore he considered 15s. 0d. per share a

favourable price. He thought 25s. 0d. an absurd price, and would not have paid anything like it.

Mr. Roger Anthony Hornby is a director of Cazenove, Akroyds & Greenwood & Co., an unlimited company carrying on business as stockbrokers, which specializes in the underwriting of new issues of capital, and in fact acted as London brokers to the issuing house of Baring Brothers when the issue of preference shares to the public was made by John Holt & Company in September, 1950. Anticipating that a 5 per cent. dividend was likely to be paid by the company, Mr. Hornby deducted from a price of 20s. 0d., according to the practice of his firm when making valuations, 20 per cent. for the absence of quotation on the Stock Exchange and marketability and for the restrictions on transfer, thus reducing the price to 16s. 0d. cum dividend. Mr. Hornby thought that March 11, 1948, following so closely upon the boycott and riots in West Africa, could not have been a worse time to try to place the company's shares.

Sir Harold Montagu Barton was the first witness called on behalf of the Commissioners of Inland Revenue. He is a very experienced chartered accountant with a long experience of the valuation of shares in public and private companies. Sir Harold Barton agreed that the company was trading in a somewhat dangerous way, but he was not alarmed by the size of the company's overdraft in 1947, nor by the company's liquid assets being very much locked up in debtors and stocks. He considered that in this way the company's assets were profitably invested, and he even said that he regarded an overdraft as a healthy sign. In Sir Harold Barton's opinion the predominant circumstance in arriving at the price for the shares would be the question of dividend yield and prospective dividend yield, and after that the earnings and the relation of the dividends to the earnings. Another factor which Sir Harold Barton took into consideration was the effective management of this old-established business. Sir Harold Barton took the extremely low yield figure of 3 per cent. and on this basis reached a price of 33s. 4d., to which he added eightpence for the dividend expected for the year 1947, making a price of 34s. 0d. Apparently Sir Harold Barton was impressed by the evidence of the petitioners' witnesses, and in particular Mr. Holt's emphasis on the policy of restricting the dividends, to the extent of increasing his yield figure to 4 per cent., producing a price of 25s. 0d.

On the other hand, Sir Harold Barton was inclined to discount the danger of a post-war slump, and he said that everyone had learnt lessons from the experience after the First World War. But when I questioned him as to the steps which business men would take to avoid the difficulties experienced after the First World War, he was only able to suggest a more cautious dividend policy and the keeping of more money in reserve, which seem to be measures tending to reduce the price of the shares as contended by the petitioners. Sir Harold Barton thought that

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Mr. Holt's and Mr. Samuel's expectations of a severe fall in prices unduly pessimistic, and considered that purchasers would not necessarily take a similar view. A great many of Sir Harold Barton's answers seemed to me somewhat vague, and it would appear that he had not examined the position of the company in any great detail. It is not at all clear that Sir Harold Barton considered the effect which the restrictions on transfer of shares contained in the company's articles would have on the purchaser.

Mr. Charles Ian Ritchie Hutton is another experienced chartered accountant. In his view the main factors affecting a prospective purchaser were the rate of dividend which he expected to receive on the shares, the prospects of capital appreciation and the restrictions on transfer. He thought that a purchaser would expect to secure a dividend of not less than 5 per cent. and would expect to receive a larger dividend, but in view of the statements made by the board he might expect to wait a year or so before he had a substantial increase. Mr. Hutton approached the question of capital appreciation on the basis of the strong probability that in the near future the company would have to go to the public for money in one shape or another. He would make some allowance for restrictions on marketability. Mr. Hutton's method was to divide his valuation into two parts—(1) a fixed element representing a dividend of 5 per cent. and (2) a contingent element in which he attempted to give effect to his estimates of contingencies affecting the price of the shares. He reached a price of 18s. 0d. for his fixed element on the basis of a yield figure of just under 4 per cent. from the Actuaries' Investment Index in respect of 5 per cent. preference shares and an addition of 1½ per cent. for restrictions on transfer, thus assuming a 5 per cent. yield. But having regard to the price of 21s. 0d. which had been agreed between the parties for the 6½ per cent. preference shares of the company, he reduced his figure from 18s. 0d. to 16s. 2d. It appeared that this corresponded in his view with the figure of 15s. 8d. reached by Mr. Benson (before he added 1s. 6d. for the contingencies) and 16s. 0d. reached by Mr. Hornby, and consequently, so far, there was very little difference between the respective valuations. But then Mr. Hutton proceeded to assume that the dividend must rise to 10 per cent., and in his calculations the additional 5 per cent. represented a further 16s. 2d. This (contingent) 16s. 2d. Mr. Hutton discounted by 25 per cent. to compensate for delay and uncertainty, and allowing against these contingencies (on the credit side) the prospects of a further issue of shares by the company. It appeared that this deduction of 25 per cent. could not have any mathematical or scientific basis, and was purely guesswork. This reduced the second or contingent 16s. 2d. to 12s. 1d., and made Mr. Hutton's valuation 28s. 3d. He said that in March, 1948, he would have advised a purchaser to buy at that price, and if offered the shares at 25s. 0d. he would have marshalled the resources of his family and friends in order to

purchase. Mr. Hutton discounted the effects of the boycott and riots in West Africa in February, 1948, and the apprehensions for the future expressed by Mr. Holt and Mr. Samuel, and Mr. Hutton actually said that "there are no bad risks in the "Commonwealth these days," which I find a very surprising statement.

Mr. Thomas Austin Hamilton Baynes, another chartered accountant, had made a special study of the valuation of shares in private companies, and had read papers on the subject at meetings in many parts of England. He was a frank and attractive witness. The first thing that Mr. Baynes looked at was the 5 per cent. dividend, and he looked at the profits for a period of ten years up to and including 1947 because that happened to include two pre-war years and two post-war years. He found that the average profits for this period were £524,744. This figure he discounted by 25 per cent. because, as I understood, the very high profits of 1947 were not likely to be maintained, and this gave him a figure of £393,558 which he regarded as approximately twice the pre-war profit. He admitted that the deduction of one quarter from the average of ten years was made for no particular reason, but he was trying to get at some kind of guesswork figure for the future profits. It seems to me, moreover, that the years to which Mr. Baynes confined his average might well produce a misleading result, because the years selected were the war years of exceptionally high profits and the years of post-war inflation; and the two pre-war years, 1937 and 1938, were years of unusually high profits not at all typical of the years between the two wars.

Mr. Baynes thought that the dividend paid by the company was quite unrealistic, having regard to the profits earned, but he thought it very unlikely that the company would remain a private company for long. He reached the conclusion that an investor would require an 8½ per cent. yield. He thought that the company would be likely to distribute a third of their profits with a view to a forthcoming issue of shares to the public. This represented a sum of £131,000 which was subject to the preference dividends of £9,004, leaving a figure of £122,000 and a possible dividend on the ordinary shares of 17½ per cent. This gave Mr. Baynes, on an 8½ per cent. yield, a price of £2 1s. 0d. per share. He thought the type of investor who would be attracted was the surtax payer looking for a capital profit. Apparently he thought that such an investor would be prepared to pay 30s. 9d. in the expectation of a rise to £2 1s. 0d. and a capital accretion of 10s. 3d. or about 33⅓ per cent. on his investment. So he took a price of 30s. 0d., which included the prospective dividend for the year 1947. It is clear that if the figure taken by Mr. Baynes for the average profits of £393,558 was unreasonable for any reason, all his calculations by which he reached his selling price of 30s. 0d. per share would be affected. It appears also that he had not paid any attention to the way in

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which heavy war-time taxation had affected the ability of the company to place money to reserve to meet future capital expenditure and the possibility of a post-war slump. Mr. Baynes made no allowance for the lack of a quotation on the Stock Exchange and restrictions on transfer because he said he had approached the problem of valuation in such a way that these considerations did not really affect the position.

Mr. Henry Samuel Loebel is the senior partner in the firm of Montagu, Loebel, Stanley & Co., stockbrokers, and he had been a member of the Stock Exchange since 1904. Mr. Loebel was very much affected by the personalities of those connected with the management of a company. He said that if he were satisfied with the integrity and ability of the men who ran the company, he would go no further. He appeared to have a touching confidence in the likelihood of business ability being reproduced in successive generations of Holts as in the case of Brookes of Brooke, Bond & Co., the tea producers and dealers. When he looked at the company's balance sheets, he looked particularly at the assets in relation to capital and the reserves, and, one other thing, cover for the dividend which was being paid. He did not anticipate particularly increased dividends in the case of John Holt & Company. It appeared that he thought a conservative policy of limitation of dividends was likely to benefit the shareholders in some form or another. He was not troubled with abstruse calculations. The question he asked himself was "Is "this a firm in which I would like to be a sleeping partner?" Having answered that in the affirmative, he reached a price of 28s. 0d. to 29s. 0d. per share, as far as I can see, by some process of intuition. Then it occurred to him that the Commissioners of Inland Revenue, by whom he was instructed, would want something more than this, and so he looked for some other company to form a guide and took Brooke, Bond & Co. He admitted that many people might think that there was no real basis for comparison in the companies, but it was "the "nearest thing in which he held shares." He came to the conclusion that Brooke, Bond & Co. represented a better investment, and so lowered his figure for the shares of John Holt & Company to 25s. 0d. per share. He said that he himself would have been prepared to purchase the shares at 25s. 0d., or a bit more in case of competition, and if Mr. Benson had offered him the shares at 17s. 2d. he would probably have fainted. Matters like the boycott and riots in West Africa in Mr. Loebel's view would not affect the price, and non-marketability or restrictions on transfer did not worry him at all. Dividend yield was a matter of indifference to him. He dismissed Mr. Samuel's anxieties as to the future with the remark "Personally I never think there "is a risk of falling prices."

As I have already indicated, the problem to be decided is purely hypothetical because, in a company in which the family are determined to retain control, it is obvious that a member or

person selected by the directors would be found to enforce a transfer at " the fair value " under article 25 of the company's articles of association. I am bound to assume, however, that this provision in the articles was not being enforced, and that the shares were thrown open for purchase by anyone who was willing to buy them.

It is plain that the shares do not give a purchaser the opportunity to control the company, or to influence the policy of the directors to any great extent, as the shares available only represent 43,698 shares out of 697,680 ordinary shares which had been issued. Any purchaser would, therefore, be dependent on the policy of the directors, so long as they should have the support of the general body of the shareholders. I think that the kind of investor who would purchase shares in a private company of this kind, in circumstances which must preclude him from disposing of his shares freely whenever he should wish (because he will, when registered as a shareholder, be subject to the provisions of the articles restricting transfer) would be different from any common kind of purchaser of shares on the Stock Exchange, and would be rather the exceptional kind of investor who had some special reason for putting his money into shares of this kind. He would, in my view, be the kind of investor who would not rush hurriedly into the transaction, but would consider carefully the prudence of the course, and would seek to get the fullest possible information about the past history of the company, the particular trade in which it was engaged and the future prospects of the company. I think that such a purchaser would consider the inter-war results of the company, the effect of the First World War on the company's trading and the heavy losses sustained in the years which followed that war.

In my view, therefore, the evidence of the witnesses for the Commissioners of Inland Revenue is open to criticism in so far as it ignores or minimizes unduly (as it seems to me) the history of that period in the company's trading. The possibility of losses due to some severe fall in prices emphasizes the importance of reserves, and I do not see how anyone considering the financial situation of the company could properly ignore the effects of inflation on the value of money, and the way in which the building up of adequate reserves to meet the difficulties likely to be caused by a slump in prices had been handicapped by the enormous sums required to be taken from profits for taxation in the years of the Second World War; and the way in which the provision for the replacement of capital assets, such as ships, had been made more difficult by allowances for depreciation being made on the basis of original cost and not the expense of replacement. These matters, in my view, as well as the fluctuating nature of West African trading, would be likely to have a greater effect upon the mind of the hypothetical purchaser than was admitted by the witnesses for the commissioners. I rule out of consideration the knowledge provided by the passage of time since

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March 11, 1948, that the company's dividend on ordinary shares has not been increased from 5 per cent., and that the company has been able to avoid a public issue of ordinary shares by launching an exceedingly successful issue of new preference shares in September, 1950. But I think that the witnesses for the commissioners have over-valued the prospects of an increase of dividend and the issue of ordinary shares in the future on March 11, 1948.

On the other hand, owing to the fall in the value of money, 5 per cent. on the ordinary shares did represent a much smaller return in fact to the members of the family than that dividend had represented in pre-war years, and there might have been pressure by the family in 1948 or later to increase the dividend (having regard to the ample earnings of the company). Moreover, some possible hypothetical purchaser might well have thought that the company would be forced to raise further capital by an issue of ordinary shares to the public instead of adopting the method of an issue of preference shares, or debentures, or unsecured notes. Any such anticipation could have no more certainty than a guess. But I think that the petitioners' witnesses have undervalued this element in the price which the hypothetical purchaser might pay in this hypothetical open market.

Having carefully considered the evidence which has been given, including such assistance as may be gained from the various tables which have been put in and the various comparisons with the prices of shares of other companies quoted on the Stock Exchange (so far as any useful deductions can be made from these), and making the most intelligent guess that I can, I have come to the conclusion that these shares of John Holt & Company, if sold on the hypothetical open market which the authorities and section 7 of the Act require me to assume, would fetch a price of 19s. 0d. a share. Accordingly, I determine the principal value of the 43,698 ordinary shares in the company to which this appeal relates to be 19s. 0d. multiplied by the number of shares, and the resulting figure is £41,513 2s. 0d.

*Appeal allowed with costs.*
*Leave to appeal refused.*

Solicitors: *Sharpe, Pritchard & Co. for Alsop, Stevens & Co., Liverpool; Solicitor of Inland Revenue.*

I. G. R. M.

[COURT OF APPEAL.]

## * PRACTICE NOTE (NOTICE OF APPEAL).

C. A.

1953
Nov. 30.

Evershed M.R.

*Practice and Procedure—Appeal—Date of hearing—Statement and certificate to be lodged with notice of appeal.*

At the sitting of the court EVERSHED M.R. read the following statement, which was made contemporaneously in the other Divisions of the Court of Appeal: Before we begin today's list, I wish to draw attention to two small matters of difficulty which have arisen in the Court of Appeal. The first is (and it appears only likely to be met with in practice where appeals are entered in District Registries) that an appeal may on occasion be set down and appear in the list before it has been served on the respondent. The second is where a respondent appears in person and may not know when the appeal is coming on—indeed, he may be misled by the common form of notice of appeal ("Take "notice that this court will be moved at the expiration of "days from the service upon you of this notice," etc.).

To get over these difficulties it is suggested that the notice of appeal should contain the statement and certificate which follow.

I would emphasize that there is no form of notice of appeal fixed by statute or the rules, and I should therefore make it clear that if a notice of appeal does not contain the suggested statement or certificate it will not thereby be invalid. We think, however, that if the suggestions are adopted they will save the mischance that I have mentioned and therefore save trouble and costs. These suggestions will be advertised as a practice note in the building of the High Court and elsewhere, and I hope that some publicity may be given to them.

That practice note reads as follows:

"PRACTICE NOTE."

"On setting down an appeal to the Court of Appeal one "copy of the notice of appeal should be indorsed with a "certificate of the solicitors for the appellant (or the appellant "himself if in person) stating the date or dates upon which "notice of appeal was served on the party or parties named "as respondent(s).

"The officer receiving the notice of appeal should satisfy "himself that it was served in due time on the respondent(s), "and must refuse to set the appeal down if it appears that the "notice was served out of time.

"The copy of the notice of appeal containing the certificate "as to service shall be in the custody of the officer in attend-"ance on the Court of Appeal when the appeal comes on to be "heard.

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PRACTICE NOTE (NOTICE OF APPEAL).

"Notices of appeal should contain after the signature by the solicitor for the appellant a statement as follows: 'No notice as to the date on which this appeal will be in the list for hearing will be given: it is the duty of Solicitors to keep themselves informed as to the state of the lists. A Respondent intending to appear in person should inform the Appeal Clerk, Room 136, Royal Courts of Justice, W.C.2, of that fact and give his address; if he does so, he will be notified by telegram to the address he has given of the date when the appeal is expected to be heard.'"

B. A. B.

END OF VOLUME 1.

WLS3/2358